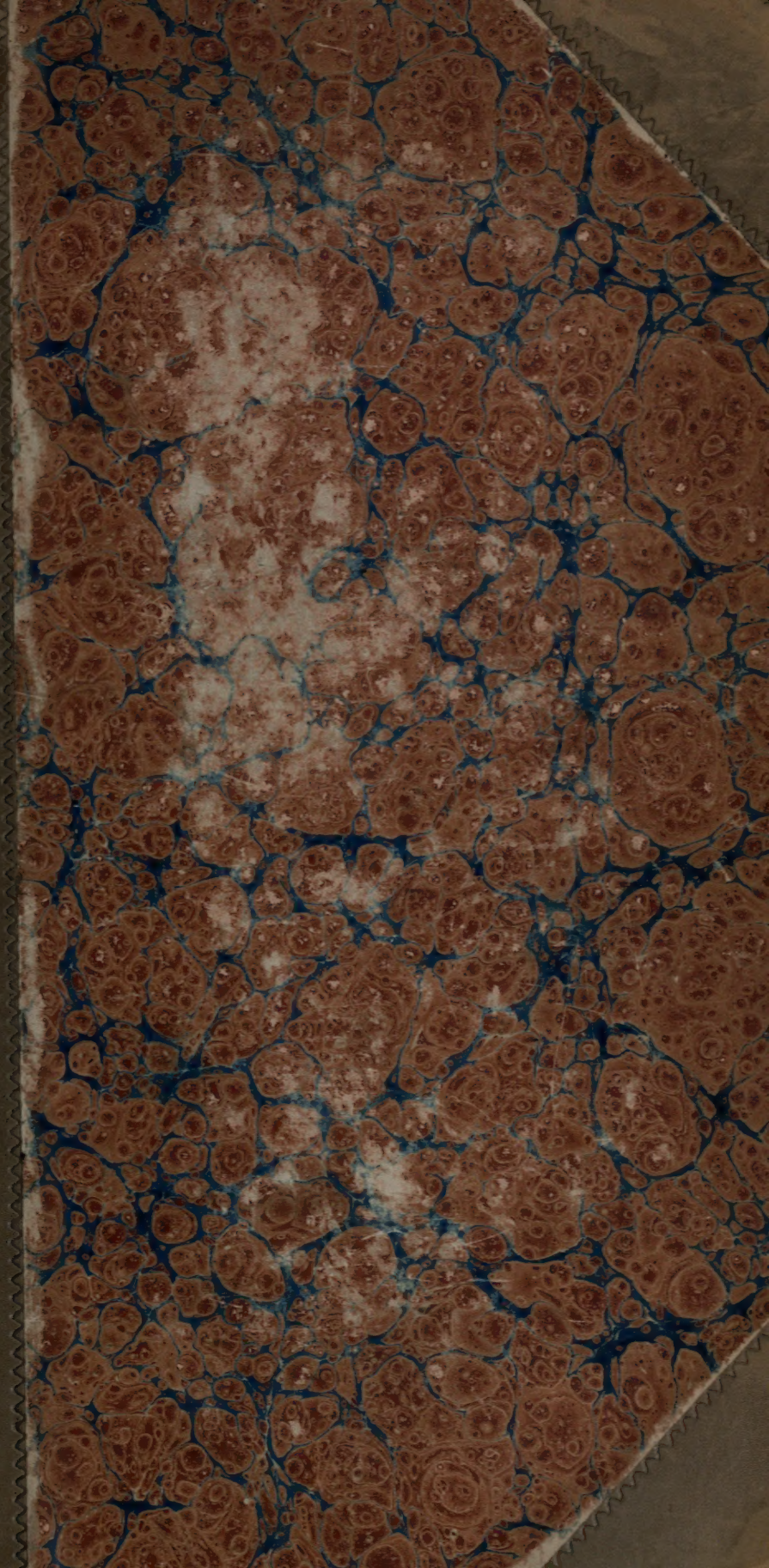


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THE
EQUITABLE JURISDICTION

OF
The Court of Chancery.

VOLUME II.

—◆—
COMPRISING

EQUITABLE ESTATES AND INTERESTS; THEIR NATURE,
QUALITIES, AND INCIDENTS;

IN WHICH IS INCORPORATED, SO FAR AS RELATES
TO THOSE SUBJECTS,

THE SUBSTANCE OF

“MADDOCK’S TREATISE ON THE PRINCIPLES AND PRACTICE
OF THE HIGH COURT OF CHANCERY.”

BY
GEORGE SPENCE, ESQ.,

ONE OF HER MAJESTY’S COUNSEL.

LONDON:

V. AND R. STEVENS AND G. S. NORTON,

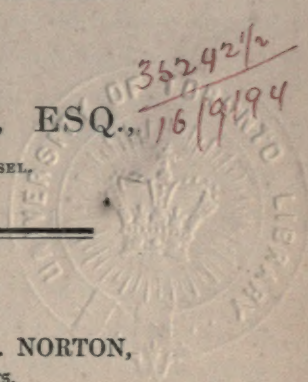
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PRELIMINARY

STATE OF NEW YORK

In the year 1847, the Legislature of the State of New York, passed an act, entitled "An act to amend the laws in relation to the courts of the State, and to the mode of selecting the judges of the same." The object of this act was to amend the laws in relation to the courts of the State, and to the mode of selecting the judges of the same. The act was passed on the 1st day of March, 1847, and is now in force.



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PREFACE.

IN the preceding volume the History of the Court of Chancery has been brought down to the time when its modern jurisdiction was established; and the various heads under which its jurisdiction may be classed, are there stated. The object of the present volume is to exhibit and illustrate the principles upon which the jurisdiction of the Court of Chancery is now exercised, in regard to what are for the purposes of this work designated *EQUITABLE ESTATES AND INTERESTS*, the meaning of which it may be proper here to explain.

It has appeared to me, as will have been gathered from the former volume, that the jurisdiction of the Court of Chancery may properly be considered under two chief and perfectly distinct heads or divisions—the one embracing the right which the Court of Chancery gives to the enjoyment of property, the legal title to which is rightfully vested in one person with a view to or as subservient to the enjoyment of the beneficial interest by another—the other division comprising those rights constituted or recognised by the Court of Chancery, under which a person is entitled to recover the property or thing itself, the legal estate or interest or possession being vested in another by wrong, as where it has been obtained by fraud or has been conferred by mistake, and also embracing all demands, of whatever kind, (other than those included in the first division,) which can only be enforced in the Court of Chancery because dependent on principles which are not recognised or so fully recognised in the Courts of Law as in the Court of Chancery, or which though recognised in the Courts of Law can only be effectually enforced in the Court of Chancery; and also embracing the protection from improper invasions of the right to property, which the Court of Chan-

cery alone can give, and discovery of facts for the purposes of aiding in the prosecution or defence of rights. I have in this volume designated the first of these divisions, The Jurisdiction of the Court of Chancery in respect of EQUITABLE ESTATES AND INTERESTS; the second, The Jurisdiction in respect of EQUITABLE RIGHTS (*a*),—it is the first great head of jurisdiction which is embraced in the volume which is now offered to the profession.

The course which I have adopted, in treating of Equitable Estates and Interests, is as follows:—After first considering how the jurisdiction of the Court of Chancery is made to operate in respect of Property situate out of its jurisdiction, I have proceeded to take a general view of Equitable Estates and Interests in property real and personal created by EXPRESS TRUST; stating the general rules as to the Creation of Trusts; the NATURE OF THE OFFICE OF TRUSTEE, and the CHARACTER OF THE CESTUIS QUE TRUST; distinguishing a CONSTITUTED or complete trust from an incomplete trust or a TRUST IN FIERI; and devoting a distinct Section to those trusts which are created by PRECATORY OR RECOMMENDATORY WORDS.

POWERS IN THE NATURE OF TRUSTS are then noticed; and the general subject of RESTRAINTS ON ALIENATION, as applicable to interests given by way of trust, is introduced. Considering how often the doctrine as to REMOTENESS OR PERPETUITY comes under discussion in regard to trusts, I have devoted a distinct Chapter to that subject. I have then proceeded to consider the subject of EXECUTORY OR DIRECTORY TRUSTS, as distinguished from TRUSTS EXECUTED; and to state the general rules in regard to LIMITATIONS OF PERSONAL ESTATE in reference to where an absolute interest is taken under the limitations; introducing the subject of limitations of Personal Estate to go according to the limitations of Real Estate, and some incidental topics. I have then devoted a Chapter to TRUSTS FOR ACCUMULATION.

I have next proceeded to take a general view of TRUSTS ARISING BY OPERATION OF LAW, not belonging to the second head of jurisdiction,

(*a*) I have found it expedient, in this volume, to vary, in some respects, the arrangement under which the different subjects of

Equitable Jurisdiction are treated of in the first Volume.

which are known by the several designations of Implied, Presumptive, and Constructive Trusts, including the doctrine as to Resulting Trusts, and Trusts arising from the maxim that "What ought to be done is considered as done;" the CONVERSION of real estate into personal, and personal into real, and some incidental topics.

Having thus noticed the several kinds of trusts, and having taken a view of the general doctrines applicable in some degree to all or most of the trusts which are created by the parties, I have proceeded to discuss in some detail the several descriptions of trusts and charges in the nature of trusts created by the parties which are commonly found in Wills and Marriage settlements and in Trust deeds, in the following order:—

First, CHARGES OF DEBTS BY WILL, more especially in reference to the statutes 1 Will. IV. c. 47, and 3 & 4 Will. IV. c. 104, and here what amounts to a charge of debts is considered: CHARGES OF LEGACIES on real estate, and the general doctrines applicable to charges of debts and legacies by will, particularly the EXEMPTION and EXONERATION of personal estate from the payment of debts and legacies, are next considered: and then, TRUST DEEDS FOR THE PAYMENTS OF DEBTS are introduced. I have next proceeded to a consideration of SALES of property real and personal under trusts or charges for payment of debts and legacies, adverting to the obligation of the purchaser to see to the APPLICATION OF THE PURCHASE-MONEY. The subject of PORTIONS, including the doctrines as to Double Portions and SATISFACTION, is discussed in a separate section. Gifts to parents for the MAINTENANCE of their children are next considered; and then, the trusts in favour of MARRIED WOMEN, which are usually introduced into wills and marriage settlements, including the SEPARATE-USE CLAUSE and provisions against ANTICIPATION; and here THE WIFE'S EQUITY TO HAVE A SETTLEMENT is introduced. Some other doctrines in regard to the trusts usually found in wills and deeds are then considered; for instance, the respective RIGHTS OF THE TENANT FOR LIFE AND REMAINDERMAN, and more especially in regard to a RESIDUE GIVEN BY WILL TO BE ENJOYED BY SEVERAL PERSONS IN SUCCESSION, and the APPORTIONMENT OF

RENTS AND DIVIDENDS; then follow the doctrines of the Court of Chancery in regard to ELECTION, SATISFACTION, and PERFORMANCE.

Following the scheme proposed, I have next proceeded to consider that kind of equitable estate or interest which is enjoyed by a mortgagor whose estate is forfeited at law, and which is called the EQUITY OF REDEMPTION. In this chapter I have endeavoured to give a general view of the doctrines of the Court of Chancery in regard to MORTGAGES, both as respects the mortgagor and the mortgagee; including the mode of proceeding to enforce REDEMPTION, and to FORECLOSE the equity of redemption, or for a SALE—the necessary PARTIES to suits for redemption and foreclosure—LENGTH OF TIME as a bar to redemption or foreclosure—PRIORITIES and TACKING—and NOTICE, Fraud, and Negligence, as affecting priorities. I have then devoted a section to the subject of MORTGAGES OF STOCK and PLEDGES of personal chattels; and another section to the subject of EQUITABLE MORTGAGES by written agreement and by the DEPOSIT OF DEEDS: and here the subject of LIENS generally is introduced, and particularly THE LIEN OF A SOLICITOR on the deeds and papers of his client, and on the funds in a suit. I have next proceeded to describe the mode in which THE ACCOUNT is taken between the mortgagor and mortgagee, particularly where the mortgagee is in possession, introducing the subject of ANNUAL RESTS and of COSTS. The next subject discussed is, OUT OF WHAT FUNDS mortgage debts and charges are to be paid; and here the subject of EXONERATION is again adverted to, and the doctrine of MARSHALLING of assets and of securities is introduced, as is also the subject of CONTRIBUTION.

I have next proceeded to consider that kind of equitable interest which a person takes under an ASSIGNMENT OF A CHOSE IN ACTION or other subject not transferable at the common law.

Having thus described the various kinds of equitable estates and interests in property real and personal to which a person may become entitled, I have proceeded to take a general view of the doctrines of the Court of Chancery in regard to the TRANSFER OF EQUITABLE ESTATES AND INTERESTS for valuable or meritorious consideration, and by way of gift: and the volume closes with a sum-

mary of the general doctrines of the Court of Chancery in regard to the DUTIES AND LIABILITIES OF TRUSTEES, with some general remarks in regard to the Office of Trustee and Executor.

This volume will, therefore, as I hope, be found to be a complete work in itself (*a*), and to contain the doctrines of the Court on every subject connected with equitable estates and interests, with such exceptions as are pointed out in the body of the work (*b*).

It is proper that I should here acknowledge the obligations which I am under to the Authors whose works I have principally consulted in the composition of this volume. First, I must mention Mr. Lewin's work on Trustees (*c*), which I consider to be a model for a treatise; next, Mr. Hill's work on Trusts, in which most of the authorities on that subject are to be found very judiciously arranged. On the subject of Mortgages I have derived the greatest assistance from the ample stores contained in Mr. Jarman's Treatise in the fifth volume of his Edition of Bythewood's Conveyancing, with the valuable additions of Mr. Sweet; and from Mr. Coote's well-known work on the same subject. I need scarcely say that on all occasions where anything relating to the subject under consideration was to be found in the works of Sir Edward Sugden, I have resorted to them, and always with the greatest advantage. My obligations to Mr. Samuel Miller and to Mr. Hargrave and other writers, whose works I have consulted, are acknowledged in their proper places. It is only where the apparently unsettled state of the law or the difficulty of the subject appeared to require it that I have entered into any lengthened details, and yet the bulk of the work has been, by this means, increased far beyond my expectations.

Some objections may strike the reader in regard to the arrangement in particular parts of the work. It was next to impossible in so bulky a manuscript, always to put the additions which I found it

(*a*) There are some references in the notes to "mistake," "injunctions," and other subjects comprised under the second head of jurisdiction, but they relate to collateral points which have no direct relation to any of the subjects comprised in this volume.

(*b*) See p. 951.

(*c*) Mr. Lewin, with a liberality in which a person of established reputation can afford to indulge, placed in my hands his own copy, with his MS. additions; but as they were made with a view to a new edition, I forbore to look into them.

necessary to make either to the text or to the notes, in exactly the proper place (*a*); however, I hope that the Index will be found to be sufficiently ample to remedy any inconvenience that might have resulted from errors such as this. Every erroneous reference will, I hope, be found to be corrected in the Errata; some errors in the punctuation have, I find, escaped me, but the reader will be able, I hope, readily to correct them from the text (*b*).

I am indebted for a considerable portion of the Index, in which a reference will be found to some omitted and subsequent cases, to my intelligent young friend Mr. Frith; it comprises an enlarged index to all or most of the practical parts of the first volume, as well as a full index to the second.

My warmest acknowledgments are due to the Principals and Clerks in that highly efficient establishment, the Registrar's Office, particularly to my fellow labourer Mr. Cecil Monro; also to the Principal and Clerks of the Report Office, for the ready and efficient assistance they have afforded to me in searching the Registrar's books.

The delay in the publication of this volume has arisen from circumstances beyond my control. But the delay has, in fact, been productive of advantage; for in the mean time some important points of law have been settled, and, above all, Sir Edward Sugden's important work on "The Law of Property as administered by the House of Lords," has been published, so that I have had an opportunity of referring to this valuable addition to our legal stores.

I have to express my acknowledgment to several of my friends of the Chancery Bar, for some important communications with which I have been favoured in regard to the First volume. My able friend the late Mr. Spurrier, was kind enough to go through the whole of that part of the volume which relates to the Court of Chancery, and

(*a*). Instances may be found in pp. 630-1, and 774, as to the text; and in pp. 475-6, as to the notes

(*b*). As to p. 30.

to send me his observations and suggestions : those in which I could concur, I have taken advantage of in this volume. I have also received some friendly communications from my brethren in the provinces, particularly from Mr. Inman of Bath : one of the points to which he has called my attention is noticed in the Errata.

Professor Mittermaier has done me the honour of presenting to his countrymen an analysis of the first volume, a translation of which has been annexed ; for this act of kindness my warmest thanks are due. I hope that I shall not be considered as indulging in an unpardonable vanity, or as showing a want of due respect for the eminent writers who have preceded me, or as in any way meaning to disparage my own countrymen, who for sound judgment and philosophical views are not to be surpassed, in referring to the remarks which that distinguished person has made on the course which I have pursued in tracing the Feudal system and the Laws of England to their sources, which are the more valuable because he has not forbore to notice my errors on some points of minor importance. The course of investigation to which I allude, though sanctioned by the high authority of Sir Francis Palgrave, is rather out of the beaten track ; and although already satisfied that the views I had taken were correct, I should have been wanting in the ordinary feelings of man had I been insensible to the approving sanction of so celebrated a person and competent a judge as Professor Mittermaier, or had I passed it over without public acknowledgment.

GEORGE SPENCE.

LINCOLN'S INN,
July, 1849.

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PART THE THIRD.

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N.B.—This Table has been in some respects varied from the Headings of the Chapters, to make it correspond more nearly with the Text.

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ERRATA IN VOL. II.

Page 9, note (b), last line but two, for "law," read "lien."

16, 48, 670, 684, and 943, before "1 Will. IV. c. 10," add "11 Geo. IV. and"

36, for § 32, read § 31.

47, note (h), before "Goodson v. Ellison," insert "Curteis v. Candler, 6 Mad. 123; and see."

70, note (c), for "Mansfield," read "King."

78, note (a), for 70 read 85.

97, note (f), for "Fry," read "Spry."

126, eighteenth line, after issue, add "for life."

224, first line, for "that," read "where."

229, strike out the last passage in note (c).

235, head line, for "note," read "rule."

315, last line, for "quasi," read "qua."

335, eleventh line, insert "not," between "be" and "also."

340, note (e), read "2 Jarm. on Wills, 572, *et seq.*"

379, note (d) of p. 378, fourth line, for "1 Atk." read "3 Atk."

471, for "Stirpes," read "Stirps;" also in the Report there cited.

515, note (a), second line, for "1 Bro." read "2 Bro."

534, heading of additional note I, for 426, read 476.

538, thirteenth line, for 175, read 474-5.

565, note (a), for 655, read 555.

577, note (d), for "4 Ves." read "5 Ves."

593, note (e), last line, for 14, read 15.

619, head line, for "separation," read "re-purchase."

626, note (c), for 248, read 243.

642, note (a), seventh line, for 447, read 44, 47.

730, note (a), for "Eldon," read "Erskine."

In Chapter III. "executory" is in some instances used where "directory" is meant.

IN VOL. I.

529, note (c), after "Doe v. Ellis," insert "but see 1 Vict. c. 26, § 29; *supra*, p. 475, and Vol. II. p. 154."

PART THE THIRD.

BOOK THE FIRST.

EQUITABLE ESTATES AND INTERESTS IN PROPERTY, REAL AND PERSONAL, WHICH ARE RECOGNIZED BY THE COURT OF CHANCERY; THEIR NATURE AND INCIDENTS.

CHAPTER I.

GENERAL VIEW OF EQUITABLE ESTATES AND INTERESTS CREATED BY WAY OF EXPRESS DECLARATION.

SECTION I.—*Introduction.—Equitable Interests and Equitable Rights distinguished.—Foreign Jurisdiction as regards Equitable Interests and Rights.*

Distribution of the subject of Equitable Jurisdiction as regards specific property.

Jurisdiction of the Court ranges itself under two great divisions.

In the first Equitable Estates and Interests are the subject.

In the second the Legal Estate or Title is the subject, in virtue of an Equitable Right.

In the first the Court recognizes and preserves the Legal Estate.

In most cases Person having Equitable Estate is not entitled to call for Legal Estate—in some simple cases he may—these seldom subject of litigation.

In some cases it is essential the Legal Estate should remain permanently in the Trustee—Permanent Trusts—in Special Trusts it must remain in him for the purposes of the Trust.

In those cases which belong to the second division the Legal Title has been acquired or is retained wrongfully—the object of the Jurisdiction is to give the Legal Title to the Party entitled to it in conscience—to enforce an Equitable Right.

Some Cases of Trusts by operation of Law come within the first division.

Other Equitable Interests embraced in the first division.

First subject to be considered—Express Trusts—two classes of Express Trusts.

Power of creating a Trust co-extensive with power to dispose—but Trust may be created where no power of actual Transfer.

Every kind of Alienable Property may be subject of a Trust.

Jurisdiction of the Court of Chancery in respect of Property situate beyond the bounds of its jurisdiction, in reference both to Equitable Estates and Equitable Rights, considered.

Exercised by coercion of the person when the party found within the jurisdiction.

Court will not interfere in regard to Property within the jurisdiction of a Foreign Tribunal, unless it be necessary for the ends of justice.

Two divisions into which the Jurisdiction separates itself.

In what cases, generally speaking, the Court will, and when it will not hold the Sentence of a Foreign Tribunal of competent jurisdiction binding.

Course of the Court as regards Contracts entered into in Scotland or in the Colonies. Suit as to Contract entered into between the Parties in a Foreign Country—Contracts construed according to the law of the Place—Remedy given according to English course of proceeding.

Right of Alien to sue.

Sovereign Prince may sue, Liabilities where he submits to the Jurisdiction.

In the absence of Evidence showing that a different principle should be applied the Court will apply its own principles to a Transaction in the Colonies.

Treaties between East India Company and Sovereign Princes in India not the subject of Municipal Jurisdiction.

Infant may be ordered to convey Lands out of the Jurisdiction, but not out of the Queen's Dominions.

THE jurisdiction of the Court of Chancery, where it is exercised in regard to specific property, as will have been collected from the general view which is contained in the former volume, ranges itself under two great heads or divisions; under the one, equitable estates and interests in real and personal property, created by the Court of Chancery, and unknown to the Common Law, are the subjects of its jurisdiction; under the other, the subject of the jurisdiction is in effect, directly or indirectly, the legal estate title or interest itself; the Court, in each case where it grants relief, operating primarily at least, on the person. In the cases which range themselves under the first division, the Court recognises and preserves a legal estate or title, as well as an equitable title; indeed, in most cases, the legal estate or interest has been devised or conveyed to the person in whom it is vested expressly for the purposes of the trust, and the legal title is only so far interfered with as to make it subservient to the enjoyment of the co-existent equitable interests.

Where a person is entitled to an equitable estate, generally speaking, as has already been observed, it is no part of his right to have the legal estate conveyed to him. Undoubtedly in the simple case of all the trusts excepting that which was created in favour of some individual having run out or been exhausted, the *cestui que trust*, unless in the case of a married woman or an infant (a), may require the legal estate to be conveyed to him; that is, he may insist that his absolute beneficial interest shall be clothed with the legal estate. But this description of case is seldom the subject of litigation; the cases which chiefly engage the attention of the Court of Chancery are those where there are subsisting trusts, and in which many persons concurrently or

(a) *V. sup.* vol. i. p. 496; and *Raikes v. Ward*, there cited.

in succession, or in both those ways, are interested. In all such cases it is essential to the interests of the several parties concerned, that the legal estate or interest should remain in a trustee: the trusts which have been described as *Permanent Trusts* are of this description (a).

So if a person claims a legacy or sum of money, which is to be raised for his benefit out of real or personal estate, under a devise or a conveyance in trust to sell, or under a charge imposed upon the estate in his favour, it would plainly not be an execution of the trust to convey to him the legal estate; in almost every such case some other person besides himself must be interested in the due raising of money, and generally speaking in the application of the proceeds; it is necessary, therefore, that the trustee should have the legal estate or interest, so that he may be enabled by sale or mortgage to raise and satisfy the charges on the estate, and, that done, to transfer the residue of the estate, or of the proceeds, to the parties interested. These are the trusts which have been described as *Special or Temporary Trusts* (b). Both of these classes come under the description of express trusts.

The cases which range themselves under the second division, are those in which the legal title has not been conveyed to the party in whom it is vested by way of trust, but has been acquired, or is retained against conscience and equity; and the equitable doctrines which govern this branch of the jurisdiction are put in force for the purpose of having the legal title in the property transferred to the person who, according to honesty and conscience, in the view of the Court of Chancery, is entitled to the property: there is no object to be attained, as in the cases which come under the first division, which requires that the legal estate should be kept outstanding: the claimant seeks to enforce an equitable *right*, not to secure an equitable *estate*: so that the doctrine of constructive trusts is applied in these cases only for the purpose of effecting an immediate transfer of the beneficial interest to the person who is entitled in equity to the legal interest: such cases therefore do not properly belong to the present volume.

There are some trusts which come under the class of constructive trusts, which have this feature in common with those which have been before described and classed under the first division of the subject, namely, that the legal estate has been rightfully vested in the person declared to be a trustee but, as in the cases which are ranged under the second division, there is no purpose for which the legal estate

(a) Vol. i. pp. 448, 466.

(b) Mr. Lewin, on Trusts, p. 23, has given

a classification of the various kinds of trusts which the reader will do well to refer to.

should remain outstanding; for instance, where an estate is purchased by one person, with his own money, but in the name of another, so as to make such person his trustee (*a*), here the only duty which such a person has to perform is to convey the estate to the actual purchaser, for whom he is constructively a trustee, or as he shall direct, and it is neither a case of a permanent trust nor of a special or temporary trust, as above defined. In the instance of resulting trusts also (*b*) it is not required for any purpose that the legal estate or the possession should continue in the trustee. But as the legal estate or possession, in both the cases above referred to, becomes vested in the person so declared to be trustee, by the act or instrumentality of some party entitled, or at least not by wrong, such trusts, though not express trusts but constructive implied or presumptive trusts (*c*), I have considered as belonging to the first division of the subject, and therefore to be treated of in this volume.

There are, as will be seen in the following pages, other Equitable Interests in real and personal property, arising out of the doctrines of the Court of Chancery; for instance, the equity of redemption of a mortgagee: all such interests will be considered in this volume. The Equitable Interests of the vendor and purchaser under a contract for sale will also be noticed, but the details more properly belong to the head of Specific Performance, which forms one of the subjects of Equitable Rights.

According to the course above proposed, our attention, in the following pages, will first be directed to those equitable estates and interests in real and personal property, created by way of express trust, which are recognized by the Court of Chancery, and to which a title may be acquired, which title does not, excepting in the instances above alluded to, involve the right of calling for a transfer of the legal estate or interest; we shall shortly examine what is the nature and what are the incidents of this kind of right to the enjoyment of property, real and personal, including what are the rights of the *cestuis que trust*, and what are the rights and duties of the trustees: but although the main inquiry will relate to express trusts, yet in prosecuting this subject we shall frequently have to refer to the doctrines of the Court of Chancery in regard to trusts by construction of law (*d*). The jurisdiction of the

(*a*) V. *supra*, Vol. i. p. 511.

(*b*) V. *supra*, Vol. i. pp. 510, 451.

(*c*) See *Cook v. Fountain*, 3 Swanst. 592; *supra*, Vol. i. p. 496.

(*d*) Trusts, it will be remembered, were, for the sake of elementary consideration, classed under two divisions:—1st. Express Trusts,

(Vol. i. pp. 439, 495-6,) whether created by act *inter vivos*, or by will. 2nd. Trusts arising by implication or construction of law (Vol. i. p. 508), comprising implied trusts (Vol. i. p. 509), resulting trusts (Vol. i. p. 510), and constructive trusts (Vol. i. p. 511).

Court of Chancery as to trusts in the more comprehensive sense of that term (*a*), namely, that which includes constructive trusts and other trusts by operation of law, embraces a large portion of its jurisdiction; for whoever has the possession of goods or lands, either has the absolute property or estate in them by a sufficient title, or so far as this is wanting is considered by the Court of Chancery, generally speaking, as a trustee for the true owner (*b*).

There are two classes of express trusts of real and of personal property:—1st. Those where the trust is defined, and the trustee or person who is to carry the trust into execution is expressly pointed out; of which there are also two descriptions, namely, those which are imposed by direct words of trust, and those which are imposed in the way of wish or recommendation (*c*). 2ndly. Those where the trust is defined, but the person who is to carry it into effect is not pointed out, so that the character of trustee has to be imposed on some person for the purpose of carrying the trust into execution; in such case the trust, as regards the person of the trustee, is a trust by construction of law (*d*).

The power of creating a trust of real or personal estate on the part of the owner of such property, is co-extensive with the ability to dispose; but a trust may be created, as will be seen hereafter, where no legal disposition could be effected. Infants are disqualified by law, and persons of unsound mind are incapable. Married women may create a trust of their real estate by disposition, according to the mode of alienation prescribed by law (*e*); and they may create a trust of their separate personal property and of such real property over which a separate power of disposition is secured to them, as effectually as if they were single (*f*).

(*a*) *V. supra*, Vol. i. p. 509—512.

(*b*) This applies, even at law, in some few cases, as in the instance of money paid to another by mistake, 2 Fonbl. 2, 3, and Buller's N. P. 131; *Bize v. Dickason*, 1 T. R. 285; *Moses v. Macferlane*, 2 Burr. 1010: *v. supra*, Vol. i. p. 634. Equitable rights, which are secured through the medium of constructive trusts, belong, as before observed, to the second principal division; but they are incidentally noticed in this volume.

(*c*) Trusts of this description have usually been classed with implied trusts, but for the reasons after mentioned, it appears to me that they should be treated as express trusts.

(*d*) *Supra*, Vol. i. p. 509, n. (*d*).

(*e*) Formerly by fine—now by deed acknowledged, *supra*, Vol. i. p. 167—169.

(*f*) *V. infra*, Chap. vii. Sect. ix., "Separate

Estate of Married Women." In reference to who has the power to dispose, it may be useful to observe, that as regards *Bankrupts*, although all the property of a bankrupt up to the time of obtaining his certificate becomes under the Bankrupt Acts vested in his assignees, so as generally to deprive him of all power of alienation, his statutory allowance vests in him on the payment of the sufficient dividend, and that whether he be living at the time or not, *Ex parte Safford*, 2 Gl. & J. 128; so that he may dispose of his statutory allowance, as he may of the ultimate surplus of his estate, if any. As regards *Felons*, the forfeiture of goods and chattels takes effect by the conviction of the party of treason or felony, and has no relation back to the commission of the offence; therefore a felon may, before conviction, assign his personal property for a valuable considera-

6 *Express Trusts, General Rules—Property out of the Jurisdiction.*

Every kind of property, real and personal—indeed, whatever will yield profit, and which is alienable—may be the subject of a trust (a).

It may be taken as a general rule, that although there be an allegation of a trust, that will not alone give the court jurisdiction; the plaintiff is bound to state how the trust arises, for the court is to carry out the trust, and is not therefore to be left in the dark on the subject (b). And although there may be a remedy at law in respect of the trust created—for instance, where it depends upon a covenant on which the covenantees might sue at law—still, where a more convenient and effectual remedy may be obtained by decree, the Court of Chancery will entertain jurisdiction (c).

It may be useful in this place to recur to and add some further illustrations of the principles upon which the Court of Chancery acts in applying its equitable jurisdiction in regard to property situate without the bounds of its jurisdiction; and to notice also the principles which are applied in the English courts in respect of the sentences of foreign tribunals, and as to suits by foreigners.

It was observed in the former volume, that the jurisdiction of the Court of Chancery, to secure the enjoyment of equitable interests and to enforce equitable rights, is not confined to cases where the property in respect to which such equitable title or right is claimed is in England. The court, it will be remembered, according to its original constitution, operated upon the conscience of the person (d), not upon the property, or *in rem* (e); and now the primary decree is

tion; but if the alienation be colourable and without consideration, for the purpose of avoiding a forfeiture, it is fraudulent and void against the Crown, *Perkins v. Bradley*, 1 Hare, 219, 227-8-9. In that case an assignment of stock by a prisoner under a charge of felony, in trust to secure payment of an antecedent debt and the costs to be incurred in his defence, was established against the Crown. As regards real estate, *attainder* has relation back to the time when the offence was committed, 4 Bla. Com. 381; but by the statute 54 Geo. III. c. 145, no attainder for felony, except in cases of treason, petit treason, or murder, shall extend to the disinheriting any heir, or to the prejudice of the right of any person other than the offender during his life. The stat. 4 & 5 Will. IV. c. 23, as to escheat and forfeiture, will be noticed hereafter, *et v. supra*, Vol. i. p. 289.

(a) Including a recipe for a medicine, *Green v. Folgham*, 1 Sim. & St. 398, the Golden Ointment case. Lord Nottingham, indeed, on an attempt being made to make a child bring some chemical receipts given to her by

her father, into hotchpot, said he would not countenance these sorts of receipts, which he thought in most cases savoured of quackery, so as to put a value on them in Chancery; "for aught I know," said his Lordship, "a receipt to make mince pies or catch rats may be as valuable," *Jenks v. Holford*, 1 Vern. 62; but see *Newbery v. James*, 2 Meriv. 446; *Williams v. Williams*, 3 Meriv. 160; *Green v. Folgham*, *ubi supra*; and *Dietrichsen v. Cadburn*, 2 Phill. 52. By the new Stat. of Wills, 1 Vict. c. 26 (*supra*, Vol. i. p. 473), the question in regard to devises of stock, noticed by Lord Eldon in *Ripley v. Waterworth*, 7 Ves. 440, 441, is put an end to.

(b) Lord Cottenham, *Jackson v. North Wales Railway Company*, xiii. Jur. 70, affirming the decision of the V.-C. K. Bruce.

(c) See *int. al. Vernon v. Vernon*, 2 P. W. 599, and *Williamson v. Codrington*, 1 Ves. 518, and *Davenport v. Bishop*, 1 Phill. 698, 705.

(d) *Supra*, Vol. i. p. 391—427; *Toller v. Carteret*, 2 Vern. 494.

(e) The Court of Chancery, in the reign of James I., established its authority contrary

Powers of Court of Chancery as to Property out of its Jurisdiction. 7

always against the person. All that is necessary, in order to enable the Court to exercise its primary authority, is that the person should be amenable to its jurisdiction. Where, therefore, a case is made out against a person resident here, in respect of property situate out of the jurisdiction of the Court, but within the empire or its dependencies, which would call for the interference of the Court of Chancery, if the property were situate in this country, the Court, as it had the power, so it has assumed the jurisdiction, where such an interference is necessary to the ends of justice, of enforcing the equitable rights of the parties to or over property out of its jurisdiction, by coercion of the person and sequestration of his property here (a), in the same manner as it would have done had the property been situate in this country. Where parties, defendants, are resident in England, said Sir J. Leach, and brought by subpœna here, this Court has full authority to act upon them personally, with respect to the subject of the suit, as the ends of justice require; and with that view, to order them to take or to omit to take any steps or proceedings in any other court of justice, whether in this country or in a foreign country (b). This court does not pretend to any interference with the other court;

to its original constitution (*v. sup.* vol. i. 391—2) to issue a writ of assistance for enforcing a decree for delivering possession of land, see *Roberdeau v. Rous*, 1 Atk. 544; *Penn v. Lord Baltimore*, 1 Ves. 454, which is now obtained at once on demand and refusal to obey the order; stat. 1 Will. IV. c. 36, § 15, Rule 19; Gen. Order, 26 Aug. 1841, § 13. The legislature has conferred on the court the power of issuing execution by *fiery facias* and *elegit*, as at law, stat. 1 & 2 Vict. c. 110, § 18, Gen. Orders, 10 May, 1839. The same statute has extended the remedy by *elegit* and *fiery facias*, § 11, 12, 13, 20. Now all the freehold and copyhold lands of a debtor may be taken in execution under an *elegit*, and choses in action may be taken under a writ of *fiery facias*, *v. sup.* vol. i. p. 392, 505.

(a) *V. sup.* vol. i. p. 427; *Bent v. Young*, 9 Sim. 190; a case relating to a Surinam mortgage, *Foster v. Vassall*, 3 Atk. 589; *Lord Cranstown v. Johnston*, 3 Ves. 182, 13 Ves. 324; *Jackson v. Petrie*, 10 Ves. 164; and see *Archer v. Preston*, 1 Eq. Abr. 133, pl. 3, where a bill was sustained for an account of rents and profits of an estate in Ireland, though not for a partition; and see, on this point, *Angus v. Angus*, West's Rep. 24; *Roberdeau v. Rous*, 1 Atk. 544 (a case as to property in the colonies), *Earl of Kildare v. Eustace*, 1 Vern. 421; *Arglasse v. Muschamp*, 1 Vern. 77, and the cases cited in Raithby's note;

Cartwright v. Pettus, 2 Ch. Ca. 214; *Penn v. Lord Baltimore*, 1 Ves. Sen. 444, 454-5; (case of specific performance of articles in regard to the boundaries of two provinces in America), *Earl of Derby v. Duke of Atholl*, 1 Ves. 204, and the other cases cited, *supra*, vol. i. p. 427, n. (g); *Houlditch v. Lord Donnegal*, 8 Bli. N. S. 344. In the last cited case it was held by the House of Lords that the Court of Chancery in Ireland might examine into the propriety of a decree of the Court of Chancery in England, in a suit instituted in Ireland to carry it into effect.

As regards *Fraud*, Lord Hardwicke said, in *Angus v. Angus*, West's Rep. p. 23—“This had been a good bill as to fraud and discovery if the lands had been in France, in case the persons had been resident here, for the jurisdiction of this court as to frauds, is upon the conscience of the party;” but the difference of the laws of the two countries would prevent any question of trust from being entertained here as to lands in France. See Code Nap. art. 896.

The service of subpœnas in suits instituted here, on parties living out of the jurisdiction, is regulated by 32nd of the general orders of 8 May, 1845.

(b) Per Leach, M.R.; *Bushby v. Munday*, 5 Mad. 307; and see *Portarlington v. Soulbey*, 3 My. & K. 108; Lord Brougham there clearly states the result of the authorities.

it acts upon the defendant by punishment for his contempt, in his disobedience to the order of the court; and if he continue contumacious, and ultimately obtain a judgment in the other court, this court will protect the plaintiff here against the consequences of that judgment (*a*).

A sale of an estate in the colonies, in order to realise a sum of money charged upon it, may be made in a suit instituted here (*b*); and it seems that in a suit here in respect of a mortgage in the colonies, the mortgagee will have the same relief here that he might obtain by a suit in the colonies; the mortgagor, therefore, will be protected from the vexation of double suits instituted by the mortgagee—one here, the other in a colonial court; though the court will reserve to itself the power of giving such directions in regard to the colonial suit, as to ensure to the mortgagee all his rights (*c*).

The Court of Chancery has no power directly to affect property situate out of the bounds of its jurisdiction (*d*); and therefore, as a decree made here *may* be ineffectual, it is no bar to a suit instituted in a colonial court (*e*).

(*a*) Sir J. Leach, *Bushby v. Munday*, 5 Mad. 307. In that case there was an action in Scotland, and a suit here, both involving the same question—namely, whether by the law of England the defendant Clowes had a right to recover upon the bond in question. Sir J. Leach considered that the Court of Chancery was the more convenient court for determining the question, for if the plaintiff established his case, the bond would be ordered to be delivered up; so that he would be relieved from all further liability, here or elsewhere; and here the plaintiff would have the benefit of Mr. Munday's admissions on oath, which in the suit in Scotland he would not. If the Court of Session should come to erroneous conclusions on the subject, it would be in vain to urge that this court ought to be concluded by that judgment; the substantial ends of justice would require that this court should pursue its better means of determining, both as to the law and the fact; if the opinion of this court did not concur with that of the Court of Session, the defendant Clowes must be restrained by the injunction of this court from taking the fruit of his judgment there; and if the opinion of this court did concur with that of the Court of Session, the defendant would have the fruit of that judgment, not by the proper force of that judgment, but because he was entitled to it by the opinion of the court. His Honour, therefore, at once granted an injunction,

but he bound the plaintiff to submit to such steps in Scotland by judgment or otherwise, as would secure to the defendant Clowes the benefit of the preferable lien, which he might have acquired by his suit in Scotland on the land in Scotland, if he should ultimately establish any demand on the bond, 5 Mad. 308-9.

(*b*) *Gascoine v. Douglas*, Dick. 431; as to the mode of making a plantation in the colonies liable for a debt contracted here, see *Noel v. Robinson*, 1 Vern. 460.

(*c*) *Beckford v. Kemble*, 1 Sim. & St. 15; and see *Harrison v. Gurney*, 2 Jac. & W. 563. Mr. Bell, in *Beckford v. Kemble*, stated that there were cases in which this court, noticing the law of Jamaica, had upon foreclosure decreed a sale instead of foreclosure, of the estate in the West Indies, so as to give the mortgagee the same benefit by his suit here as he would have obtained by that in Jamaica.

(*d*) *Roberdeau v. Rous*, 1 Atk. 544, and see 2 Swanst. 323-4, note; therefore the validity of a will of lands in the colonies is not triable in Westminster-hall, though made in England, *Pike v. Hoare*, 2 Eden, 184; but see Lord Henley's note, p. 185, and his work on Injunctions, p. 142-3; nor can a partition be obtained, *supra*, p. 7, note (*b*).

(*e*) *Bayley v. Edwards*, 3 Swanst. 710, Lord Camden, C.

But, as before observed, the court will not interfere in these cases, unless it be necessary for the ends of justice. If a matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction in the colonies or elsewhere, the same parties will not be permitted to open the same subject of litigation in the Court of Chancery, any more than they would, in case there had been such an adjudication in one of the tribunals in this country, in respect of matter which might have been brought forward as part of the subject of contest, but which was not brought forward by the party complaining only because he has, from negligence, inadvertence, or even accident, omitted a part of his case (a).

But where the court refrains from interference it is on the presumption that justice has been or will be fairly and properly administered. Natural law, said Lord Eldon, requires the courts of this country to give credit to those of another for the inclination and power to do justice; but if that presumption is proved to be ill-founded in any particular case the court cannot, of course, act on the presumption (b).

If a decree obtained in a foreign or colonial court is impeached, as being so plainly against natural justice (c), or contrary to the *jus gentium* (d), as that it may be considered as altogether null and void; or if it appear to have been obtained by fraud (e), the Court of Chancery, in such cases, would probably assume jurisdiction in the same manner as if the matter had never been adjudicated upon; but an allegation of a mere irregularity in the proceedings, or even of an apparent error in the judgment in point of law (f), is insufficient to sustain a bill seeking to have the whole matter opened in this court after an adjudication in a foreign or colonial court of competent jurisdiction. As regards the colonial courts, there is an appeal from such courts to the judicial committee of the Privy Council (g), which tribunal may reform the

(a) V. C. Wigr.; *Henderson v. Henderson*, 3 Hare, 115, and the cases there cited. Lord Camden, in *Bayley v. Edwards*, 3 Swanst. 710, was of opinion, on appeal, that the pendency of a suit here could not be effectually pleaded to a suit instituted in Jamaica where the property was situate, for the same matter.

(b) See *Wright v. Simpson*, 6 Ves. 730. Lord Eldon, in this case, in which the question arose whether a creditor can be compelled to resort to any lien he may have upon the property of his creditor out of the kingdom, before he proceeds here against the debtor personally; decided against the opinions of Lord Thurlow, *Wright v. Nutt*, 1 H. Black, 136;

3 Bro. 326, 339. Lord Kenyon and Lord Rosslyn; see Eden's note, 3 Bro. 340, that he could not, more especially as the law in that case was not a subject of contract, but was given by the act of the foreign state.

(c) See *Becquet v. Mac Carthy*, 2 Barn. & Adol. 951, 958.

(d) See the authorities cited in *Price v. Dewhurst*, 8 Sim. 291.

(e) Mitford on Pl. 256; *White v. Hall*, 13 Ves. 324; *Price v. Dewhurst*, 8 Sim. 302-3.

(f) See *White v. Hall*, 12 Ves. 323-4.

(g) See Stat. 2 & 3 Will. IV. c. 92; 3 & 4 Will. IV. c. 41.

errors of any of the colonial courts, and call for further evidence if necessary (a), and even suspend the execution of the decree pending the appeal if justice requires that it should be suspended (b).

If a person has, by proceedings in a foreign court, improperly obtained what is there considered as the equitable as well as the legal title, the court has jurisdiction in a suit instituted here to declare him to be trustee for those who are beneficially entitled to the property, and to enforce such decree by its process against the party, if within the jurisdiction (c).

Where a sentence of a foreign court has affected the relative rights of the parties in that country as between themselves, and then proceedings are taken by one of them in this country, if the interference of the Court of Chancery is necessary, in order to protect the rights of the party sued, the court will not examine into the merits of the sentence which has been so obtained, in reference to the law of the country where it was pronounced (d); it might be different if a suit were instituted here merely to carry such a sentence into execution (e).

Confiscation in a foreign country cannot operate upon property here: no nation executes the criminal judgments of another (f).

When the matter has not been the subject of judicial decree or decision, if it be a matter within the jurisdiction of another tribunal of competent authority, the court will, unless under special circumstances, leave it to be disposed of by that tribunal, though it will, when necessary, so far interfere as to secure or make available the fund as to the disposal of which the question has arisen. Thus, where a person domiciled in England founded a charity which was to be administered in Scotland, where there are courts competent to give the necessary directions for its regulation if such should be required, the Court of Chancery secured the fund, but would not entertain jurisdiction to administer the trusts (g). But the Court of Chancery being a superior court of general jurisdiction, the presumption in its

(a) *Wood v. Hitchings*, 3 Beav. 511.

(b) *V. C. Wigr. ; Henderson v. Henderson*, 3 Hare, 114. The V. C. gave no opinion as to whether the court would entertain jurisdiction where a decree so impeached was made by a foreign tribunal, from which there was no appeal to any superior court which the Court of Chancery could regard as competent to administer justice in the case, *ib.* p. 118; and see *White v. Hall*, 12 Ves. 324.

(c) Lord Cottenham, *Price v. Dewhurst*, 4 My. & Cr. 85, though the authority of the case on which his lordship relied has been impeached,

so far as relates to an English probate, by the late decision in the House of Lords, in *Barrs v. Jackson*, ix. Jurist, p. 609, *infra*.

(d) See *Gold v. Canham*, 2 Swanst. 325, note, before Lord Nottingham, *Hamilton v. Dutch*, E. I. Comp. 8 Bro. P. C. 264, 269; and *Anon.* 2 Swanst. 326.

(e) See 8 Bro. P. C. 269.

(f) *Folliott v. Ogden*, 1 H. Bla. 125; *Barclay v. Russell*, 3 Ves. 429.

(g) *Attorney-Gen. v. Lepine*, on appeal, 2 Swanst. 181; *Provost and Bailiffs of Edinburgh v. Aubery*, Ambl. 236.

favour is, that nothing of equitable cognizance shall be intended to be out of its jurisdiction which is not shown and alleged to be so; if, therefore, it be sought to exclude the jurisdiction of the Court of Chancery, it is an essential requisite to show that another court of competent authority has jurisdiction of the matter (a).

The Court will not compel a person resident here to make a discovery to be used in a suit in a foreign court, unless it be shown that a suit has been instituted, and that the discovery is essential to the proceedings there, and that the parties to the suit are deprived of the benefit of that discovery by the party to make it being in this country (b).

If two suits are instituted, one in the Court of Chancery, the other in the Court of Session of Scotland (c), which is a court of law and of equity (d), to enforce equitable rights in respect of property partly within the jurisdiction of the Court of Session and partly within that of the Court of Chancery, the Court of Chancery cannot on principle (e) restrain the proceedings in the Court of Session; at least, as regards that portion of the property which is subject to equitable rights of which that court properly has cognizance, if such proceedings appear to have been instituted *bonâ fide*, and not by collusion. The Court of Session might with greater propriety, perhaps, restrain the proceedings here in respect of that portion of the property. But the Court of Chancery will retain its own suit. The relief given by the Court of Session on the whole matter may not be exactly the same as that given in the Court of Chancery here; the national character of the individuals, and the character of the property which the decree affects, will determine, on the ultimate hearing of the cause, whether the English or Scottish notions of equity are to be applied; if in the

(a) Lord Hardw., *Earl of Derby, v. D. of Athol*, 1 Ves. 203-4; *Nabob of Carnatic v. E. I. Comp.* 1 Ves. J. 388; S. C. Bro. C. C. and see Mitf. on Plead. 256.

(b) See *Bent v. Young*, 9 Sim. 190. This suit related to proceedings in Surinam; and see 1 Ves. 205; *Dunn v. Coates*, 1 Atk. 288. It would seem that the court will perpetuate testimony, with a view to proceedings in a foreign court; *Morris v. Morris*, 2 Phillips, 205.

(c) By the Act of Union it is declared, that no causes in Scotland be cognizable by the Court of Chancery or any other court in Westminster Hall, and that such courts shall have no power to cognosce, review, or alter the acts or sentences of the judicatures within Scotland, or stop the execution of the same, 5 Anne, c. 8, art. 19. Sir J. Leach, in granting an injunction in *Bushby v. Munday, ubi inf.*, said, as to the argument derived from

this article of the union, his mind was in no degree affected by it; the article only meant that the courts should remain as independent as they were before the union; if the Act of Union had never been made, he should have granted the injunction; the injunction in no way broke in upon the absolute independence of the Court of Session, but touched only the party affected by it. This course of reasoning was applied successfully, as we have seen in the former volume, to enable the Court of Chancery to nullify the judgments of the common-law court of Westminster Hall, when contrary to natural justice.

(d) See 2 Swanst. 321.

(e) See on this subject the cases cited in Mr. Swanston's note to *Kennedy v. Cassillis*, 2 Swanst. 325; Eden on Injunctions, 141, *et seq.* The subject will be more fully considered under the title "Injunctions."

Scottish court, Scottish principles of equity should be applied to the subject-matter to which English equitable principles ought to be applied, the Court of Chancery will, as it is presumed, so far as its powers over the persons and the property will enable it, set right any decree that may be made by the Court of Session in Scotland (a).

If the question in litigation depends upon the right to land according to the law of the colony where it is situate, the Court of Chancery will leave the question to be decided there (b); as the right to land or immoveables (unlike personal property, which follows the domicile) (c) is to be determined by the law of the country where it is situate; but if that question is mixed up with others,—for instance, with matters of account,—which can be more conveniently (d) disposed of here, the court will entertain jurisdiction of the whole matter, giving such directions as may be necessary as to any proceedings which it may be thought advisable to institute in the colonial courts (e).

As to the inconvenience of having different suits here and in the colonies, considering the difficulties of administering justice between parties occasionally living under separate jurisdictions, Lord Camden thought that, as regards questions of equitable cognizance, the parties ought to be amenable to every court possible where they are travelling from country to country: the Court of Chancery, said his lordship, will correct the mischiefs of these double suits as much as it can, by allowing in each country the benefit of all the other proceedings in the other parts of the British dominions; and this should be introduced to the notice of the court by supplemental bill, or insisted upon by answer, according as the occasion may require (f).

As regards contracts relating to property in Scotland or in the

(a) See *Kennedy v. Lord Cassillis*, 2 Swanst. 321-2; and see *Bushby v. Munday*, 5 Mad. 308-9; *supra*, p. 7. The Vice-Ch. K. Bruce, in *Lestie v. Baillie*, 2 Y. & Coll. C. C. 96-7, held that payment by English executors of a legacy to the surviving wife—domiciled in Scotland, whose husband, who was also domiciled there, and who, by the law of Scotland, was entitled to the legacy, so that it had passed to his representatives—was a good payment, though the executors had notice that the husband and wife were Scotch persons, but not that the Scotch law differed from the English law.

(b) See *Attorney-General v. Stewart*, 2 Meriv. 156; *Elliott v. Lord Minto*, 6 Mad. 16; *Price v. Dewhurst*, 4 My. & Cr. 81, 83, 84; *Bent v. Young*, 9 Sim. 190, 191; *Beckford v. Kemble*, *ubi sup.*

(c) *Pipon v. Pipon*, Ambl. 25, App. D.,

Blunt's Ed.; *Thorne v. Watkins*, 2 Ves. 35; *Campbell v. French*, 3 Ves. 321; *Price v. Dewhurst*, 8 Sim. 299; and see *Stanley v. Bernes*, 3 Hagg. Eccl. Rep. 435-8, and the cases in the argument.

(d) So if the whole matter may be more conveniently disposed of here, *Beckford v. Kemble*, 1 Sim. & S. 15.

(e) *Bunbury v. Bunbury*, 1 Beav. 326, 331; and see *Bushby v. Munday*, 5 Mad. 308, 309. When the Court of Chancery has made a decree in a suit embracing all the questions between the parties, no one ought to take proceedings in a foreign court relative to the same subject though they are intended to be auxiliary only, without leave of this court, *Wedderburn v. Wedderburn*, 2 Beav. 214.

(f) Lord Camden, *Bayley v. Edwards*, 3 Swanst. 711, where the leading authorities, down to that time, may be found.

colonies, where the law varies from that which is administered here, if the Court of Chancery has to carry out such contracts, the construction will be very much influenced by where the contract was entered into, as that circumstance in most cases will afford a material index to the intention. When a contract is entered into in this country in regard to an estate in the colonies,—for instance, for the sale of a plantation, and the settlement of the proceeds upon certain trusts,—though the contract by the law of the colony may be a nullity so far as regards the estate, yet the Court of Chancery, where the intention of the parties is plain, will, so far as they are concerned, carry it into effect. But the equity of the parties claiming under the contract until a bill is filed to enforce it, is personal only as against those who have the legal dominion of the estate; so that a mortgagee having obtained the legal title from a party to the contract, even with notice, will not, it seems, be disturbed (*a*).

However, as a general rule, a contract which is void by the laws of the country in which it was made cannot be enforced here (*b*).

A settlement executed in Scotland between Scotch parties will be construed according to the law of Scotland if a suit be instituted here in regard to it; for it is not to be supposed that the parties had any English equities in their contemplation (*c*). So, articles executed in England in the English form, and not referring to any thing *dehors* the articles, will receive the construction which is proper to be put upon such an instrument in England, though the question in contention arise upon a right depending upon the law of Scotland, and such construction may not be conformable to that which would have been put upon the same words in an instrument drawn in Scotland and in Scotch form (*d*).

If the parties in a foreign country express that they are contracting in reference to English law, there can, of course, be no doubt that English doctrines will be applied to the contract here (*e*).

Where infants resident here become entitled to personal property

(*a*) *Martin v. Martin*, 2 Russ. & M. 507, 529, 530. That was the case of a settlement made on the marriage of a ward under the directions of the court.

(*b*) *Heriz v. Riera*, on a Plea, 11 Sim. 325.

(*c*) *Anstruther v. Adair*, 2 My. & K. 513, 516.

(*d*) *Marquis of Breadalbane v. Marquis of Chandos*, 2 My. & Cr. 738, on appeal.

(*e*) See *Lang v. Lang*, 8 Sim. 452, 464. In *Stanley v. Bernes*, 3 Haggard, 441-7, Sir

John Nicholl held, that the will of a person domiciled in a foreign country, made with the intent that it should operate as an English will, should be admitted to probate, though it was not made conformably to the laws of the country where he was domiciled; but this decision was reversed by the delegates, *ibid.* p. 465; 8 Sim. 300. But in *Anstruther v. Chalmers*, 2 Sim. 1; 8 Sim. 301, where a party domiciled in England made a will in a foreign country, that will was proved here, and it

under the decree of a foreign tribunal, it will be administered for their benefit here just as any other property to which they may have become entitled. Any right which the father might have in the country in which he is domiciled over the property of the infants will not follow him (*a*).

Though in construing contracts the law of the place in which they are made must govern, the remedy upon them must be pursued by such means as the law of the country where the parties reside points out. A person suing in this country must take the law as he finds it; he cannot by virtue of any regulation in his own country enjoy greater advantages than other suitors here, and he ought not to be deprived of any superior advantage which the law of this country may confer (*b*): a Portuguese, for instance, was allowed to arrest another here, though the law of Portugal did not allow arrest for debt (*c*). Foreigners suing in our courts are entitled to equal justice with a subject, but not to a greater measure of indulgence than a subject would have (*d*).

As regards the right of an alien friend to sue, equity follows the law; an alien cannot hold real property in this country, therefore he cannot sue in respect of it; but he may hold personal property, and therefore may bring any personal action (*e*); and in a creditor's suit an alien creditor resident abroad may, on giving security for costs, go in and prove his debt before the master (*f*). An injunction will not be awarded against a foreigner here who is acting as a mere agent under the orders of the ambassador of his sovereign (*g*).

A sovereign prince, resident in the dominions of another, is ordinarily exempt from the jurisdiction of the courts there; but it is now settled that a foreign sovereign may sue at law and in the Court of Chancery, though he cannot be sued; and if he sues in this court, or being made a party in order that all parties interested may be before the court, he comes in, as he may, to enforce his claims, he submits

was decided that it must be construed according to the law of England; and see *Price v. Dewhurst*, 8 Sim. 279, 302; S. C. on appeal, 4 My. & Cr. 86. If probate be granted here, that, in the Court of Chancery, is conclusive that the instrument is a will, so far as regards the appointment of executors; but not that the English law is to be applied to its construction; that will depend on the domicile of the testator, and the executors may be declared to be trustees against the provisions of the will, *Thornton v. Curling*, 8 Sim. 300, 301; S. C. 30.

(*a*) *Gambier v. Gambier*, 7 Sim. 270.

(*b*) See *De la Vega v. Vianna*, 1 Barn. & Adol. 284; *Anstruther v. Adair*, 2 My. & K. 513; *Ashcomb's case*, 1 Ch. Ca. 232.

(*c*) *Ibid.*, and see *Sharp v. Johnston*, 2 Scott, 407.

(*d*) Note to *Duckworth v. Tucker*, 2 Taunt. 37; and 1 Bar. & Adol. 287-8, Lord Tenterden.

(*e*) Mitford on Pl. 229. Lord Redesdale adds, an alien enemy may sue under some circumstances.

(*f*) *Drever v. Maudesley*, 5 Russ. 11.

(*g*) *Service v. Castaneda*, 2 Coll. 58-9; and see stat. 7 Anne, c. 12, there stated.

himself to the jurisdiction; and where he is a plaintiff, if a cross bill be filed against him he must answer personally on oath (a).

It would seem that the Court of Chancery has no discretion to refuse a *ne exeat regno* upon an equitable demand where an equitable debt is positively sworn to, although the defendant's usual residence is in the West Indies, or Scotland, or Ireland, or in a foreign country; and although, as regards transactions in the British dominions, a bill may have been filed against the party in the country where he usually resides (b). It may be observed it is only where the demand is upon a balance of account that the writ will be issued where bail might be obtained at law (c).

As a general rule, in an application to a court of equity in this country for its interference in respect of a transaction in one of the colonies, the court will apply the same reasoning,—at least, in the absence of evidence that, according to the law of the colony, a different principle ought to be applied,—as would be applied to a similar transaction in this country (d), always, however, having regard to the different nature of landed property in the colonies (e).

It may be observed that the power of the Court of Chancery to appoint managers and consignees (f) of property in the colonies, they giving security duly to account (g), is an important engine for effectuating its decrees, in respect of property so situate (h).

The Court of Chancery will not entertain a suit instituted by a sovereign prince of India against the East India Company, where the matter arises out of a transaction in which the sovereign Indian prince

(a) *Duke of Brunswick v. King of Hanover*, 6 Beavan, 37; see particularly pp. 39, 42, 60. The whole of the judgment is important on this subject; all the authorities were cited and observed upon in this case; *The King of Spain v. Hullett*, 1 Cl. & Finell. 333; S. C. 7 Bli. 359; and see Calvert on Parties, pp. 401-2.

(b) *Howden v. Rogers*, 1 Ves. & B. 132; *Grant v. Grant*, 3 Russ. 604, 606; *Flack v. Holme*, 1 Jac. & W. 407, 411, 413, 415, 417; the defendant was a native of Russia, carrying on business there.

(c) *Ibid.* and *Parnell v. Taylor*, Turner & Russ. 103.

(d) See *Henderson v. Henderson*, 3 Hare, 115; *Bentinck v. Willink*, 2 Hare, 8.

(e) *Scott v. Nesbitt*, 14 Ves. 444, 445.

(f) See Seton on Decrees, p. 327.

(g) *Morris v. Elme*, 1 Ves. J. 138.

(h) *V. int. al., Quarrel v. Beckford*, 13

Ves. 378. The general question as to how far foreign judgments are binding, and to what extent they may be examined into in the English courts, offers too large a field of inquiry to be here entered into, and it belongs rather to a work on the common law. The Vice-Chancellor of England reviewed some of the authorities on the subject in *Martin v. Nicolls*, 3 Simons, 461-5. The Vice-Chancellor, in *Price v. Dewhurst*, 8 Simons, 302, appears to have adhered to his opinion in that case, though Lord Brougham had expressed some doubts upon it. See also Burge, Conf. of Laws, iii. 1054; *Houlditch v. Lord Donegal*, 8 Bli. 346; *Buchanan v. Rucker*, 9 East, 192; *Cavan v. Stewart*, 1 Starkie R. 525; *Frankland v. McJusty*, 1 Knapp, 274; *Molony v. Gibbons*, 2 Campb. 504; *Douglas v. Forrest*, 4 Bingham. 686; *Beequett v. McCarthy*, 2 Barn. & Ad. 958.

treated with the Company as an independent sovereign (a)—it is not a subject of municipal jurisdiction.

An infant trustee may be ordered to convey under the stat. 1 Will. IV. c. 60, passed in substitution for the stat. 7 Anne, c. 19, though the lands of which he is trustee are situate in Ireland, the East Indies, or any other of the British dominions excepting Scotland (b), but the Act does not extend to lands out of the Queen's dominions (c).

The reader will bear in mind, as regards the jurisdiction of the Court of Chancery generally, that the jurisdiction of this court cannot be taken away merely by another jurisdiction having cognizance given it of the same matters (d), though, as we have seen in the preceding volume (e)—and other instances will be noticed hereafter (f)—if the jurisdiction assumed by the courts of law over a matter originally cognizable in the Court of Chancery is effectual for all purposes, the Court of Chancery will then decline to entertain jurisdiction of the matter.

(a) *Nabob of Arcot v. E. I. Comp.* 4 Bro. 198; and see S. C. 1 Ves. J. 371, 3 Bro. 292.

(b) 1 Will. IV. c. 60, § 29, *q. v.* The decisions in the stat. of Anne had extended that statute to Ireland, the East Indies and the colonies, *Expte. Prosser*, 2 Bro. 325; *Expte. Anderson*, 5 Ves. 240, 242; *Evelyn v. Forster*, 8 Ves. 96. These cases proceeded

on the principle that the order operated *in personam*.

(c) *Price v. Dewhurst*, 8 Sim. 620.

(d) Lord Cottenham, *Attorney-General v. Aspinall*, 2 My. & Cr. 628; *Beckford v. Hood*, 7 T. R. 620.

(e) *V. supra*, vol. i. p. 694, *Action on the Case*.

(f) *V. infra*, *Assignments of Choses in Action*.

SECTION II.—General Doctrines relating to Express Trusts.

Trusts created by Will most frequent.

In determining the Effect of the Testamentary Act, Equity follows the Law.

New Stat. of Wills, 1 Vict. c. 26, as to Revocation.

Construction of Devises.

Wills of Personal Estate, as to what matters the Ecclesiastical Court has exclusive Jurisdiction.

Creation of Trusts which are to have Effect during the Life of the Party.

Where Trusts may be created by Parol, and where not.

No Form necessary even where Writing required.

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At what time a Trust may be declared.

Trust must be certain in its Nature, and in its Subject and Object.

Where plain Intent to create a Trust, and the Trust fails, the Property goes to Donor, or his Representatives.

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Limitations by way of Trust analogous to Legal Limitations.

Trusts extended to Personal Estate.

Other Equitable Interests in Personal Estate.

Doctrine of Perpetuities, and Rules as to Trusts for Accumulation apply to Trusts.

Cognizance of Trusts belongs exclusively to Court of Chancery.

Directing Principle which governs the Court of Chancery in the Exercise of its Jurisdiction as to Trusts is the Intention.

In a subsequent part of this volume, the various kinds of express trusts of real and personal estate under which equitable interests are acquired which usually occur in practice, will be considered under distinct heads. But it may be proper first to recur to, and in some instances to enter a little more at large into, the general doctrines and rules which are applied to trust estates and interests, including the rules relating to the mode of their creation, the nature of the office of trustee, and the rights and interests of the *cestui que trust*.

Trusts created by will are those which most frequently come before the Court of Chancery.

When the Court of Chancery, in the exercise of its jurisdiction, has to determine upon the effect of the testamentary act itself, it is governed by the same rules as prevail in the courts of law (a). Thus, before the late Act for regulating wills (b), what would have been a

(a) V. *sup.* vol. i. p. 524; and see *Habergham v. Vincent*, 2 Ves. Jun. 235, 236, Lord Loughborough.

(b) "The head of revocation, once so bulky and intricate. is on the whole greatly reduced and simplified by the Act of the 1 Vict. c. 26."

revocation of a devise of an equitable estate was determined by the same general principles as were applied by courts of law to legal estates (a), though there were exceptions; as, where the beneficial interest, being distinct from the legal interest, was devised, and the devisor afterwards took the legal estate without any new modification or alteration, and where having the complete legal and beneficial estate at the date of the will, he divested himself of the legal estate, but remained owner of the equitable interest, as in the case of a mortgage or conveyance for payment of debts (b). But the law in regard to the revocation of devises by an alteration of estate is placed by the late Act upon an entirely new footing, equally binding upon courts of law and of equity (c); so that now, no conveyance or other act done subsequently to the testamentary act, will prevent the operation of the will on such estate or interest as the testator shall have power to dispose of at the time of his death.

As regards the construction of devises, as well as of deeds and contracts in writing, the rules, unless in some peculiar instances, are the same at law and in equity (d), the Court of Chancery having now, in general cases (e), no greater latitude in the constructions of wills than a court of law (f). But although the Court of Chancery is equally competent as a court of law, if it shall think fit, to decide upon all questions of construction, even on a legal devise, such questions, whether arising on limitations strictly legal, or on trust limitations analogous to legal limitations, are usually, in order to preserve uniformity of decision, sent to a court of law (g).

As regards wills of personal estate, the probate is conclusive both

Hayes, *Elem. of Convey.* vol. i. p. 377, 378, *et seq.*

(a) See *Williams v. Owens*, 2 Ves. Jr. 598; 1 Jarm. on Wills, 134.

(b) Lord Alv. in *Harmood v. Oglander*, 6 Ves. 223.

(c) 1 Vict. c. 26, § 23, *et v. sup.* vol. i. pp. 473, 476; Hayes, *Elem. ubi sup.*

(d) See vol. i. p. 502; Lord Talbot, *Atkinson v. Hutchinson*, 3 P. W. 259.

(e) The exceptions have been adverted to, vol. i. pp. 195, 523; the doctrine as regards *executory trusts* will be separately considered hereafter.

(f) Lord Hardwicke, in *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 74. The general rules for construction of deeds and wills have been stated, *sup.* vol. i. pp. 517—573.

(g) *V. sup.* vol. i. pp. 517—520. It may be remarked that Lord Hardwicke considered that in questions upon a legal title to an estate on the construction of a will, if there was any doubt, it was not the proper or convenient course to determine it on demurrer, though the inclination of the opinion of the judge might be in favour of the demurring party. But, he added, if the opinion of the court is, that on the face of the bill the plaintiff has no title, and the will is set forth verbatim in the bill, it is just, and more for the benefit of the parties, to cut it short on the demurrer, since it must still be determined on the same matters as are before the court on the demurrer, *Brounsword v. Edwards*, 2 Ves. Sen. 246, 247; and the same reason will, of course, apply to a case of construction upon a trust estate.

as to the sanity of the testator (*a*), and the dispositions contained in the will (*b*); and even on other points incident to the granting of administration over which the ecclesiastical court has jurisdiction, as on the question who is the next of kin of the intestate, the decision of that court is conclusive (*c*). The Court of Chancery having jurisdiction over all testamentary bequests, necessarily has to construe such bequests; but it has lately been decided by the highest authority that the court cannot advert to any matter out of the will, excepting for the purpose of construction; so that the Court of Chancery cannot declare a person to be a trustee for another of property which is bequeathed to him, when by fraud and misrepresentation and for his own benefit, he has caused the testator to revoke a bequest of part of it which the testator had made to another person (*d*).

The ecclesiastical courts have jurisdiction to decree the payment of a legacy, or a share of the residue; but the Court of Chancery has also a concurrent jurisdiction (*e*). In all cases of bequests in trust, the Court of Chancery has exclusive jurisdiction, as that court alone can enforce the trust (*f*).

As regards the Creation of trusts, which are to have effect during the life of the party, it is clear as an abstract proposition that in the case of personal property (exclusive of chattels real, as terms for years in lands and tenements) (*g*), a declaration of trust may still

(*a*) Williams on Executors, p. 423, and cases there cited. In *Dew v. Clarke*, before Sir John Nicholl, a will of a man who was proved to be generally competent to the management of his affairs was set aside by Sir John Nicholl, and his decision was affirmed by the delegates, at the instance of the daughter of the testator, who was his sole next of kin, on the ground chiefly of delusion, as regards his daughter; see the judgment by Dr. Haggard, p. 98. It is remarkable that the daughter did not, as heiress at law, attempt to dispute the will so far as regarded the real estate, and as regards the real estate, it was established by the Court of Chancery. Lord Lyndhurst had refused to advise His Majesty to grant a further commission of review.

(*b*) See Williams on Executors, p. 423, and cases there cited. In *Allen v. Macpherson*, Dom. Proc. 1847, xi. Jurist, 785, all the leading authorities were reviewed. Lord Lyndhurst considered that *Barnesly v. Powell*, 1 Ves. 119, which it is to be remarked was decided after *Kerrick v. Bransby*, 7 Bro. P. C. 437, had been overruled, *ib.* 787. Lord Cottenham, see particularly p. 788 *a*, and Lord

Langdale, see p. 729 *b*, dissented from the judgment pronounced by the House of Lords.

(*c*) *Boucher v. Taylor*, 4 Bro. P. C. 708; Williams on Executors, 424, and the other cases, n. (*f*); *Barrs v. Jackson*, ix. Jur. 609; 1 Phillips, 582, 588, before Lord Cottenham, on appeal. The Vice-Chancellor Knight Bruce, in an elaborate judgment, 1 Y. & Coll. 587—602, in which he examined the civil law authorities as well as our own, had pronounced a contrary opinion.

(*d*) *Allen v. Macpherson*, Dom. Proc. *supra*, note (*b*).

(*e*) *V. supra*, vol. i. p. 581, 582.

(*f*) Lord Hardw. *Hill v. Turner*, 1 Atk. 516; *Anon.* 1 Atk. 491; and see Prec. Ch. 548.

(*g*) *Skett v. Whitmore*, 2 Freem. p. 281, and there are many other cases to the same effect. The doctrine that parol evidence cannot be admitted to create a trust of chattels real was recognized by Lord Hardwicke in *Hutchins v. Lee*, 1 Atk. 447, though parol evidence was there admitted for the avoidance of a fraud, under peculiar circumstances.

be made without writing (*a*), notwithstanding the Stat. of Frauds (*b*). Money secured on real estate has been treated as being personal estate, not coming within the provisions of the Stat. of Frauds, so far as relates to declarations of trust (*c*). Parol trusts of copyholds, unless perhaps some special custom may control it, are within the operation of the statute (*d*). But as regards express trusts of real estate, no evidence can be received to establish such a trust, but that which the statute prescribes; namely, a writing signed by the party (*e*). A son conveyed his estate to his father in consideration, as it was expressed, of 400*l.*, but really as trustee, in order, as appeared, but by parol only, that he, being in better credit than the son, might raise money on the estate for the benefit of the son; it was held, that the Statute of Frauds excluded the evidence of the trust attempted to be set up, and that the only relief the son could obtain, and which was given under the prayer for general relief, was an equitable lien for the 400*l.*, which had not been, and was not intended to be paid (*f*).

In those cases in which a writing signed is required under the statute to evidence the trust (*g*), no form is requisite, either as regards the nature of the instrument or the language; the absence of the word trust is a circumstance to be attended to, but nothing more; if the whole frame of the instrument creates a trust, for the particular purpose of satisfying which the estate is devised or conveyed, the law is the same though the word trust is not used (*h*).

Where there is no evidence of the actual creation, any writing, which on a due construction is sufficient to show that a trust was

(*a*) *Sup.* vol. i. p. 498, *Foster v. Hale*, 3 Ves. 707, *et seq.*; *McFadden v. Jenkyns*, 1 Hare, 461, V. C. Wigram, and the cases cited, *ibid.* n. (*p*).

(*b*) *Supra*, vol. i. p. 497.

(*c*) Dict. of Sir J. Leach, *Benbow v. Townsend*, 1 M. & K. 510. The case of *Bel-lasis v. Compton*, 2 Vern. 294, seems rather to have turned on the effect of parol evidence to repel a resulting trust. But see Hill on Trustees, p. 17. A different construction has been put upon the stat. 9 Geo. II. c. 36, commonly called the Stat. of Mortmain, it having been held that moneys secured by mortgage of lands, in fee or for years, or by an assignment of poor's rates or county rates, and even judgment debts, so far as they operate as a charge on real estate, are within the stat. See Jarm. on Wills, i. 199; but the reason in the latter case appears to be, that if money secured on mortgage

might be given to charity, the charity by foreclosure might acquire the land itself, contrary to the policy of the statute (v. *infra*, "Charities"), a reason which in some measure applies to the policy of the Statute of Frauds. However, even under the stat. 9 Geo. II. c. 36, shares in the London Dock Company and West India Docks, which are declared by act of parliament to be transmissible as personal property, are not within the act. *Hilton v. Giraud*, V. C. K. Bruce, 26 March, 1847, xi. Jurist, 839.

(*d*) This seems to be assumed in *Devenish v. Baines*, Prec. Chan. 3.

(*e*) *Supra*, vol. i. p. 497, 499.

(*f*) *Leman v. Whitley*, 4 Russell, 422.

(*g*) See vol. i. p. 497.

(*h*) Lord Eldon, *King v. Denison*, 1 Ves. & B. 273; and see *Raikes v. Ward*, 1 Hare, 447, 448.

created and is still subsisting, will avail to establish the trust (a); thus, a letter or note, or memorandum in writing, signed by the person charged to be a trustee, will be sufficient (b). So will a deposition in answer to interrogatories, or a confession in an answer to a bill, though the Statute of Frauds be expressly pleaded; for in such a case the statute is not permitted to be a cover for fraud (c). Indeed, any written evidence under the hand of the party which is inconsistent with the fact of the apparent owner being other than a trustee, will constitute him a trustee in the view of the Court of Chancery (d). In a late case, where an instrument was signed by two parties, which was drawn up for the purpose of regulating their own interests in an estate purchased on speculation, and therein a trust for a third person not a party, but with whom a previous parol agreement had been entered into by which he was to have one-third of the profits to be made by means of the estate in question, was recognized,—that was considered as a sufficient declaration of trust, and to entitle such third person to enforce the parol agreement (e).

The omission of the trustee to declare a trust on which property is held, may be made good within any reasonable time, so as to affect any person claiming under the trustee, not being a purchaser for valuable consideration without notice, provided the *bona fides* of the transaction be established. Thus, where a bankrupt, after committing an act of bankruptcy, by deed declared himself to be a trustee of a lease granted to him more than a year before, it having been found on an issue directed to try that fact that the lease had actually been granted to the bankrupt as trustee, the deed was established against the assignees as a valid declaration of trust (f).

(a) See *Randall v. Morgan*, 12 Ves. 74, and *sup.* vol. i. p. 498.

(b) Though in the form of a promise, *Belamy v. Burrow*, on appeal, Forrest, 97, 106.

(c) *Podmore v. Gunning*, 7 Sim. 655-7. 658, 660; *Hampton v. Spencer*, 2 Vern. 288. In the conveyance a consideration was expressed; yet the trust, which only appeared by the defendant's answer in favour of the grantor's wife and children, was decreed. *Ryal v. Ryal*, 1 Atk. 59; *Nabb v. Nabb*, 10 Mod. 404; *Cottingham v. Fletcher*, 2 Atk. 156; where Lord Hardwicke said, "An admission of an express trust for one person is likewise an admission of a resulting trust for another." It is to be observed that there the defendant, who confessed the trust, had also pleaded the Statute of Frauds; and see on this point *Strickland v. Aldridge*, 9 Ves. 519; *Ambrose v. Ambrose*, 1 P. W. 323; *Smith v. Wilkinson*, cited 3 Ves. 705; and see *Degg v. Degg*, 2 P. W. 412, and other cases cited 2 Fonbl. 35, 36; but the marginal note to *Kirk v. Webb*, Prec. Ch. is not supported by the judgment, see p. 88. The doctrine, in regard to a plea of the statute to a bill for specific performance, is different; for although the defendant admits a parol agreement by his answer, yet if he relies on the statute, he has the benefit of it, *Cooth v. Jackson*, 6 Ves. 37; see Mitf. on Pleading, 267.

(d) See *Leman v. Whitley*, 4 Russ. 427; *Cripps v. Jee*, 4 Bro. 472.

(e) *Dale v. Hamilton*, on appeal, xi. Jurist, 575, 576, reported on original hearing, 5 Hare, 369.

(f) *Gardner v. Rowe*, 2 Sim. & St. 346, affirmed on appeal, 5 Russ. 258. Some letters

Where it is sought to affect any property, real or personal, with a trust, the trust sought to be established must be certain in its nature and in its subject and object (*a*). In those cases where a writing is required, if the signed document refer to any other document which shows what was meant by the parties, that will be sufficient (*b*); and, further than this, where there is a writing signed so as *primâ facie* to satisfy the requisitions of the statute, then, if the terms of the trust do not sufficiently appear upon the face of it, evidence may be received for the purpose of showing the position in which the party signing stood when he wrote and signed the document, the circumstances by which to his knowledge he was surrounded, and the degree of weight and credit which, independently of any question of construction, may belong to the document so signed (*c*); and if the judge, so assisted, can collect that the intention and views of the parties required a positive trust, and the objects of the trust are plain, the court will enforce it (*d*). Illustrations of this doctrine, in regard to recommendatory trusts, will be given in a succeeding section (*e*).

Where there is a plain intent to create a trust, and the property is conveyed for that purpose, but the trust attempted to be declared is too uncertain or indefinite for the court to execute, it would be unreasonable that the trustee should keep the property for himself, which plainly was not intended (*f*). The property, therefore, in the view of the Court of Chancery, goes to the party, whether the donor himself, his heir at law, or next of kin, or other claimant, who would have been entitled to it if there had been no specific act of disposition of the property;

had passed between the parties on the subject before the bankruptcy; but they do not appear to have affected the judgment; and see *Milner v. Singleton*, 2 Y. & Coll. N. S. p. 75, as to letting in parol evidence of circumstances to create a trust on the ground of agency; where the trust was *denied* by the answer.

(*a*) V. C. K. Bruce, *Morton v. Tewart*, 2 Y. & Coll. N. S. 80; *Foster v. Hale*, 3 Ves. 706, 707; S. C. 5 Ves. 308. "There must be certainty of the thing demanded to be adjudged or decreed, or at least a means to reduce it to a certainty; for otherwise the court will not know how to give judgment." Hobart, 174, Siderf. 270; and see the other cases cited, Treat. Eq. by Fonbl. i. 173, 174; and see *ib.* ii. 39, Downman's case, 9 Rep. 9 a, &c. As to the corresponding doctrine in the creation of uses, v. *sup.* vol. i. p. 499.

(*b*) See *Tawney v. Crouther*, 3 Brown, 319, 320, Eden's edn.; *Coles v. Trecothick*, 9 Ves. 250. These cases are decisions on the fourth section, *supra*, vol. i. p. 646, but the

principle applies to the seventh; the words of the fourth section are, "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith," or some person lawfully authorized by him.

(*c*) *Morton v. Tewart*, 2 Y. & Coll. C. C. 75, 77, 79; and see *Gardner v. Rowe*, 5 Russ. and *Milner v. Singleton*, before Lord Cottenham, cited 2 Y. & Coll. C. C. *ubi supra*; *Verlander v. Codd*, Turner & Russ. 356. The same principle is laid down by Lord Thurlow, as to the construction of a will, in *Eden v. Smyth*, 5 Ves. 355-6, *et v. supra*, vol. i. p. 557.

(*d*) *Morton v. Tewart*, 2 Y. & Coll. C. C. 80, 81.

(*e*) Under the head of "Trusts created by Words of Recommendation," &c. *infra*, p. 64, *et seq.*

(*f*) V. *supra*, vol. i. p. 499, and see *Fowler v. Garlike*, 1 Russ. & M. 235.

and it is the same if the trust attempted to be declared be void, or become incapable of taking effect. Where the property is conveyed or devised in trust, but the trust declared does not exhaust the property, the portion unaffected by the trust will equally belong to the person who would have been entitled to it had there been no disposition (a). But where there is an absolute devise to a person not as trustee, but, for anything that appears to the contrary, beneficially, and an imperfect or inefficient trust is then attempted to be imposed, the property, as noticed in the former volume, will remain in the donee, for there is an actual gift, and the subsequent act being a nullity, there is nothing in fact to impair the effect of the gift (b).

Limitations by way of trust, of real estate, it will be remembered, have always been considered in the Court of Chancery in the same light and as having the same incidents, generally speaking, as corresponding legal estates at law (c).

(a) *Ackroyd v. Smithson*, 1 Bro. p. 503; *Cogan v. Stephens*, Lewin on Trusts, Append. No. VII. p. 719, *et seq.*; *Hughes v. Evans*, 13 Sim. 496, *sup.* Vol. i. pp. 510, *et v. infra*, "Resulting Trusts."

(b) *Gibbs v. Rumsey*, 2 Ves. & B. 297, *sup.* Vol. i. p. 499. On the same principle it has been held that where there is a devise subject to a charge which fails, it sinks for the benefit of the devisee, *Jackson v. Hurlock*, Amb. 687; 2 Eden, 263, 274; *Kennell v. Abbott*, 4 Ves. 811, dict. of Lord Alvanley. The other cases on this point are collected by Mr. Hill on Trustees, p. 112, *et seq.*, and Mr. Jarman on Wills, i. pp. 302, 307, *et seq.*: the conflicting decisions are stated and reviewed in each of those works, Mr. Jarman leaning to the title of the heir, pp. 308-9. In *Cooke v. Stationers' Company*, 3 My. & K. 264, Sir J. Leach thus states the law as regards a residuary devise, and which affords a general principle wherever the intention can be ascertained:—"Where a real estate is directed to be sold, and the testator wills that a sum of 1000*l.*, or any other sum of money, shall be applied to a particular purpose, and the residue of the produce of the sale only is given to A., and the particular purpose fails, either by lapse or because it is void at law, then the heirs, and not A. will take the 1000*l.* or other sum of money, because the whole is real estate at the death of the testator, and A. can take no more of that estate than is expressly given to him—namely, the residue of the real estate, after deducting the 1000*l.* or other sum;" and then his Honour states the leading cases as to this point. "Where real estate is not directed to be sold, and the residuary devise is not of the produce but of the corpus of the real estate, then the

question arises between the heir-at-law and the devisee as to the intention of the testator. If the devise to a particular person or for a particular purpose is to be considered as intended by the testator to be an exception from the gift to the residuary devisee the heir takes the benefit of the failure. If it is to be considered as intended by the testator to be a charge only upon the estate devised, and not an exception to the gift, the devisee will be entitled to the benefit of the failure." And see *Wright v. Row*, 1 Bro. p. 61, where the same distinction is taken in the margin of the case, and *Gravenor v. Hallum*, Amb. 643.

(c) *Supra*, Vol. i. p. 503, "I am of opinion," said Lord Henley, "that a limitation of a trust perfected and declared by a testator must have the same construction as the devise of a legal estate executed, and to hold the contrary would make property very precarious and uncertain. The testator would mean one thing in this court, and directly the contrary on the other side of the hall," *Wright v. Pearson*, 1 Eden, 125. This opinion was called forth in consequence of Lord Hardwicke's expression in *Garth v. Baldwin*, 2 Ves. 655, being cited, that the construction ought to be the same, "unless the intention of the testator, or the author of the trust, plainly appeared to the contrary;" and see *Austen v. Taylor*, 1 Eden, 366-368; *Duke of Marlborough v. Godolphin*, 1 Ed. 417; *Jervoise v. Duke of Northumberland*, 1 Jac. & Walk. 570; *Legatt v. Sewell*, 2 Vern. 551, a case of an executory trust; see also Mr. Butler's note to Co. Litt. 290 b, which the student will do well to read, though part of it is now obsolete, by reason of the recent statutes relating to real property. It is to be observed, that the rule in *Shelley's*

It has already been observed, that trusts were from an early period extended to personal estate; the executory limitations of terms for years and personal chattels which were at length allowed by the courts to prevail in wills (*a*) having been the creatures of the Court of Chancery, it was natural that in that court such limitations should be allowed to take effect when created by deed by way of trust (*b*). The limitations of a trust of a term, and an executory devise of a term, are governed by the same rules (*c*).

Many other equitable interests in personal estate, as, for instance, by assignments of choses in action, which will be noticed more particularly hereafter, were recognized and enforced in the Court of Chancery, though they were regarded as nullities in courts of law (*d*).

But although the limitations of equitable estates and interests, in all their incidents, have very closely followed the corresponding limitations of legal estates; yet in respect of one of the most important trusts of personal estate, and that which is now of constant occurrence, namely, for the separate use of married women—which will form a distinct subject of consideration hereafter—the doctrines of the common law in regard to marital right not only have not been followed, but, as will be more particularly noticed hereafter, they have been made to give way altogether to rights created by the court for the wife as a distinct person (*e*).

Every estate and interest given by way of trust must be confined within the limits prescribed by the doctrine *Supra* relating to perpetuities (*f*). As regards trusts for accumulation, originally the limits to the accumulation of annual income and the creation of future estates were the same: that which was too remote a period for the suspension of the acquisition of full power over the corpus of the property was likewise

case (*sup.* Vol. i. p. 142) applies to equitable as well as legal interests, and whether the trust be created by deed or by will, see 1 Fonbl. 407, and the cases there cited; provided both interests be created by the same instrument: but no union takes place unless the limitation to the heirs, and the limitation to the ancestor be of the same quality, *i. e.* both legal or both equitable; see Jarm. on Wills. ii. 243-4. To make a good tenant to the *præcipe*, said Lord Thurlow (*Shapland v. Smith*, 1 Bro. 76), it is necessary that there should be a legal estate for life, with a legal reversion in tail, or an equitable estate for life, with an equitable reversion in tail; and see *Lord Say and Sele v. Jones*, 3 Bro. P. C. 113; *Silvester v. Wilson*, 2 T. R. 444; and *Venables v. Morris*, 7 T. R. 342-

438; but the mode of barring entails, as before mentioned, is now regulated by the statute for disentailing lands and abolishing fines and recoveries, 3 & 4 Will. IV. c. 74.

(*a*) *Supra*, Vol. i. 194.

(*b*) See *Warmstey v. Tanfield*, 1 Ch. Rep. 16; *D. of Norfolk's case*, 3 C. C. 1; 1 Eq. Abr. 192; *Massenburgh v. Ash*, 1 Vern. 234, 304.

(*c*) *Fearne*, Ex. Dev. 354; agreed *Massenburgh v. Ash*, 1 Vernon, p. 234.

(*d*) See Vol. i. p. 457, and *infra*, Chap. ix.

(*e*) *V. supra*, Vol. i. pp. 596-7, *et infra*, Chap. viii. s. ix.

(*f*) See *Duke of Marlborough v. Godolphin*, 1 Ed. 417, 418, and *infra*, Chap. ii.

too remote for the accumulation, and consequent deprivation of the beneficial enjoyment of accruing profits (a). Any attempt to carry on an accumulation (except in certain cases, as for payment of children's portions and debts) for more than twenty-one years, has been restrained by statute (b): but it has been adjudged that if the trust exceed the prescribed limits, it is not altogether void, but only for the excess beyond twenty-one years, or the other period fixed by the statute (c). But these subjects will be more fully considered hereafter (d).

From what has been said, it will at once be seen that the cognizance of estates and interests created by way of trust, as distinct from the legal estate or interest, must belong exclusively to the Court of Chancery, which court is their parent (e). The courts of law, in modern times at least, have not shown any disposition to take cognizance of trust estates or interests; indeed, if a case be sent to a court of law, it will refuse to give its opinion, if the question as stated in the case appears to arise upon a trust (f); when, therefore, a case as to the effect of a limitation of a trust estate is sent to a court of law, the case is always so drawn up as to obtain an opinion upon an analogous legal gift, not that which is presented to the Court of Chancery. However, the courts of law, in some cases, are compelled collaterally to take notice of trusts, as in the case of an estate devised upon trusts, in which the question whether the trustees take any and what estate, depends upon the nature and purposes of the trust (g).

The directing principle which governs the Court of Chancery in the exercise of its jurisdiction in regard to trusts, and which may be traced throughout almost every other branch of its jurisdiction, is the intention (h); indeed, it may be stated, as an almost universal proposition,

(a) Jarm. on Wills, 264; Lewis on Perpetuities, 592; Sir W. Grant, 2 Ves. & B. 61.

(b) 39 & 40 Geo. III. c. 98. See next note.

(c) *Griffiths v. Vere*, 9 Ves. 131; and see *Longdon v. Simson*, 12 Ves. 295.

(d) *V. infra*, "Trusts for Accumulation."

(e) There are still some other courts of equity, the Chancery of Lancashire, for instance, but all are governed by the same principles.

(f) See 5 Ves. 581, *et v.* vol. i. p. 517. However, in one case, viz., *Farmer v. Francis*, 9 Moore, 310; S. C. 3 Bing. 151, the Court of Common Pleas certified that certain parties took equitable estates in fee.

Lord Hardwicke defines a trust to be "such a confidence between the parties, that no action at law will lie, but is merely a case for

the consideration of courts of equity;" *Sturt v. Mellish*, 2 Atk. 612; such a confidence, therefore, as would found an action at law, he would not have called a trust.

(g) Jarman on Wills, 251, note i. ii., 202-228.

(h) "Fidei Commissa are only supported on the intention, which is their life and foundation," D'Aguessau, Evans' Pothier, ii. 516, and see Com. Dig. Chanc. 4 W. 13, *infra*. It may be observed, that in the early cases, both at law (Co. Lit. 24 b, and Hargrave's note,) and in equity (see particularly *Nourse v. Tarnworth*, Finch, 159; *Hyde v. Seymour*, 2 Freem. 42; *Scudamore v. Scudamore*, Pr. Ch. 544; *Warburton v. Warburton*, 2 Vern. 421; *Bolger v. Mackell*, 5 Ves. 513,) special favour has been shown to the "heir," but latterly the claims of the heir have been

that, provided the intention do not contravene the policy of the law, or the rules and maxims which govern the rights and incidents of property (a), the Court of Chancery will give effect to the intention without regard to form (b).

A public trust, or thing for the public good, more especially shall be liberally expounded (c). In executory trusts—as where the testator has directed money to be laid out in land to be settled—it is not material whether he has used any technical terms, or confounded technical terms; if there be a clear intention, the court will execute that intention, by correcting, adding to, or altering the sense; it is sufficient to discover the intent (d); but this will be more fully considered hereafter.

In ascertaining what is the intention, the established rules of evidence and of construction—which have been shortly stated in the preceding volume—are resorted to. But though it can hardly be said that there are any rules of construction peculiarly applicable to trusts, unless in the instance of legacies (e), yet it has been said that the maxim, *qui hæret in litera hæret in cortice*, is more especially applicable to cases of trusts; and in such cases the court will from the general frame of the will or settlement, collect the intent contrary to the express words of a particular clause (f): so where a term has been so placed in a settlement, that the trust might be defeated, the court has corrected the mistake (g). But if the words are clear, whatever inconveniences may result, they must be followed; thus, if a testator thinks proper, whether prudently or not, to say distinctly that his

considered without reference to any special favour, see 1 Fonb. 428; 2 Fonb. 97; *Toldervy v. Colt*, 1 Y. & Coll. 621. Some rules however have descended to our times which have been considered as founded on this special favour, see *Doe v. Ewart*, 7 Adol. & Ell. 649, one of which, namely, as to the different meanings to be given to dying without issue, was put an end to by the late Statute of Wills, 1 Vict. c. 6, § 29.

(a) *Browne v. De Laet*, 4 Bro. 535.

(b) See Lord Northington's judgment in *Earl of Northumberland v. Earl of Egremont*, 1 Eden, 446.

(c) *New River Company v. Graves*, 2 Vern. 431; *Same v. Henley*, *ib.* 432; Lord Somers, Com. Dig. Ch. 4 W. 13.

(d) Lord Rosslyn (1794), *Browne v. De Laet*, 4 Bro. 535; *Banckes v. Lady Le Despencer*, 10 Sim. 589; *supra* vol. i. p. 527, *et seq.*

(e) *Supra* vol. i. p. 524.

(f) As in the instance 2 Ventr. Com. Dig. Ch. 4 W. 13, a case of a will; *Turgis v. Puget*, 2 Ves. 195; a case of executory trust in marriage articles, was decided on the "impossi-

bility of a design to carry away from the issue of the marriage (though so on the words) in favour of a remote relation;" *Kentish v. Newman*, 1 P. W. 234, to the same effect. "In the construction of all instruments," said Sir J. Leach, "it is the duty of the court not to confine itself to the force of a particular expression, but to collect the intention from the whole instrument taken together. But a court is not authorized to deviate from the force of a particular expression, unless it finds in other parts of the instrument expressions which manifest that the author of the instrument could not have the intention which the literal force of a particular expression would impute to him. However capricious may be the intention which is clearly and unequivocally expressed, every court is bound by it, unless it be plainly controlled by other parts of the instrument." *Hume v. Rundell*, 2 Sim. & S. 177; and see Lord Cottenham's judgment in *Whatford v. Moore*, 3 M. & C. 289, stated *infra*, title "Portions."

(g) *Uvedale v. Halfpenny*, 2 P. W. 152.

legatees, pecuniary or residuary, shall not have the legacies or the residue, unless they live to receive them in hard money, there is no rule against such an intention if clearly expressed (a); but that would be open to so much inconvenience and fraud, causing the legatees to be defeated by the negligence of the trustees, or the contrivance of the parties interested against the legatees, that the court is not in the habit of making conjectures in favour of such an intention (b); and some general rules of construction in these cases have been adopted, which will be noticed in a future page.

As regards wills, as has been observed in the former volume (c), the circumstances in which the settlor or donor stood, in relation to the subject and objects of the trust, must all have their due weight. In the construction of particular devises, little assistance is to be derived from prior decided cases; the decision on the expressions used by one testator can scarcely afford any clue to the meaning of another (d): but some rules, founded on general convenience, in the instance of trusts, as in other cases calling for judicial construction, have necessarily been introduced, as, for instance, to fix the meaning of terms when unexplained by the context, and to render definite expressions in constant use which do not of themselves import any precise or definite meaning: for ascertaining these rules, precedents must be resorted to; and where any words or expressions have thus received an uniform judicial interpretation, whatever conjectures may in the particular instance arise, that interpretation must be given to them, unless upon the context it is clear that they were used in a different sense (e). If there is a settled construction, said Lord Eldon, founded upon decisions applying to the terms used, it is better to adhere to that settled construction, though the judge may entertain some doubt whether it is according to the intention, than, upon grounds on which

(a) *Innes v. Mitchell*, 6 Ves. 461.

(b) Lord Eldon, *Gaskell v. Harman*, 11 Ves. 497, 502-7; the testator had there directed that each of his residuary legatees should have 500*l.* "when that sum could be clearly ascertained for them," an inquiry into the property was directed; and see *Hutcheon v. Mannington*, 1 Ves. J. 366. In *Bernard v. Montague*, 11 Ves. 508 a, note, 508 c, Sir Wm. Grant states the rule in these cases to be, that what might have been got in or realized for the legatee must be considered as got in and realized; in that case the payment of the testator's debts was made a condition precedent to the vesting of the legacies.

(c) *Supra*, vol. i. p. 557-9.

(d) "This case," said the Vice-Chancellor

of England, *Vaughan v. Marquis of Headfort*, 10 Sim. 641, "shows, as I have often observed before, that no light is thrown on questions like the present by quoting other cases. By the laws of this country every testator, in disposing of his property, is at liberty to adopt his own nonsense, and a decision on the expressions used by one testator seldom affords any clue to the meaning of another." But still, even in such cases, precedents may be usefully referred to, if it were only to show the astuteness which has been exercised in order to give a consistent and intelligible meaning to instruments incapable, at first sight, of any rational construction.

(e) *V. supra*, vol. i. p. 542.

he cannot rest in every view of the case, to come to a decision having a tendency to shake that which forms a rule of construction, and what may in practice have been acted upon in many cases (a).

Generally speaking, in doubtful cases, the prevailing intention will be carried out (b): the intentions expressed in a will may be apparently inconsistent, in which case the court will have to reconcile them, or to carry out the prevailing intent. Thus, where a testator devised and bequeathed his estates to trustees, upon trust, to receive the rents and profits thereof, as the same should become payable, and thereout pay an annuity of 200*l.* to his wife, and on the death of his wife to convey the estate to his three sisters: here the prevailing intent was considered to be the securing an annuity to the widow, and the gift over was considered to be after full payment of an annuity to the amount of 200*l.*, so that the rents not being sufficient, the arrears were ordered to be paid out of the *corpus* (c). But if the prevailing intent appears to be, that the estate should be secured entire to those to whom it is given in succession, the *corpus* will be preserved; such was the case in *Phillips v. Phillips*, lately decided by Lord Langdale, where annuities were directed to be charged on the estates to be purchased, which were given over, on the death of the annuitants, to several persons in succession (d). There may be an expression importing a kind of condition, on which an estate is to go over; but where the prevailing intent shows that such apparent condition was only inserted with a view to some particular persons first enjoying the estate, if there should be any, that construction will prevail. Thus, in cases where, in the event of all the children of the testator dying under twenty-one, the property is given over, and no child is born, the having a child has been held not to be a condition essential to the bequest over; in these cases the limitation is considered as depending on the failure of that which preceded it, and that the testator has not taken in all the modes by which it might fail (e).

(a) Lord Eldon, *Lady Lincoln v. Pelham*, 10 Ves. 175; Alderson B. *Smyth v. Foley*, 3 Y. & Coll. 157, uses expressions to the same effect.

(b) As to the more comprehensive rules of construction of wills, v. *supra*, vol. i. p. 519-548; and Jarman on Wills, vol. ii. p. 737, *et seq. et v. supra*, vol. i. p. 530.

(c) *Foster v. Smith*, 2 Y. & Coll. C. C. 193; and see *Bullock v. Thomas*, 9 Sim. 634, referred to *ibid.* p. 198, where the testatrix having given a part of a fund, by which the Vice-Chancellor of England considered a plain blunder in language had so given the

remainder as apparently to trench upon what she had before given. *Farham v. Wiggins*, Vice-Chancellor Wigram, 3 June, 1847.

(d) 8 Beavan, 193. In this case the estates to be settled to the use that the annuitants should receive their annuities "out of the same premises," with powers of distress and entry. *Foster v. Smith* was not cited; and see the cases cited in the note (p), 198.

(e) *Murray v. Jones*, 2 Ves. & B. 313; 2 Y. & Coll. C. C. 198; *Jones v. Westcombe*, 1 Eq. Abr. 245.

Technical rules have been introduced as regards such questions as the following, namely, whether the personal estate is as between the legatees and devisees to be considered as exonerated from the payment of debts and legacies, also in regard to presumptions to be acted upon in the interpretation of written instruments, as in the instance of the satisfaction of debts, and portions, and other provisions, by legacies, each of which subjects will be considered hereafter; and as to legacies being held to be cumulative, or the converse. In all these cases precedents must be resorted to; and in these instances also the interpretation fixed by judicial decisions and the artificial rules so established, must be adhered to if not displaced by the application of the rules of construction upon the whole context, or by evidence where it can legitimately be introduced. So that, anxious as the judges have been to conform to the intention, it will be found that, being bound by the force of precedent and the established rules of construction, they have, in numerous cases, been compelled to give to instruments a construction which they were morally convinced would defeat the testator's intention (*a*); acting in this respect upon the principle that, for the purpose of securing property and the due administration of justice, judges ought constantly to abide by established principles, and such beneficial rules as may afford some reasonable judgment, without applying to a superior tribunal (*b*). There is also a leaning, as it is called, in favour of a particular construction, in certain cases, as in regard to the vesting of legacies; the extent to which this leaning may be relied upon, of course, can only be learned from precedents.

Considering the variety of the forms of expression that must necessarily be used, particularly in wills and other voluntary instruments even where the persons using them may have had in their minds a definite intention which they meant to express, some varieties of decision must occur in the application of established principles to particular cases, but it will be found that the principles of construction have been for the most part kept entire. The differences which may be observable in regard to the construction of the same, or similar words, in a will, and in a deed or writing between parties, arises from this, that in a deed between parties both are supposed to speak; in a will one person only speaks, and his will serves as law (*c*).

(*a*) *V. int. al. Baines v. Dixon*, 1 Ves. 42; *Ex parte Pye*, 18 Ves. 148, 151, 154-5. That was the case of a legacy by will and a subsequent gift to a natural child; it was held, according to the technical rules of the court, that the advance to the child (she being a stranger) was not a satisfaction, though Lord Eldon was satisfied that he was disappointing

the actual intention; and see *Lady Lincoln v. Pelham*, 10 Ves. 170; and in later times, *Crockett v. Crockett*, 11 Jur. 98, Vice-Chancellor Wigram, and *Hall v. Hill*, *supra*, vol. i. p. 569, 570.

(*b*) Lord Thurlow, 1 Bro. 465.

(*c*) See 1 Fonb. 488.

30 *Trusts on Words importing to be Executory only—Future Property.*

It must be observed, that though words spoken *in futuro* are not sufficient to raise an use at law, and future property, generally speaking, cannot be assigned at law, yet it is an established rule in equity, that whenever parties agree concerning any particular subject, such agreement—provided there be a valuable consideration, as against the party himself, and any claiming under him, voluntarily or with notice—is sufficient to raise a trust (a); and this result will follow, though the subject be a *chose in action*, or other interest, not assignable at the common law (b).

(a) *Legard v. Hodges*, 1 Ves. J. 477; 2 Fonbl. 38.

(b) See *Goring v. Bickerstaff*, 1 Ca. Ch. 8; and see *Duke of Chandos v. Talbot*, 2 P. W. 608; *Wright v. Wright*, 1 Ves. 411, and the

cases cited, 2 Fonbl. 215; and *Wethered v. Wethered*, 2 Sim. 183; *Lyde v. Mynn*, 1 My. & K. 693-5; *Meek v. Kettlewell*, 1 Phillips, 348; *Metcalf v. Archbishop of York*, 1 My. & Cr. 556.

Office of Trustee.

SECTION III.—General View of the Doctrines of the Court of Chancery, as to the Office of Trustee—his Estate in the Trust Property—his Rights and Duties—with some incidental Subjects.

Who may and may not be Trustees.

The King may be a Trustee.

Stat. 39 & 40 Geo. III. c. 88, § 12, as to Forfeiture ; 4 & 5 Will. IV. c. 23, § 2, as to Trustee or Mortgagee dying without heir.

Equities between the Crown and a Subject may be adjusted by the Court of Chancery.

Corporations may be Trustees of Personal Estate, and of Real Estate for Charitable Trusts.

Court supplies Trustee where Real Estate devised to Corporation in Trust.

General Jurisdiction over Funds vested in Corporations for Public Purposes.

Breach of Trust visited.

Alterations effected by Municipal Corporation Act, 5 & 6 Will. IV. c. 76.

Effect of 92nd Section.

Members of Governing Body considered as Agents of the Corporation.

Inherent Control of the Court over all Persons in the position of Trustees.

Enactments of the modern Statute of Wills as to the Estate of Trustees.

Trustee may call for Legal Estate, when.

Devise of Trust Estate.

Appointment of New Trustees.

Trustee derives his Authority solely from the Instrument by which he is appointed.

Trust can only be transmitted to Representatives or Assigns by the Directions of the Creator of the Trust.

Devise of Trust Estate.

Distinction between Power and Trust where Exigence is not complied with.

The Trust Property protected from Claims of Creditors of Trustee.

The Trust Property made liable to Claims of Creditors of Cestui que Trust.

Extended Rights given to Creditors by Stat. 1 & 2 Vict. c. 110.

Court will exercise its Powers to prevent the Conduct of the Trustee, whether actively or passively, from prejudicing his Cestuis que Trust.

General Rules established as to the Period at which outstanding Property shall be considered as converted.

Tenant for Life and Remainderman of Property so circumstanced.

Main Intent will be performed where, if particular Directions were followed, the Trust might become abortive.

Trustee allowed the full Exercise of such Powers and Authorities as are essential to the Execution of his Trust.

Possession of the Estate.

Custody of Title Deeds.

Trustee bound to render Accounts and entitled to have his Accounts wound up.

Mere Agent of Trustees not liable to account to Cestuis que Trust.

When Trusts at an end, Trustee must convey the Legal Estate at the peril of Costs in case of capricious or obstinate Refusal.

But may require Indemnity in doubtful case.

Stat. 10 & 11 Vict. c. 96, for the Indemnity of Trustees.

ALL persons, among whom are included *femes covert* and infants, may *primâ facie* be considered as capable of confidence, and may therefore be trustees. The exceptions are aliens who can only be trustees of personal estate, and persons attainted (*a*).

The character of Sovereign is not, it seems, incompatible with that of being a trustee (*b*); but as to the means by which the trust could be enforced there was necessarily considerable difficulty according to the ordinary forms of law. In *Reeve v. The Attorney-General*, 1751, where lands which were directed by will to be sold had come to the Crown, the testator having died without an heir, Lord Hardwicke refused to make a decree for a conveyance, as was asked, and dismissed the bill, saying this court had no jurisdiction, though the Court of Exchequer might have, and the parties must proceed by petition of right (*c*). The legislature has now removed all difficulty on the subject of forfeitures and escheats as regards trust property. The stat. 39 & 40 Geo. III. c. 88, § 12, had authorized the King to make grants by sign manual to trustees for the purpose of executing the trusts affecting estates that had become forfeited to the Crown; now by the stat. 4 & 5 Will. IV. c. 23, § 2, if a trustee or mortgagee die without an heir, the Court of Chancery may appoint some person to convey, in the same manner as is provided by the 11 Geo. IV. & 1 Will. IV. c. 60, in cases where there is an heir but it is not known who the heir is; and by the third section it is enacted that no land, chattels, or stock vested in any person upon any trust, or by way of mortgage, shall escheat to the King, or any lord of the manor or other person, by reason of the attainder or conviction of any such trustee; but it shall remain, survive, or descend as if no such attainder or conviction had taken place (*d*).

It may be well here to observe, as regards the general jurisdiction against the Crown at law and in equity, that it is now settled that the Crown can only take the property of its debtor, subject to such

(a) See 2 Fonb. 139-40, note; and Lewin, p. 73.

(b) Lord Hardwicke, *Penn. v. Lord Baltimore*, 1 Ves. 453, Dict. Lord Mansfield, *Burgess v. Wheate*, 1 Eden, 229.

(c) 1 Ves. 445-6; 2 Atk. 223; and see

Pawlett v. Attorney-Gen. Hard. 467.

(d) See further as to the exposition of this act, Lewin, p. 225. By the statute 13 Eliz. c. 4, the trust estate of a *cestui que trust* debtor to the Crown, was made liable for Crown debts.

liabilities as the debtor has legally created (*a*). Where there are equities only, as between the Crown and a subject, the court may by its decree adjust those equities. An equitable mortgage was established against the Crown and ordered to be paid out of the proceeds of the Crown debtors' estate, sold under an extent, the Lord C. Baron saying, that in so doing he took nothing from the Crown; though if the legal estate had been in the Crown his lordship seemed to think the difficulty would have been insuperable (*b*); and a decree for a sale may be made against the Crown in the administration of assets of an illegitimate person who has died intestate (*c*).

It has been already observed (*d*), that Corporations have long since been recognised as being capable of being constituted trustees of personal estate; there are numerous cases in which the court has exercised jurisdiction over them as such trustees. Under the equity of the stat. 43 Eliz. corporations may be constituted trustees of real estate upon charitable trusts; but real estate cannot be devised to trustees upon trust for private purposes, by reason of the Statutes of Mortmain: the Court of Chancery, however, will not permit the trust to fail on this account; the trust is fastened on the estate, and the heir to whom the estate descends by reason of the legal invalidity of the devise, is held by the Court of Chancery as bound in conscience to perform the trust (*e*); and on the same principle the Court of Chancery has always decreed the execution of a trust when no trustee is named (*f*). Although a limitation to a parish is void as an use, it is good as a trust (*g*).

Before the passing of the Municipal Corporation Act, which will be presently adverted to (*h*), the Court of Chancery did not entertain jurisdiction to compel the application of property belonging to a corporation to corporate purposes, from the difficulty, as it would seem, which would have attended the attempt to carry out such a jurisdiction (*i*); nor even now would the court interfere, unless under

(*a*) See the opinion delivered by Mr. Justice Patteson, *Giles v. Grover*, 6 Bli., N. S., p. 292, 1 Phill., 733.

(*b*) *Casberd v. Attorney-Gen.* 6 Price, 411, 478. This decree was by the L. C. B. sitting in equity; and see *Smith v. Tyler*, 1 Jur. 470.

(*c*) *Rogers v. Maule*, 3 Y. & Coll. 74.

(*d*) *Supra*, vol. i. p. 501.

(*e*) *Sonley v. Clockmakers' Company*, 1 Bro. 81.

(*f*) *Ibid.*

(*g*) Gilbert on Uses, 44; Saunders on Uses, 90, 91.

(*h*) 5 & 6 Will. IV. c. 76, intituled, "An Act to provide for the Regulation of Municipal Corporations in England and Wales."

(*i*) *Mayor and Corporation of Colchester v. Lowton*, 1 Ves. & B. 226, 244; *Attorney-Gen. v. Corporation of Carmarthen*, Sir Geo. Coop. R. 30, 31; where Lord Eldon notices and repudiates Mr. Justice Buller's doctrine, *King v. Watson*, 2 T. R. 200, that the court had such a jurisdiction.

special circumstances, in regard to the alienation of property belonging to a corporation, and not affected by any public trust (a). But where there is any fund created for the purpose of being applied to some public purpose, which fund is vested in a corporation, the Court of Chancery has, by its original inherent jurisdiction, a right to see to the due application of the fund (b). The Court of Chancery would always lay hold of any breach of trust in relation to the administration of property, let the party guilty of it be either in a public or private capacity (c); and a corporation, being a trustee, is in this court the same as an individual (d).

Funds supplied from the gift of the Crown, or from the gift of the Legislature, or from private gift to a corporation, for any legal public, or general purpose, are charitable funds to be administered by the Court of Chancery under its general jurisdiction; it is not material that the particular public or general purpose is not expressed in the statute of Elizabeth, all other legal public, or general purposes being within the equity of the statute (e). When, after the fire of London, the Legislature imposed a duty to be levied on all coal imported into the city or the river, amongst other purposes for rebuilding St. Paul's church, that was held to constitute a charitable use (f). However, according to Sir J. Leach, the source from which the funds are derived must be looked to, and not the mere purpose to which they are dedicated, in order to determine whether the use be charitable. Therefore, where an act of parliament passes for paving, lighting, cleaning, or improving a town, to be paid for *wholly* by rates or assessments to be levied upon the inhabitants of that town, the funds so raised, being in no sense derived from bounty or charity in the most extensive sense of the word, are not charitable funds to be administered by the Court of Chancery (g).

By the Municipal Corporation Act, the right of property in the

(a) See *Attorney-Gen. v. Mayor of Liverpool*, 1 My. & Cr. 201, Dict. Sir C. Pepys, M. R.

(b) *Attorney-Gen. v. Corporation of Dublin*, 1 Bli. N. S. 337; *Attorney-Gen. v. Mayor of Carlisle*, 2 Sim. 449; *Attorney-Gen. v. Mayor of Exeter*, 2 Russ. 45, 3 Russ. 395.

(c) *Lord Hardwicke, Charitable Corporation v. Sutton*, 2 Atk. 406.

(d) *Attorney-Gen. v. Governors of Foundling Hospital*, 2 Ves. J. 45; *Mayor of Coventry v. Attorney-Gen.* 7 Bro. P. C. 235.

(e) *Attorney-Gen. v. Heelis*, 2 Sim. and St. 76; *Attorney-Gen. v. Mayor of Carlisle*,

2 Sim. 449-50; *Attorney-Gen. v. Brown*, 1 Swanst. 297.

(f) See *Attorney-Gen. v. Brown*, 1 Swanst. 297; and on the same principle Lord Eldon decided, *Attorney-Gen. v. Brown*, see 1 Swanst. 300, 301, 307-8. Lord Eldon considered that the duties which the commissioners were allowed to levy were to aid the inhabitants in protecting the town, they being too poor to do it themselves. The case was ultimately compromised.

(g) Sir J. Leach, *Attorney-Gen. v. Heelis*, 2 Sim. & St. 77.

corporations within its operation, is entirely altered; that which might have theretofore constituted their own property, and which they may have held as owners, they now hold in virtue of the act, subject to certain duties (a), and there is no doubt whatever of the jurisdiction of the Court of Chancery to interfere to prevent anything from being done which is clearly against the object, principle, and provisions of the Municipal Corporation Act (b).

The 92nd section of that act (c) directs that the funds are to be received by the treasurer and carried to the "borough fund," and that out of that fund shall be paid debts due, salaries of officers, &c., and that the surplus shall be applied for the public benefit of the inhabitants, and the improvement of the borough—that is, for what are considered as charitable purposes; that clause, taken by itself, and considered as if it stood alone, gives the Court of Chancery jurisdiction to interfere to see that the property is duly administered and applied to the purposes for which it is directed to be applied (d).

The members of the governing body of a corporation may be considered as its agents, bound to exercise its functions for the purposes for which they were given, and to protect its interests and property; and if such agents exercise those functions for the purpose of injuring its interests, and alienating its property, the corporation will not be estopped in this court from complaining, because the act was ostensibly an act of the corporation (e).

The Court of Chancery having an inherent control over all persons

(a) *Attorney-Gen. v. Mayor of Liverpool*, 1 My. and Cr. 201-2; *Attorney-Gen. v. Aspinall*, 2 My. and Cr. 613, on original hearing, 1 Keen, 513; *Attorney-Gen. v. Wilson*, 9 Sim. 526, on appeal, 1 Cr. & P. 1.

(b) *Attorney-Gen. v. Mayor of Liverpool*, 1 My. and Cr. 200. The 97th section of the Municipal Corporation Act does not deprive the Court of Chancery of its general jurisdiction, 2 My. & Cr. 627-8, 632-3, 9 Simons, 49; though the Vice-Chan. of England said it might be right that in future the Attorney-General should sue in conjunction with the corporation in suits against trustees, *ibid.* 49, and see 1 Cr. & Phill. 23. The 7 Will. IV. & 1 Vict. c. 78, was afterwards passed to amend the original act, and to make provisions as to the mode of transferring, &c., stock in the funds belonging to corporations, as trustees for charities or otherwise, and the payment and application of the dividends; sects. 45, 46, 47, 48. The Court of Exchequer held, that under the 5 & 6 Will. IV. it was not competent to the court to order the principal money arising

from the sale of lands belonging to a corporation to be applied in payment of its debts, and that the dividends only could be applied for that purpose; *Ex parte Corp. of Hythe*, 4 Y. & Coll. 55. The statute 1 Vict. 78, was not cited, but probably it would not have altered the judgment. The Municipal Corporation Act, it is to be observed, has not destroyed the identity of the old corporations; it has continued the existence of the old corporations, varying, however, the mode in which certain corporate officers are to be chosen, Vice-Chan. of England, 9 Simons, 48.

(c) See 1 My. & Cr. 200; 2 My. & Cr. 619. By this section, no power is given to touch the principal of any part of the corporate property, Lord Cottenham, 2 My. & Cr. 619; the income alone forms the borough fund, *ibid.*

(d) *Attorney-Gen. v. Aspinall*, 2 My. & Cr. 618-19, 620, 623.

(e) Lord Cottenham, *Attorney-Gen. v. Wilson*, 1 Cr. & P. 24, 27; Charitable Corporation Case, 2 Atk. 405.

in the position of trustees; though by the stat. 1 & 2 Vict. c. 117, s. 4, it is directed that in certain cases the court shall order the money deposited in court to be paid out, yet the Vice-Chancellor of England was of opinion that it was not imperative on the court to order the money to be paid out without seeing that it really ought to be done, and ascertaining whether the circumstances would justify the court in making the order that was prayed (*a*).

As regards the estate of the trustees under a devise in trust; it had been decided before the late Statute of Wills, that the word "heirs" was not necessary to give an estate of inheritance to the trustees if a less estate would not be sufficient to answer the purposes of the trust (*b*); and that every devisee in trust must necessarily have as large an estate and as large powers as were essential for the execution of the trusts arising out of it (*c*). But the modern decisions having involved questions of construction as to the quantity and quality of the estate taken by trustees and executors under an indefinite gift (*d*), the following enactments on the subject were introduced in the Statute of Wills, 1 Vict. c. 26.

By § 30 it is enacted, That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication. And by § 32, That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

The general result of these two consecutive propositions, says

(*a*) *Goodman v. De Beauvoir*, 10 Jurist, 939-10, V.C. Eng., on motion to dissolve injunction against committee of railway company, from obtaining deposits made under that act out of court.

(*b*) *Shaw v. Weigh*, 1 Equity Ca. Abr. 185, 8 Mod. 253, Ambl. 95.

(*c*) *Strange*, 799, 803, agreed; *Chapman v. Blissel*, Forrest, 150.

(*d*) *Hayes's Elem.* vol. i. 352-3; and see *Jarman on Wills*, ii. 229.

Mr. Hayes, appears to be this; first, that a devise to a person upon any trust, or to an executor as such, either indefinitely, or for any estate (except an estate of freehold, express or implied, or a definite term), will give the fee, or other the whole interest, notwithstanding any indication of a contrary intention—and secondly, that a devise to a person, without such a limitation of his estate as would exclude all constructive modification, upon any trust or trusts, either not being, or not including a trust to continue for life (which ingredient, by letting in the implication of an estate for life, would bring the case within the previous provision), or being or including a trust to continue for life, but capable of outlasting the life, will likewise imperatively give the fee or other the whole estate. They leave the question open whether the trustees take an estate, or merely a power; for before the statute rule can apply, it must be ascertained that the land is devised to the trustees (*a*). When it is necessary for the execution of his trust that the trustee should have the legal estate, he is entitled to call upon the person in whom the legal estate may be outstanding, to convey it to him without the concurrence of his *cestui que trust* (*b*).

It may now be considered as settled that a general devise of real estate will pass an estate held by the deviser as trustee, unless a contrary intention can be collected from the words of the will, or from the purposes or objects of the testator as where the devise is in trust to sell (*c*). The words “to and for his and their absolute use and benefit, and to be disposed of as the devisee by deed or will, or otherwise, may see fit,” will not, it seems, of themselves be considered as evincing an intention to exclude trust estates (*d*); though a devise to a wife for her sole use and benefit will, as those words indicate an intention that the property devised shall be enjoyed beneficially (*e*).

In the case of a charitable trust, it seems that the court will direct a power to appoint new trustees prospectively to be inserted in a deed appointing new trustees of the charity estate (*f*); but not in the case of a private trust (*g*), unless it is authorised by the instrument constituting the trust (*h*).

(*a*) Hayes's Elem. i. 396-7; and see Lewin on Trusts, 202; and Sugden on Wills, p. 119.

(*b*) Poole v. Pass, 1 Beav. 600.

(*c*) Lindsell v. Thacker, 12 Sim. 182-3; Lord Braybroke v. Inskip, 8 Ves. 435; *supra*, vol. i. p. 517, *d*.

(*d*) *Ex parte Shaw*, 8 Sim. 159; but see *Ex parte Brettell*, 6 Ves. 578, which was not cited there; however, its being a devise to a natural son, so that the estate might go to the Crown on his intestacy, had some influ-

ence on the decision.

(*e*) Lindsell v. Thacker, 12 Sim. 184. The marginal note of this case requires to be corrected.

(*f*) In the matter of 52 Geo. III. c. 101; 12 Sim. 262.

(*g*) Boucles v. Weeks, 14 Sim. 591.

(*h*) White v. White, 5 Beav. 221. There the power was extended to subsequent trustees; and see the cases cited in the note, page 221.

As the only authority which a trustee has is derived from the instrument which appoints him as such, he can have neither more nor less of authority than is given to him by the instrument. It is contrary to the very nature of a trust that, unless specifically given, any right to defeat the trusts should exist in the party who is the depositary of the trust property (a). Where two or more persons are appointed trustees, and all of them excepting one renounce, the trust may be executed by that one (b). If a man appoint a trustee of real or of personal estate, or of both, *simpliciter*, adding nothing more, this does not make the heir or personal representative a trustee. The testator may select the heir or representatives, or may authorize the survivor of several trustees to commit the trust to any one whom he may name (c), but the testator only can do so; the property may vest in the representative, but that is another question from his being trustee (d). It has been held, that where an estate is conveyed to a person and his heirs upon trust, that he and they should as soon as to him and them should seem meet and at the request of a person named his executors or administrators make sale of the estate, the sale cannot be properly made by an assign of the original trustee or of his heir, on the request of the person named or his executors, notwithstanding that assigns are mentioned in the clause directing that the receipts of the trustee, his heirs, &c. shall be a sufficient discharge (e). When two or more persons, and the survivor, and the heirs of the survivor are appointed trustees to execute a temporary trust, such as a trust for sale, and to execute conveyances and the like in order to effect it, and the word "assigns" is not introduced as connected with the original trust, the sole or surviving trustee cannot by will devise the trust any more than he can delegate it by act *inter vivos* (f). If a trustee under

(a) Lord Cottenham, 2 My. & Cr. 629.

(b) The Vice-Chan. of England, *Cooke v. Crawford*, 13 Sim. 96 (after noticed), stated that this had been the admitted rule since *Hawkins v. Kemp*, 3 East, 410.

(c) *Titley v. Wolstenholme*, 7 Beav. 425.

(d) *Mortimer v. Ireland*, xi. Jur. 721; Lord C.

(e) *Bradford v. Belfield*, 2 Sim. 264. There the question arose as to whether a good title could be made under a sale by the assignee of the heir of the original trustee. The Vice-Chan. of England considered that the doctrine held in *Townsend v. Wilson* 1 Barn. & A. 608, which, though disapproved by Lord Eldon in *Hall v. Dewes*, Jacob, 189, was never reversed, had settled the point, and was now the law, 2 Sim. 271. In that case it was held

by the Court of King's Bench, that a power of sale given to three persons and their heirs, could not be exercised by two of them after the death of their co-trustee, although the purchase money was directed to be paid to the three donees of the power, or the survivors or survivor of them. And see *Jones v. Price*, 11 Sim. 563, *et seq.*, where the Vice-Chan. of England has stated the effect of the cases upon this subject.

(f) *Cook v. Crawford*, 13 Sim. 97. The trustees and their "assigns" were directed to hold the purchase monies on the trusts stated, *Bradford v. Belfield*, 2 Sim. 264; see *Hardwick v. Mynd*, 1 Anst. 109, as to a delegation by act *inter vivos*; and see *Ord v. Noel*, 5 Mad. 438, as to the employment of an agent by trustees.

such circumstances devises the estate, the court, if it were urged to do so, would probably order the costs of obtaining the legal estate from his devisee, to be paid out of the assets of the trustee. He ought to permit it to descend, for, in so doing, he acts in accordance with the devise which is made to him (*a*).

There is a distinction, which should be noticed, between a power, whether it be a power operating under the common law, or by way of declaration of use under the Statute of Uses, and a trust, in regard to the consequences which result from the directions which may have been given, and the conditions imposed not being strictly complied with. When, for instance, a power to sell a settled estate is given to trustees or others, on a given event, or under circumstances or in a manner precisely marked out (*b*), of course if it be not executed according to the exigencies of the power the estate cannot pass; here there is no necessity for the intervention of the Court of Chancery. But it is different as regards a trust; thus where a trustee in whom the legal estate is vested, has a power to sell, and a sale is made and a conveyance executed, the legal estate will pass though the sale be made, not according to the trust, but in violation of its provisions; the power of the Court of Chancery must in such case be resorted to, in order to get back the legal estate. If a trustee of the fee, with a limited equitable power to grant leases or the like, execute a lease not warranted by the power, though the lease is void in equity, yet the legal estate passes by reason of the trustee having the legal estate; therefore here also the Court of Chancery must be resorted to (*c*).

When the Court of Chancery had assumed jurisdiction over trusts, and established that the equitable ownership might be in one person, and the legal ownership in another, the court necessarily interfered to protect the equitable ownership (*d*), which would have been liable to be destroyed if the legal ownership could have been affected by those having claims against the persons in whom the legal estate was vested merely upon trust; therefore a judgment against a trustee was not allowed to affect either real estate or personal chattels held in trust (*e*).

(*a*) Vice-Chancellor of England, *ibid.* 13 Sim. 98.

(*b*) *V. supra*, vol. i. p. 486-7; and Sugden on Powers, i. p. 1, *et seq.* An ordinary power to sell and exchange may be seen, Bythewood, by Jarman, ix. 208.

(*c*) See *Bowes v. E. L. W. W. Comp.* 3 Mad. 375, 383; *S. C.* Jacob, 326, on Appeal. This is an important authority on the subject

of acquiescence and confirmation, and compensation for improvements in such cases.

(*d*) See *Langton v. Horton*, 1 Hare, 560; *V. C. Wigram*.

(*e*) See *Finch v. Earl of Winchelsea*, 1 P. W. 278; *Newlands v. Paynter*, 4 My & Cr. 408; *Lodge v. Lyseley*, 4 Sim. 75; and *Whitworth v. Gaugain*, 1 Phill. 730.

It was necessary, also, that the court should take care that the estate of the trustee, and the powers vested in him in that character over the property, should be made subservient to the interests of the *cestui que trust*, and should, so far as that could be effected, without injury to third persons, be exercised for the benefit of the *cestuis que trust* only, according to the original nature of the office of trustee (a). It has become a rule of universal application, that trust property cannot, by any act of the trustee, be removed from the operation of the trust in the view of the Court of Chancery, excepting by a conveyance or assignment of the legal interest to a *bonâ fide* purchaser for valuable consideration, without notice of the trust (b); in all other cases, into whosoever hands the land may pass, the trust follows the land (c).

However, the negligence of the *cestui que trust* may cause personal property held in trust to pass to the assignees of a bankrupt or insolvent, under the provisions of the statutes in favour of creditors, which govern courts of equity as well as of law (d), though wherever the possession of a chattel is according to the equitable right, the statutes do not apply (e); a mortgage of lands, either freehold or leasehold, cannot be impeached on the ground of the mortgagor retaining the possession (f).

But as the legal estate was protected against the claims of the creditors of the trustee, it was equally just that the equitable or trust estate should be made available to the creditors of the person who was entitled to such equitable estate; therefore in those cases where the judgment creditor had no execution at law (g) against the equitable estate of his debtor, it was determined that he might come into the Court of Chancery, and claim there the same satisfaction as he would have been entitled to at law had the estate of his debtor been legal (h).

(a) See vol. i. p. 458-496.

(b) A mortgagee is a purchaser within this rule; *Finch v. Earl of Winchelsea*, 1 P. W. 278.

(c) See *Saunders v. Dehew*, 2 Vern. 271; *Pye v. Gorge*, 1 P. W. 129. There may, perhaps, be some special exceptions to this rule.

(d) See 6 Geo. IV. c. 16, s. 72; *Ex parte Dale*, Buck, 365.

(e) The property must be in the order and disposition of the bankrupt, with the assent of the true owner, and not independently of such assent; therefore, furniture left by the testator to trustees, to be enjoyed with the mansion house, by whomsoever should be entitled for the term to the freehold estate, will not pass to the assignees. See *Lord Shaftesbury v. Russell*, 1 Barn. & Cr. 666,

672-3; and see *Joy v. Campbell*, 1 Sch. & Lef. 328; and *Simmonds v. Edwards*, in the Exch. xi. Jurist, 592; and *Pinkett v. Wright*, 2 Hare, 120, 128.

(f) *Lattlingstone's case*, cited 2 Bullstrode, 236; *Touchstone*, 67, 4 Per. & D. 233; *Jarman Convey.* by Sweet, v. 248.

(g) By the Statute of Frauds, 29 Car. II. c. 3, § 10, trust estates in lands, tenements, rectories, tithes, rents, and hereditaments were made assets at law at the suit of creditors by judgment, statute, and recognizances, following up the analogy between legal and equitable estates, v. *supra*, vol. i. 504; and see *Browne v. Blount*, 2 Russ. & M. 83; and *Lord Dillon v. Plaskett*, 1 Dow. & Cl. 320, as to this enactment.

(h) *Sir J. Leach, Forth v. Duke of Norfolk*, 4 Mad. 506, *et v. supra*, vol. i. p. 502.

The rights and remedies of judgment creditors, as before noticed, have been materially altered and extended, so as to embrace every kind of equitable interest, by the late act for abolishing arrest on mesne process, an abstract of which is set out in the former volume (a); but a judgment creditor, when he comes to the Court of Chancery to affect the equitable interest of his debtor in freehold estate, must use the utmost diligence to perfect his title at law, and must, therefore, first sue out an elegit, and he must state in his bill that he has done so (b).

The Act is a remedial one, and therefore ought to receive a liberal construction. The whole object of the legislature was to give creditors a more effectual remedy against the property of their debtors than they had under the old law, in compensation for the remedy against the persons of their debtors which the act took away from them (c).

The Court of Chancery will exercise its powers to prevent the conduct of the trustee, whether actively or passively (d), from prejudicing the *cestuis que trust*, however reasonable their motive may have been. Thus, as may be observed, by way of illustration, in the common case of a devise to trustees in trust to sell real estate, "at such time and in such manner as they shall think fit," for payment of debts, the residue to be paid to certain persons named: though the trustees do not sell, the estate has been considered as money, so as to pass as money under the wills of any of the legatees of the residue: "else," as it has been said, "it would be in the power of the trustees to make it land or money, and so to give it to whom they should think fit" (e). An unnecessary delay on the part of a trustee in the execution of the trust, will not be permitted to afford a benefit to himself or to others (f). It is hardly necessary to add, that the court will not permit trustees to have such an election as to change the property, unless it is expressly given to them (g).

It has been necessary to introduce some general rules to avoid the inconvenience that might result from the rights of parties being made

(a) 1 & 2 Vict. c. 110, s. 11, 12, 13, 14, 15, 16, 17, 18, 19. *Supra*, vol. i. p. 505.

(b) *Neate v. Duke of Marlbro*, 3 M. & C. 407, 415, 417, affirming the judgment of the V. C. of England, 9 Sim. 63; and see *Smith v. Hurst*, 1 Coll. C. C. 531, 705.

(c) *Harris v. Davison*, 15 Sim. 133, where the V. C. of E. expounds the 13th sect. of the act.

(d) *V. int. alia*, *Hawkins v. Chappel*, 1 Alk. 623; *Sitwell v. Bernard*, 6 Ves. 520, 538, and the cases there cited.

(e) *Collingwood v. Wallis*, 1 Eq. Abr. 396; and see *Dacers v. Folkes*, 2 Eq. Abr. 396; *Elwin v. Elwin*, 8 Ves. 554; *Gibson v. Bott*, 7 Ves. 94; *Walker v. Shore*, 19 Ves. 392.

(f) *Dict. Burgess v. Wheate*, 1 Eden. 238; *Hawkins v. Chappell*, *ubi supra*; *Gastell v. Harman*, 11 Ves. 507; *Bernard v. Montague*, 1 Meriv. 433.

(g) *Earlom v. Saunders*, Amb. 242; *Selby v. Alston*, 3 Ves. 341; and see *Ware v. Polhill*, 11 Ves. 278, as to the property of infants and *infra*, title "*Infants*."

apparently to depend upon the greater or less amount of diligence that may be exercised by a trustee or executor, or the greater or less degree of convertibility of the fund. Thus, in the instance where a testator directs that his personal estate, or a portion of it to a certain amount, shall be got in as soon as conveniently may be, and when collected the mass shall be divided amongst a certain number of persons named, or such of them as shall be living at the time of the distribution, unless some rule had been adopted to apply to such cases, the greater or less diligence which the trustees might exercise, might have determined who should be entitled, and the vesting of the shares would have remained in suspense; to avoid this uncertainty the court, as a rule of convenience, has fixed twelve months as a reasonable time within which the testator's assets might be collected with reasonable diligence, and has taken that as the period at which, in such cases, the title of the legatees should be perfected (a).

As a general rule, where a testator subjects the residue of his personal estate to a series of limitations, directly or by way of trust, without any particular directions as to the investment or mode of enjoyment, it is clear that such part of the residue as may be wearing out, so that the *corpus* is becoming of less value, must be converted and put in such a state of investment as to be securely available for all persons interested in it; for instance, in government perpetual annuities, or upon mortgage of freehold estates. Another principle is, that if the residue comprises property of a reversionary nature that too must be converted. The one rule protects the remainder-man, the other protects the tenant for life (b). If, indeed, the testator has expressed an intention that the residue, though given in trust for or for the benefit of various persons in succession, or any part of it, and though by a gift in form residuary (c), should remain either absolutely or during a limited period in the state in which it was at the testator's death, that intention will of course be

(a) *Brooke v. Lewis*, 6 Mad. 359.

(b) The leading case on this subject is *Howe v. Lord Dartmouth*, 7 Ves. 137. The rule, said the V. C. Wigram, in *Cafe v. Bent*, 5 Hare, 35, does not proceed on the assumption that the testator intended his property to be sold; but upon this, that the testator has intended the enjoyment of perishable property by different persons in succession; and this the court can only accomplish by means of a sale: and see *Caldecot v. Caldecot*, 1 Yo. & Coll. C. C. 322; *Alcock v. Soper*, 2 My. & K. 699, 701-2; *Johnson v. Johnson*, x. Jur. 279; V. C. K. Bruce, *Chambers v. Chambers*, x.

Jur. 326; V. C. of E. *James v. Gammon*, 15 Law J. 217; V. C. K. Bruce, *Preston v. Melville*, 15 Sim. 35; cases as to Long Annuities; *Bythewood* by Jarman, vi. p. 307; and see *Sutherland v. Cooke*, 1 Coll. 502, as to investment. The stat. 4 & 5 Will. IV. c. 29, puts Irish real estates for the purpose of investment of trust funds on the same footing as real estates in England; and see *Stickney v. Sewell*, 1 My. & Cr. 15; and *Wyatt v. Sharratt*, 3 Beav. 498, as to the nature of the real estate to be selected.

(c) *Bethune v. Kennedy*, 1 My. & C. 117.

carried out (a): the question on each particular is, whether there is sufficient to satisfy the mind of the judge that the property ought to be enjoyed in specie, if not the rule as to conversion must prevail (b). Where the residue is given in succession, with a direction for conversion express or implied, and no special intention as to the enjoyment of the interest till the conversion is to be collected from the will (c), an important question frequently arises between the tenant for life and remainder-men, as to the interest, or equivalent for interest, to be received by the former, and the time from which it is to commence, in respect of unconverted residuary property given to such different persons in succession. If the question were left to depend upon the event—that is if the tenant for life were to take the interest of such part as was converted from the time of actual conversion—or upon the convertibility of the property, great uncertainty would necessarily prevail; accordingly, the court has endeavoured to establish general rules, which shall do justice to each class of claimants. But no precise and definite rule on this subject can yet be considered as conclusively settled (d).

It would seem that where there is a direction for accumulation until the conversion shall take place, the accumulation will be limited to the end of one year, and the tenant for life will take from that time the interest which the fund would have produced had it been invested in Three per Cent. Consols at that time (e).

If there be a direction to convert, as opposed to an enjoyment in specie, and interest is given to the tenant for life out of the converted fund, all modern authority and experience is against the strict and literal interpretation of the will, which would exclude the tenant for

(a) See *Caldecot v. Caldecot*, *ubi sup.*; *Daniel v. Warren*, 2 Yo. & Coll. C. C. 290; *Sutherland v. Cooke*, 1 Coll. 498. In this case the V. C. K. Bruce, after referring to the circumstance of some particulars being enumerated, which does not of itself prevent a bequest from being residuary, (*et v. Pickup v. Atkinson*, 4 Hare, 624, and xi. Jur. 922.) said, it may be an important consideration, tending to reconcile some of the cases, whether the gift of the residue precedes or follows the enumeration of the particulars, 1 Coll. 501. *Bethune v. Kennedy*, *ubi sup.*; *Collins v. Collins*, 2 My. & K. 703; *Pickering v. Pickering*, 4 My. & Cr. 289; S. C., 2 Beav. 31. *Simpson v. Earles*, xi. Jur. 992, V. C. Wigram; *Vaughan v. Buck*, 1 Phillips, 80; *Cafe v. Bent*, 5 Hare, 33-4. "In modern cases, cir-

cumstances, apparently trifling, have been held sufficient to entitle a tenant for life to the enjoyment in specie of the residue for his life." Dict. 5 Hare, 77.

(b) *Cafe v. Bent*, 5 Hare, 33-34.

(c) See *Mackie v. Mackie*, 5 Hare, 76. If the testator uses words which express no more than the law would direct or imply without them they will not take a case out of the ordinary rule, 1 Yo. & Coll. C. C. 322-3.

(d) See *Sparling v. Parkes*, x. Jurist, Rolls, p. 450 b. See also on this subject Seton on Decrees, 74, and 1 Jarman on Wills, 540, *et seq.*

(e) *Sitwell v. Bernard*, 6 Ves. 520. In *Vickers v. Scott*, 3 My. & K. 500, this principle was applied to a direction to convert real estate into money; and see 1 Hare, 168.

life from any interest until the actual conversion (a). There also the end of the year is to be taken for estimating the amount of capital upon which interest is to run (b). As regards the interval between the testator's death and this constructive conversion, according to some of the authorities, the tenant for life will be entitled to the income which has been actually made by the trust fund (c). According to others, he will be entitled to the income of such parts of the personal estate as were at the testator's death, and have remained in a state of investment which ought to be recognized and continued; and as regards those parts of the personal estate which neither were at the testator's death, nor have since been in a proper state of investment, the tenant for life will have interest at 4 per cent. on the value to be set on such property at the end of the year (d). But, according to other authorities, the tenant for life will be entitled only to interest from the testator's death, equivalent to the dividends which would have arisen on an investment of the whole of the residuary property in Three per Cent. Consols at the end of one year (e).

Where a testator dies leaving property and a family in a foreign country (as in India), it is not the duty of the executor or trustee to send it to this country, to be invested in the funds; the tenant for life is entitled to the amount of interest actually made, but when the parties come to this country, then the property must be brought here and invested, though to the prejudice of the widow or other tenant for life (f).

If there be an express trust created for a particular purpose, as for the erection of a mansion-house, or the like, according to a plan to be

(a) See *Taylor v. Clarke*, 1 Hare, 167; *Turner v. Newport*, 2 Phillips, 16, 18; but there the interest was computed from the end of the year, not from the death.

(b) See *int. al. Turner v. Newport*, on appeal, 2 Phillips, 14, 18; *Mehrten v. Andrews*, 3 Beavan, 78.

(c) *Douglas v. Congreve*, 1 Keen, 428; *Angerstein v. Martin*, Lord Eldon, 1 Turn. & R. 232; 1 Keen, 427; but see 1 Yo. & Coll. C. C. 318, and 1 Hare, 172, as to this case. *Sparling v. Parkes*, x. Jur. 448, 450, M. R., was decided in the particular expressions.

(d) *Caldecot v. Caldecot*, 1 Yo. & Coll. C. C. 324; *Gibson v. Bott*, 7 Ves. 89. In *Sutherland v. Cooke*, 2 Coll. 505, the Vice-Chancellor Knight Bruce said, a will may be so framed as to make it the duty of the court to consider the property as laid out in the *Three per Cents.*; but where there is no specific direction for

conversion, and by innocent mistake the property has been left upon the original security, his Honour thought it competent to the court to allow interest at 4 per cent. on the value, at the end of one year from the death of the testator, computed from the testator's death.

(e) *Dimes v. Scott*, before Lord Gifford, and Lord Lyndhurst, on appeal, 4 Russell, 209; followed by the Vice-Chancellor Wigram, *Taylor v. Clarke*, 1 Hare, 175; *Mills v. Mills*, 7 Sim. 501. The subsequent case of *Mackie v. Mackie*, 5 Hare, 70, was decided on its own circumstances. It will be observed that *Dimes v. Scott*, and *Douglas v. Congreve*, cannot stand together, 1 Hare, 172. See the result which the learned editor of the last edition of Roper on Legacies has deduced from these cases, p. 1335.

(f) *Holland v. Hughes*, 16 Ves. 114; 3 Mer. 685.

approved of by the trustees, with the assent of whoever may be tenant for life, such a trust, if left to be performed strictly according to the letter, might become indefinitely postponed, or even rendered abortive by reason of infancy or other circumstances not provided for, or a perverse refusal. In such cases, if the consent be refused, or for any reason cannot be obtained, the Court of Chancery will not allow the express, clear, declared intent from being carried into execution on that account, but will, as a matter of course, refer it to the Master to approve a plan, according to the directions of the will^(a): numerous similar instances might be produced where the court has caused the main intent, namely, the trust, to be performed where the qualifications intended to secure its due performance have in fact presented obstacles to its being performed at all.

It is obvious that however proper it may be to restrict the powers of the trustee where any acts on his part might prejudice the *cestuis que trust*, yet the trustee must be allowed the free exercise of all such powers and authorities as are essential to the execution of the trust reposed, in the manner in which that trust is to be performed. Whether in the case of a permanent trust the trustee is to have the Possession or Management of the estate, or whether the tenant for life or other person having a partial interest is to be let into Possession, must depend upon the wording of each particular will. There may be cases in which it may be plain, from the expressions of the will, that the testator did not intend the property to remain under the personal management of the trustees. There may be cases in which it may be plain, from the nature of the property, that the testator could not mean to exclude the *cestui que trust* for life from the personal possession of the property, as in the case of a family residence. There may be very special cases in which the Court of Chancery would deliver the possession of the property to the *cestui que trust* for life, although the testator may have so expressed himself that his intention appears to be that it should remain with the trustees; for instance, where the personal occupation of the trust property would be beneficial to the *cestui que trust*: there the court, in letting him into possession; at the same time taking means to secure the due protection of the property for the benefit of those in remainder, would in substance be performing the trust according to the intention of the testator. But if the testator, when there are no special circumstances, has

(a) *Lombe v. Stoughton*, 12 Simons, 315.

thought fit to place his property in the hands of trustees and out of the management of the *cestui que trust* for life, the court has no authority to revoke the will; more especially when it is a *feme covert* who is entitled, as it is essential to her interest that the trustee should have the receipt of the rents and management of the estates (a). If the trustee be guilty of misconduct the court has it in its power to appoint a receiver or manager of its own.

As it is one of the primary duties of a trustee of a permanent subsisting trust to maintain and defend all such actions at law as are requisite for the assertion or protection of the title to the trust property (b), and to protect the rights and interests of all the parties beneficially interested, it is obvious that he ought to have the muniments of title in his possession (c). It will be a breach of his duty if, where there is a trust to perform, he willingly suffer the title deeds or muniments relating to the trust property to go out of his possession (d). He may even be answerable to third persons if he is instrumental directly, or by such culpable negligence as is equivalent to fraud, in a fraudulent use being made of the deeds to the detriment of such third persons (e).

But where the trustees have for a long time acquiesced in the title deeds remaining in the possession of the equitable tenant for life, and the trustees do not show any case requiring active interference on their part, the rule is not so positive as to the right of the trustees, that they will be permitted to proceed at law for their recovery (f). In cases where there is any difficulty or danger as regards the title deeds of a trust estate, or the securities of a trust fund, the court has it in its power to provide for every such emergency by ordering the deeds or the securities to be deposited in court (g).

A trustee of a trust fund is entitled to have his accounts examined and to have a settlement of them. He is bound to give accounts if demanded, but giving the accounts he is entitled, to use a familiar

(a) Sir J. Leach, *Tidd v. Lister*, 5 Mad. 432-3. In *Naylor v. Arnitt*, 1 R. & M. 503. Sir J. Leach sanctioned a letting for 10 years, by trustees who had active duties to perform in the application of the rents—a legal tenant for life, subject to a charge, on paying into court sufficient to answer the charges, may be let into possession; *Blake v. Bunbury*, 1 Ves. J. 194-5.

(b) *V. supra*, vol. i. p. 448, 496-7.

(c) The general rule at law is, that the

title deeds belong to the legal owner; *Goode v. Burton*, xi. Jurist (Excheq.), 851; the legal owner has to defend his possession himself; and see Hill on Trustees, p. 259, n. (f) & (g).

(d) See *Meux v. Bell*, 1 Hare, 95, 98.

(e) See *Evans v. Becknell*, 6 Ves. 174, 188, 190, 191-2.

(f) *Denton v. Denton*, viii. Jur. 388.

(g) See *Denton v. Denton*, *ubi supra*; *Jones v. Jones*, 3 Bro. 80.

phrase, to have them wound up. If the party to receive is satisfied upon the account sent in, that nothing more is coming to him, he ought to close the account and give an acknowledgment, which shall be equivalent to a release, though the trustee is not entitled to demand a release under seal (a): on the other hand, if the *cestui que trust* is dissatisfied with the accounts he ought to require to have the accounts taken; he is not at liberty to do neither, and keep a Chancery suit hanging for an indefinite time over the head of the trustee (b).

A person employed by trustees as a mere agent will not, as a general rule, be accountable to the *cestuis que trust* (c). His duty is to hand over the monies he receives to his principal, and, even if he is aware that the trustees are misapplying the fund, still he will not be responsible for paying to his principals monies placed in his hands for the purpose of being remitted to them (d); but if a person is substituted as trustee, and employs the trust monies for his own benefit, accounting to nobody, he is liable to account to the *cestuis que trust*.

When all the duties of a trustee as trustee are at an end, and he has no notice of any disposition or incumbrances made by the *cestui que trust*, he must, on demand and on its being clearly and satisfactorily shown to him (e) by the *cestui que trust* that the trusts are at an end, convey the legal estate to his *cestuis que trust*, at the peril in case of refusal in a plain case of being visited with the costs of any suit which may be instituted against him to compel him to convey, if he acts from caprice or obstinacy, or if his objections are captious, or he insists upon unfounded claims (f). However, where on his refusal he acts *bonâ fide* and under advice he will not be visited with costs (g). In cases of real doubt or difficulty, a trustee, before he parts with his estate, is fully justified in requiring an indemnity from his *cestuis que trust* (h), or in seeking the directions and indemnity of the court (i).

(a) *Fulton v. Gilmore*, Rolls, 15 Feb. 1845; *Hill on Trustees*, 605; *Chadwick v. Heatley*, 2 Collier, 137; it may be reasonable to ask for it, but he cannot compel his *cestui que trust* to give a release, *ibid*.

(b) *Chadwick v. Heatley*, 2 Coll. 137. The plaintiff in this case having elected to take the sum offered, the decree directed that it should be received in full of all demands, and that the defendant, the trustee, should have his full costs; he had required a release, the plaintiff had offered a simple receipt, so as to leave the account open.

(c) *Keane v. Roberts*, 4 Mad. 356; *Davis v. Spurling*, 1 Russ. & M. 64; and see *Fyler v. Fyler*, 3 Beav. 556.

(d) *Myler v. Fitzpatrick*, 6 Mad. 360.

(e) See *Holford v. Phipps*, 3 Beav. 440-1.

(f) *Willis v. Hiscox*, 4 My. & Cr. 202; *Jones v. Lewis*, 1 Cox, 199; *Goodson v. Ellison*, 3 Russ. 588-9; *Taylor v. Glanville*, 3 Mad. 178, Sir J. Leach; *Hampshire v. Bradley*, 2 Coll. 40, 41; *Thorby v. Yeats*, 1 Y. & Coll. C. C. 438; *Penfold v. Bouch*, 4 Hare, 272, rather a harsh decision.

(g) *Angier v. Stannard*, 3 My. & K. 566.

(h) *Goodson v. Ellison*, 3 Russ. 583.

(i) Formerly one great source of hazard to trustees for preserving contingent remainders, was their being required to join in destroying the contingent remainders; see *Moody v. Walters*, 16 Ves. 302-312; *Biscoe v. Per-*

In case of refusal by a trustee, without reason, to convey, the parties interested may apply by petition, under Sir E. Sugden's act, 1 Will. IV. c. 60, for the appointment of a person to convey in the place of the trustee (a).

As between the *cestui que trust* and trustee, unless the trustee be such by implication or construction of law only, the Statute of Limitations does not apply; the trustee can only discharge himself by accounting to his *cestuis que trust* in such a manner as the court shall consider that he ought to have done (b). It may be observed that, if a legacy is transferred to one of several executors as trustee, and he assents to it, it ceases to be a legacy and becomes a trust fund; and if the legacy turns out to be invested in an unauthorized security, the trustee or his estate is severally liable as for a breach of trust (c); and where a legacy is so set apart and appropriated to the payment of a legacy, whether it be held by all or one, and a breach of trust is committed, the Statute of Limitations (d) does not apply to such a case; it is an express trust within the exception in the statute (e).

The rules relating to the conduct of trustees in the execution of their trust, and their liabilities according to the doctrines of the Court of Chancery, will be the subject of a distinct section; but it may be here observed, that Lord Hardwicke declared that, if there is no *mala fides*, nothing wilful in the conduct of the trustee, the court will always favour him; for as a trust is an office necessary in the concerns between man and man, said that eminent judge, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept it: to add hazard or risk to that trouble, and to subject a trustee to losses which he could not foresee, and consequently could not prevent, would be a manifest hardship, and would be deterring every one from accepting so necessary an office (f). How far this kindly feeling towards trustees has been acted upon will appear in the section above referred to.

kings, 1 Ves. & B. 485, 1 Ball & B. 59, *et v. infra*: Trustees to preserve contingent remainders. Of the assignment of the legal estate by the trustee see Hill on Trustees, 266-7, *et seq.*, 307, *et seq.*, where the authorities are collected.

(a) *V. int. al. Prendergast v. Eyre*, 1 Lloyd and G. 11; *Robinson v. Wood*, 5 Beav. 268; and Hill on Trustees, 268.

(b) *Wedderburn v. Wedderburn*, 4 My. & Cr. 53; 2 Keen, 722; and see *Townshend v. Townshend*, 1 Bro. 554; *Beckford v. Wade*,

17 Ves. 100. As to the doctrine before the statute, see *Cholmondeley v. Clinton*, 2 Jac. & W. 175.

(c) *Attorney-Gen. v. Higham*, 2 Yo. & Coll. C. C. 644.

(d) *Supra*, vol. i. p. 502-3.

(e) *Philippo v. Munning*, 2 My. & Cr. 309; *Dinsdale v. Dudding*, 1 Yo. & Coll. C. C. 270; and see, on the subject of change of character, *Bond v. Graham*, 1 Hare, 485.

(f) Lord Hardwicke, *Knight v. Earl of Plymouth*, 1 Dick. 126; S. C. 3 Atk. 480.

It is impossible ever to pronounce that a trustee or executor, whatever precautions he may have taken, is safe from personal risk, unless he has acted in the execution of the trust under the directions of the Court of Chancery (*a*); but an act has lately been passed for the purpose of securing an indemnity to trustees in certain cases by a more simple and less expensive process than a bill. The act is entitled "An Act for better securing Trust Funds, and for the Relief of Trustees (*b*)."

By this act it is enacted, that all trustees, executors, administrators, or other persons, having in their hands any moneys belonging to any trust whatsoever, or the major part of them, shall be at liberty, on filing an affidavit shortly describing the instrument creating the trust, according to the best of their knowledge and belief, to pay the same, with the privity of the accountant-general of the High Court of Chancery, into the Bank of England, to the account of such accountant-general in the matter of the particular trust (describing the same by the names of the parties, as accurately as may be, for the purpose of distinguishing it), in trust to attend the orders of the said court; and that all trustees or other persons having any annuities or stocks standing in their names in the books of the Governor and Company of the Bank of England, or of the East India Company, or South Sea Company, or any government or parliamentary securities standing in their names, or in the names of any deceased persons of whom they shall be personal representatives, upon any trusts whatsoever, or the major part of them, shall be at liberty to transfer or deposit such stocks or securities into or in the name of the said accountant-general, with his privity, in the matter of the particular trust (describing the same as aforesaid), in trust to attend the orders of the said court; and in every such case the receipt of one of the cashiers of the said bank for the money so paid, or, in the case of stocks or securities, the certificate of the proper officer, of the transfer or deposit of such stock or securities, shall be a sufficient discharge to such trustees or other persons for the money so paid, or the stocks or securities so transferred or deposited.

And, that such orders as shall seem fit shall be from time to time made by the High Court of Chancery in respect of the trust moneys, stocks, or securities so paid in, transferred, and deposited as aforesaid, and for the investment and payment of any such moneys, or of any dividends or interest on any such stocks or securities, and for the transfer and delivery out of any such stocks and securities, and for

Lord Hardwicke, in that case, applied the same doctrine to a receiver, who had remitted monies to a person who had failed: he was the substitute of the trustees.

(*a*) See particularly *Knatchbull v. Fearnhead*, 3 My. & Cr. 122.

(*b*) 10 & 11 Vict. c. 96.

the administration of any such trusts generally, upon a petition to be presented in a summary way to the Lord Chancellor or the Master of the Rolls, without bill, by such party or parties, as to the court shall appear to be competent and necessary in that behalf, and service of such petition shall be made upon such person or persons as the court shall see fit and direct; and every order made upon such petition shall have the same authority and effect, and shall be enforced and subject to rehearing and appeal, in the same manner as if the same had been made in a suit regularly instituted in the court; and if it shall appear that any such trust funds cannot be safely distributed without the institution of one or more suit or suits, the Lord Chancellor or Master of the Rolls may direct any such suit or suits to be instituted.

This act, it will be seen, is confined to giving the trustee, executor, or other person a release for what he may pay or transfer into court. Where there is a definite trust fund, and the trustees find a difficulty in administering it with safety, owing to conflicting claims, the act will afford to the trustees a ready mode of ridding themselves of responsibility. No doubt it will often happen that the parties interested will be content to take the sum so paid into court without any judicial investigation as to the accuracy of the amount. But if there should be infants or married women concerned, or any parties should require that the trustees should pass their accounts, the trustees will still be liable to a suit, and by paying the money into court they will deprive themselves of the means of reimbursing themselves any expenses they may incur. If the fund be part of a testator's estate, there must still be the necessary inquiries as to debts and the like, which must be prosecuted in the usual course. Much yet remains to be done, particularly as regards proceedings in the Masters' offices, to prevent estates being exhausted in ascertaining how they are to be distributed: this act has, however, established this important principle, that notwithstanding what has been urged as to the impossibility of bringing the necessary parties before the court in cases of trust without a bill, it has been considered by the highest authority that there is at least one class of cases where such a proceeding may be dispensed with.

SECTION IV.—*General View of the Rights and Interests of the Cestui que Trust—What Acts will constitute another Cestui que Trust of Property.*

Every Cestui que Trust entitled to Aid of the Court to avail himself of the Trust.

The Court will execute the Trust, if by any possibility it can.

But to induce the Court to interfere, there must be a constituted Trust.

Or if it rest in fieri, a valuable, or at least meritorious Consideration.

What is a constituted Trust.

General Rule.

Irrevocable Trust of personal Chattels.

Owner may constitute himself or the Possessor Trustee, without any Transfer.

The Documents on which Ex parte Pye, 18 Ves. was decided, note.

Thorpe v. Owen, 5 Beav.

Irrevocable Trust of Chose in Action.

Petre v. Espinasse,

Collinson v. Patrick,

Beatson v. Beatson,

Meek v. Kettlewell.

A clearly expressed Intention not always sufficient to create a Trust.

Rule that a defective Conveyance without valuable Consideration, will not be aided—

Locus Pœnitentiæ.

Apparent Exception to the Rule that a constituted Trust is binding, in the instance of voluntary Assignments for Creditors ;

Dependent to some extent on Doctrine as to Mandate.

Lord Cottenham's Exposition of the Doctrine.

Whether Notice being formally sent to the Creditor makes a Difference.

EVERY actual *cestui que trust*, whether a volunteer or not—that is, be the limitation under which he claims with or without consideration—has always been considered as entitled to the aid of the Court of Chancery in order to avail himself of the benefit of a constituted trust (*a*). If the trust can by any possibility be executed by the court, the non-execution by the trustees shall not prejudice the *cestui que trust*, even though the trust be to a great extent discretionary, depending from the nature of the trust upon the opinion of the trustees as to the merits of the persons who are the objects (*b*). Nor is it necessary that there should actually be a trustee. If there be plainly a trust created, and

(*a*) Sir J. Jekyll, *Lechmere v. Lord Carlisle*, 3 P. W. 222; *Vernon v. Vernon*, 2 P. W. 595; *Austen v. Taylor*, Amb. 376; *Collinson v. Patrick*, 2 Keen, 134.

(*b*) *Richardson v. Chapman*, 7 Bro. P. C. 318; *Brown v. Higgs*, 5 Ves. 505; *Edwards v. Freeman*, 2 P. W. 437.

from any circumstance (as the trustee declining to act, or being incapable of acting, or any other cause) the exercise of the trust by the party intended to be intrusted with its execution becomes impracticable, the want or failure of a trustee will be supplied by the court (*a*); and the court will take upon itself to execute a trust, whatever difficulties or apparent impracticabilities may stand in the way (*b*), provided it can be ascertained what the intended trust is. But to induce the court so to interfere there must be a trust completely and effectually constituted; or if it rest in contract, or *in fieri*, that is, if it be imperfect, there must be a valuable or at least a meritorious consideration; nothing less will do (*c*). The consideration of marriage is one of the highest considerations in the view of the court, and has always been held to be sufficient to support any settlement; in a case before Sir William Grant, a stockbroker, greatly indebted, married his mistress and settled his property on her, falsely reciting that it was hers; the settlement was supported even against his creditors (*d*).

To determine what is a Constituted Trust is often a matter of great difficulty. As a general rule, where there is a plain intention to create a definite trust of property, real or personal, legal or equitable, and every thing is done that can be required to complete the transaction (*e*) on the part of the donor, the trust, though voluntary, is constituted and is binding upon the donor and all claiming under him (*f*). The simplest case is where a person actually conveys, assigns, or transfers property of which he is the owner, and declares the trusts upon which the assignee is to hold the property; there an irrevocable trust is created, even without any communication to the donor (*g*).

(*a*) See vol. i. p. 501, 508; *Ellison v. Ellison*, 6 Ves. 663; *Attorney-Gen. v. Stephens*, 3 M. & K. 347. "If a man devise to his heir, upon condition to be sold, the condition to be void; it shall be a trust in the heir to sell."—Com. Dig. Chanc. 4 W. 2, p. 718. A devise to an heir is now effectual, 1 Vict. c. 26.

(*b*) *Pierson v. Garnet*, 2 Bro. 46, per Lord Kenyon; see *Brown v. Higgs*, 5 Ves. 505, above.

(*c*) Lord Thurlow, *Colman v. Sarrel*, 1 Ves. J. 55; and see *Ellison v. Ellison*, 6 Ves. 662; *Pulvertoft v. Pulvertoft*, 18 Ves. 84; 2 R. & M. 253, 2 M. & K. 453. In *Wright v. Wright*, 1 Ves. 412, Lord Hardwicke speaks of a valuable consideration in the second degree—namely, a provision for younger children, which appears to be the same as that which Lord Thurlow designates a meritorious consideration.

(*d*) *Campion v. Cottens*, 17 Ves. 263, 271, 273.

(*e*) "If the act is completed, though voluntary, the court will act upon it;" Eldon, C. 18 Ves. 140; *Wheatley v. Purrr*, 1 Keen, 558; and see Lord Cottenham's Observations in *Fortescue v. Barnett*, 1 My. & Cr. 239.

(*f*) Lord Eldon, *Ellison v. Ellison*, 6 Ves. 662; *Pulvertoft v. Pulvertoft*, 18 Ves. 98-9.

(*g*) In *Bill v. Cureton*, 2 My. & K. 503, a single woman, not immediately contemplating marriage, transferred a sum of stock to trustees and declared the trusts to be for herself for life, remainder to her children, if any, remainder to her next of kin; having afterwards, whilst yet single, become embarrassed, she sought to revoke it, but it was held to be binding upon her.

It may be well to observe that *Lynn v. Ashton*, 1 Russ. & M. 188, did not turn upon a power to revoke an executed trust,

As regards personal estate, where writing is not necessary, declarations made previously to the act of transfer, or contemporaneously with it and relating to it, are of the greatest value, and a trust once constituted by such declarations cannot be changed by the party, nor will it be affected by any declarations at subsequent periods (*a*). Indeed a trust which is once effectually created, whether by a formal instrument, or by parol where a parol declaration alone is sufficient, cannot be revoked (*b*).

It is not necessary that there should be any transfer of property accompanying the declaration of trust, whether the fund be in the possession of the donor or of another; the property may still remain as it was, and the donor may constitute himself or the possessor trustee of the fund (*c*); and in such case it is not necessary that the donor should expressly declare himself to be trustee; if he do any acts in relation to property to which he is legally entitled, though without reference to the creation of a trust, from which it clearly appears that he considered that the property, though legally vested in him, had ceased to be his and had become the property of another, those acts may amount to a sufficient declaration that the donor holds the property in trust so as to be binding upon him (*d*)

but it was held, that the settlor had an interest and a power under the trust, in virtue of which she might dispose of the property: nor did the case of *Godsal v. Webb*, 2 Keen, 121, proceed on the ground of revocation; there, by one of the clauses of the marriage settlement, it was provided that the trustees should keep up an insurance on the life of the intended wife upon trust at her death to lay out the money insured when received, and pay the interest to the husband for life, if he should survive, then to such persons as the wife should appoint, and in default of appointment, to her next of kin; the husband having died, the wife and the surviving trustee assigned the policy to Mr. Godsal. The Master of the Rolls construed the settlement as being an agreement between the husband and wife, *only for his benefit*, and that the next of kin could not have compelled the wife or the trustees to keep up the insurance for their benefit, and the Master of the Rolls distinguished that case from *Anderson v. Dawson*, 15 Ves. 557, where it was held that the wife had only a life interest, with power of disposition by will (Sugd. Powers, ii. 237-8), for there the fund was in the hands of the trustees bound by the trust; here the next of kin would have had to compel the trustee, that is in effect the wife, to create the fund.

(*a*) *Kilpin v. Kilpin*, 1 My. & K. 531; Sir

J. Leach; *ib.* 539, Lord Brougham. There was also a contemporaneous entry in that case.

(*b*) *Kilpin v. Kilpin*, 1 My. & K. 531; *Adlington v. Cann*, 3 Atk. 151.

(*c*) See the dict. of Lord Eldon, *Ex parte Pye*, 18 Ves. 139-40. In *Stapilton v. Stapilton*, 14 Sim. 197, the trust was created by the donor making entries in the books of the bank, of which he was a partner. In *McFadden v. Jenkins*, 1 Hare, 558, 1 Phillips, 157-8, the trust was constituted by a creditor, verbally directing his debtor to hold the money due to him in trust for the claimants, which trust he accepted and acted upon, 1 Phill. 153, 157; but was it in the power of the debtor to prevent the trust from being effectual, by refusing to be a trustee? *v. infra*.

(*d*) *Ex parte Pye*, 18 Ves. 140. My friend, Mr. Francis Bailey, of the Chancery bar, has been kind enough to furnish me with the documents on which Lord Eldon, in that case (the first where the doctrine on the text was established), held that there was what was equivalent to a declaration of trust.

By an order, 28th January, 1811, it was ordered that the Master should inquire and certify whether the French annuity of 2,300 francs, purchased by Christopher Dubost, as the agent and on behalf of the testator, William Mowbray, in the testator's name,

payable during the life of Marie Genevieve Garos, and after the death of the testator, alleged to have been assigned to the said M. G. Garos, by the said C. Dubost, under the said testator's power of attorney was or not to be considered as part of the said testator's personal estate.

The Master, by his report dated 27th February, 1811, certified that by a letter dated 25th November, 1807, the testator authorized the said C. Dubost to purchase in France an annuity of 100*l.*, for the benefit of the aforesaid M. G. Garos, for her life, and to draw on the testator for 1500*l.* on account of such purchase, when made.

The letter was, so far as was material, in these words:—"Sir, my intention being to make a settlement upon the head of Mrs. M. G. Garos, I authorize you to purchase, in France, in the most safe and eligible manner, an annuity of 100*l.* sterling, or 2400 livres tournois, its equivalent at par, to be paid by quarterly payments to Mrs. Garos during her life; and upon my approving of the arrangements that you will make to that effect, in order to reimburse you the amount of the purchase of the said annuity, as well as to indemnify you for your trouble in taking care of Mrs. Garos for the future, I promise to pay you the sum of 1500*l.* sterling, with interest at five per cent. from the time of the purchase of the annuity till the time of payment." (Dubost was admitted a creditor for this sum against the estate.)

In case Dubost should not be able to purchase an annuity, then the testator authorized him to buy French funds, to the amount of 2000*l.* sterling, so that Mrs. Garos should receive the dividends during her life, and so as to preclude the possibility of the husband of Mrs. Garos, or any other person or creditor, to seize upon them; and on the death of Mrs. Garos, the stock was to be sold and divided amongst the persons named in the letter.

On the 4th April, 1808, Dubost wrote to the testator, informing him that he (Dubost) had purchased an annuity from an individual, secured on a house in Paris. Mr. Dubost proceeds, "This annuity, which will be paid by quarterly payments, is settled upon the head of Mrs. Garos, and bought in your name, from the motives I am about to declare." He then states that Mrs. Garos would, by the law of France, have had to accept the annuity, and for that purpose, to have obtained the authority of her husband, or a certificate of his death, or a sentence of interdiction against him, as being incompetent to manage his affairs, not one of which she could procure, and her own state of mind would have been another objection to the validity of the deed being made in her name, therefore the annuity had been made payable to the testator. He

proceeds, "What remains for you to do is to send me a power of attorney, agreeable to the one I annex at foot, by which, being authorized to receive the several payments of the annuity as they become due, I shall pay to Mrs. G. the amount. That same power authorizes me, besides, to transport to Mrs. Garos the annuity itself, appearing, at the same time, to receive the price; 2nd, to make the donation to her of the same annuity, without receiving any fine (in both cases she must accept), and lastly, to prosecute Mrs. Dangis. I have, therefore," he adds, "fulfilled your intentions, according to the best of my abilities, and in the most secure as well as eligible way that circumstances permitted me to do. I have settled upon the head of Mrs. Garos an annuity which, by the actual course of exchange, exceeds the 100*l.* you meant expressly to allow her, and which will be sufficient to pay her expenses. Your account is, in consequence, debited with 1500*l.*"

The power of attorney was to the effect stated in the above letter; the annuity was described as an annuity of 2300 francs, created on the head of Mrs. Duval, the wife of J. L. Garos, and constituted by the said Mrs. Dangis, for the benefit of the said Mr. Mowbray, the testator; there was a power, "even to assign to the said Mrs. Garos solely, but to no other person, as well the principal as the dividends of the annuity, without acquittance; and also to make a deed of gift, without any consideration for the same, of the said annuity unto the said Mrs. Garos, to be unalienable by her." It was signed by the said Mr. Mowbray, in due form, and registered.

On the 9th of June, 1808, Mr. Mowbray wrote to Mr. Dubost in answer, in which he said "I was favoured on Saturday last with yours of April the 4th. I am sorry you have had so much trouble with Mrs. G.; you have done the best you could for her; I hope she may recover her senses," &c. He then says he will credit Mr. Dubost's account for 1500*l.* and other sums. He then states he will get the power of attorney legalized as soon as possible, and concludes by saying, "Upon the whole, I am well pleased with your conduct in the management of our affairs; it is that of a man well acquainted with business." Mr. Mowbray died before the power of attorney was acted upon.

By the death of Mr. Mowbray, the power of attorney, being voluntary, by the English law was revoked. (See *Lepard v. Vernon*, 2 Ves. & B. 51; *Watson v. King*, 4 Campb. 272, Lord Ellenborough; though a power of attorney may operate as an appropriation or charge; see *Spooner v. Sandilands*, 1 Yo. & Coll. C. C. 390.) The validity of the transfer made under it was attempted to be supported by reference to the law of France, but Lord

equally, as where the owner makes an express declaration of trust (a).

An irrevocable trust without consideration may even be created of property which is incapable of legal transfer, as of a chose in action (b), if every thing is done in the way of transfer that such a subject is capable of (c). Thus, if a married woman have a power of appointment over property held by trustees in trust for her, whether the legal interest be in the trustees or in some third person, if she execute an appointment, though voluntary, without reserving a power of revocation, that will operate to constitute her trustees to be trustees for the appointee, and the transaction will be binding on the appointor (d), but this subject will again be considered in a subsequent section.

Eldon passed over that point, and gave judgment in these words: "Upon the documents before me, it does appear that though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what seems to me a sufficient declaration, that he held this part of the estate in trust for the annuitants," 18 Ves. 140. (The Lord Chancellor's order is in the office of the Secretary of Lunatics.)

The decision only applied to volunteers claiming under the donor, but it is obvious that Lord Eldon considered that the declaration was binding on the testator himself. The judgment was not founded on the effect of the law of France to give validity to the acts done under the power of attorney before the attorney knew of the revocation by the death of her principal, it not having been sufficiently established by evidence; that view of the case would, of course, have made the question of trust immaterial.

In *Thorpe v. Owen*, 5 Beav. 224, a testatrix had, by her will, given the residue of her personal estate to the six daughters of Henry Owen, and appointed him executor. Owen converted the residue into money, and, with 1000*l.* of his own, purchased 2550*l.* 3½ per cent. In 1830 one of the daughters came of age, when H. Owen paid her one-sixth of the whole fund, she giving a receipt for it as one-sixth of the estate of her grandmother, and of the addition made thereto by H. Owen, the father, amounting in the whole as above. In 1834 another daughter came of age, and received another one-sixth. In 1838 a third daughter married one Sadler, when her father (Owen) covenanted to settle "the contingent share" in the legacy given by the grandmother's will on certain trusts.

Sadler and wife having called for accounts of the grandmother's estate, on Owen having

queries in writing sent to him, he stated the 1000*l.* was a voluntary gift, and that "he had hitherto made the 1000*l.* part of the testatrix's property, and could not alter it." There were subsequent acts of recognition. On the death of Owen, a suit was instituted to administer his estate, when the Master of the Rolls, after having allowed the suit to stand over, to see whether further evidence could be produced, held that there was a complete trust of the 1000*l.* in favour of the daughters.

(a) See Vice-Chancellor Wigram's judgment in *Meek v. Kettlewell*; 1 Hare, 473-4.

(b) See *Portescue v. Barnett*, *infra*, title, "Assignment of Equitable Interests."

(c) *Petre v. Espinasse*, 2 My. & K. 496, is perhaps the strongest case. There the plaintiff being unmarried had assigned his share (unascertained) in his deceased brother's estate, which of course was incapable of legal transfer, to the defendant, Robert Espinasse, in trust, at his discretion and at the plaintiff's request and with consent of his elder brother, to pay all or any part of his debts, and to invest the residue in government or real securities in the name of the trustee, and to apply the interest and any part of the capital at his discretion, with the consent of the elder brother, for the benefit of the plaintiff for his life, then upon trust for his children, if any, if none for his executors, &c. with a power of revocation with the consent of the persons therein named; this was held to be an executed trust binding on the plaintiffs. See also Lord Langdale's judgment, *Roberts v. Lloyd*, 2 Beavan, 384; but the case itself turned upon the liability of the obligor in respect of his payments after notice of the voluntary settlement.

(d) In *Rycroft v. Christy*, 3 Beavan, 238, Ann Rycroft, a married woman, being entitled to the interest of 500*l.* then standing in the

If the alleged donor has only expressed an intention to make a declaration of trust in favour of some object that is clearly not suffi-

names of trustees, executed an instrument by which she directed the trustee, who was a party to the instrument, to pay 7s. a week out of the interest to Ann Elf for the maintenance of her child, and Ann Rycroft covenanted to indemnify the trustee in respect of such payments and to allow them out of the dividends; the trustee accepted the trusts of the deed and acted upon it. The M. R. considered that this was an executed trust binding upon Ann Rycroft. Her husband disclaimed all interest. In *Collinson v. Patrick*, 2 Keen, 123, though this case belongs to a subsequent chapter, a bond was settled for the separate use of a married woman, with a power of appointment. She appointed her interest in the debt to the plaintiffs to indemnify them in respect of a breach of trust committed by her husband. Lord Langdale considered that the transaction was binding on the married woman. "If what has been done is equivalent to a transfer of the legal interest, the parties in whose favour the trust is created are entitled to the benefit of it in this court, and I am of opinion that this deed gives an interest to the plaintiffs which does so entitle them," p. 134. This case shows that it is not necessary that the trustee should have the legal title, for the legal title was in the obligee.

It is not easy to reconcile the case of *Beatson v. Beatson*, 12 Simons, 281, with the foregoing cases, but more especially with *Petre v. Espinasse*. The facts were shortly as follow:—A single woman had a power of appointment over considerable property under two wills. She being about to sail for India, and being under an engagement to marry some person there, executed a voluntary settlement by which she absolutely and irrevocably appointed that, from and after her marriage with any person whomsoever, the same should enure as to 1000*l.* in trust for the person with whom she should marry, and as to the remainder for her separate use for life, and after her death for any husband with whom she might have married for his life, and, subject thereto, for her children by any husband or husbands whomsoever; if she should leave no husband or child then in trust for her executors; if she should leave a husband, in trust for her next of kin exclusive of her husband. After her arrival in India she became dissatisfied with the settlement. She alleged, amongst other reasons, that she thought that it had been revocable (but which the trustees of that settlement, according to their belief, denied), and she executed a deed purporting to revoke the settlement, and after her actual marriage made a new settlement with the concurrence of her husband, by which a joint appointment

over the whole was given to the husband and wife, and in default of appointment the whole was settled on the children of that marriage, and in default of children in trust as she and her husband or the survivor should appoint, and, subject thereto, in trust for the survivor absolutely.

On a bill being filed by the lady against her husband, and the trustees of the original settlement, and of the two wills under which she derived her title to the property, the Vice-Chancellor of England established the deed of revocation and the subsequent settlement; *Bill v. Cureton*; *Petre v. Espinasse*, and *Sloane v. Cadogan*, were cited. His Honour examined the case of *Sloane v. Cadogan*, for the purpose of showing that the opinion of Sir William Grant in that case was extrajudicial, as there was another point on which the case must clearly have been decided in favour of the parties claiming under Lord Cadogan, without its being necessary to establish the deed as a good assignment; but his Honour also disputed the authority of Sir William Grant's dicta, though he apparently, as noticed in the first volume, p. 508, mistook Sir William Grant's meaning, in supposing that in using the word *if* that learned judge intended to represent that Lord Cadogan had assigned his share of the fund itself, and not merely his equitable interest in it. As regards the merits, his Honour went fully into all the circumstances. He stated that the first settlement was made evidently without any contract with any human being, and was altogether voluntary, not to say grossly absurd. He held that Mrs. Beatson had clearly a right to revoke and annul all the trusts declared by that settlement, and she having done so, he pronounced it to be a nullity. This case must perhaps be considered as standing on its own peculiar circumstances.

In *Meek v. Kettlewell*, Lord Lyndhurst, Chancellor, 1 Phill. 347, confirming the decree of the Vice-Chancellor Wigram, held, that a deed of assignment of a mere possibility, with a power of attorney to demand the money, if and when it should fall to the grantor, could not be considered as an assignment, or as a declaration of trust, so as to bind the grantors, on the authority of *Edwards v. Jones*, *ubi infra*, and *Antrobus v. Smith*, *ubi infra*; and see the same case on the original hearing before the Vice-Chancellor Wigram, 1 Hare, 474. The former may be an authority for this decision, but not the latter, for in that case the property (shares in a canal) was presently transferable, and therefore might have been actually transferred—a material circumstance, as will be

cient, even as against volunteers (a), or if a person direct that a transfer be made upon certain specified trusts, which trusts are to be declared or recorded, and the property is actually transferred in pursuance of such directions, but, whether by accident or otherwise, no trust is declared upon the transfer being made, the donor himself may clearly assume the dominion of the property after such transfer, and if he do, then the transaction will be a nullity as between the intended donee and the donor's representatives (b); and probably it would be held that the intended gift was incomplete, and therefore not binding on his representatives, though the donor had died without having done any further act. It is an universal rule, unless the case of *Ex parte Pye* forms an exception (c), that a defective conveyance without valuable consideration, where the party means actually to vest the legal ownership in the donee (d), or in any person as trustee for him, will not be considered as a declaration of trust, even though, as it would appear, the property may not be capable of legal transfer (e). There

observed hereafter; in *Meek v. Kettlewell*, the property could not have been transferred; all was done in the way of transfer, that from the nature of the property could have been done. For the same reason, *Antrobus v. Smith* is hardly an authority to support *Edwards v. Jones*; but this subject will be more fully considered under the title "Assignments of Equitable Estates and Interests."

(a) *Bayley v. Boulcott*, 4 Russ. 347. The testatrix there had given instructions to her solicitors to prepare a deed, but the particular terms of the trust were not definitively settled. In *Adams v. Claxton*, 6 Ves. 231, a paper, purporting to be an assignment to a particular person, was pinned to a policy, but both were kept in the owner's possession.

(b) *Smith v. Warde*, 15 Law J., Chan. 105. This case has some of the ingredients of *Ex parte Pye*, *supra*. The testator had directed his bankers to invest 4000*l.* in the funds, in the names of himself and his wife, in trust for his son; but as the bank does not permit any trust to be entered in their books, this could not be done, and the fund was, in fact, invested in the name of the husband and wife simply, and so the testator was informed. The testator then directed the bankers to invest 800*l.* more "in the same manner, which they did; the settlor, however, always received the dividends on both sums, and dealt with them as his own property. On the settlor's death, it was held by the Vice-Chancellor of England, that there was no trust declared for the son, but that the whole formed part of the assets of the donor. It is plain that something was here wanting—namely, a declaration

by the donor, after he was informed that the intended record of the trust could not be made; besides, he acted as actual owner of the fund.

(c) *Supra*. If the case had stood on the power of attorney alone, it would clearly have been an exception.

(d) *V. supra*, Vol. i. p. 449, *et inf.* Ch. x.

(e) *Edwards v. Jones*, 1 My. & Cr. 226; (but see this case, which is stated *infra*, Ch. x.)

In *Colman v. Sarrel*, A. D. 1789, a deed was executed, purporting to be an assignment of 1000*l.* stock to trustees in trust for Joan Sarrel (a stranger), for life, in case she should survive the donor, and after her death for her children; the stock was never transferred to the trustees; the donor covenanted, in case he survived Joan Sarrel, to pay the dividends to her children, as she should appoint. It was insisted that the deed made the executors of the donor trustees for the donees, and if not, that such a gift ought to operate as being equivalent to a legacy given by will. Lord Thurlow said—If you can bring an action (that is, on the covenant), you may: where a deed is not sufficient to pass the estate out of the hands of the conveyor, but the party must come into equity, the court has never yet executed a voluntary agreement; to do this would be to make him who does not sufficiently convey, and his executors after his death, trustees for the person to whom he had so defectively conveyed; and there is no case where a court of equity has ever done that: "Whenever you come into equity, to raise an interest by way of trust, you must have a valuable, or at least a meritorious consideration" (such as pay-

is no instance, said Lord Northington, where a court of equity has compelled a man to complete a mere act of volition (*a*); there is a *locus pœnitentiæ* till it is completed (*b*).

The distinction above adverted to between cases where the matter rests *in fieri*, and those where the instrument is executed and the relationship of trustee and *cestui que trust* is created, though admitted to be somewhat refined and obscure, has been considered by modern judges as being now settled by the uniform tenor of the decisions (*c*); it will be again adverted to in treating of the assignment of choses in action and the transfer of equitable estate and interests. But there is one instance, which is apparently an exception to what in ordinary cases is treated as a constituted trust, which must here be noticed, namely, a conveyance or assignment of real or personal property to trustees in trust to distribute the funds amongst the creditors of the donor (*d*). These cases have been determined in great part upon the analogy afforded by the doctrines of the common law in regard to a mandate.

At law, where property is remitted voluntarily by the owner to a third person, with a direction that it be applied for the benefit of another, or if such a direction is given in regard to property already in the agent's hands, it has been held that such third person receives it in the one case and still retains it in the other, not for the use of the person designated, even though he be a creditor, but of the original owner. Such a transaction is treated as a voluntary arrangement by the person who owes the money, which may be revoked at pleasure; at least before any engagement is entered into on the part of the mandatory with such third person to execute it for his benefit (*e*).

ment of debts, or making a provision for a wife or child, 3 Bro. 14); "nothing less will do;" *Colman v. Sarrel*, 1 Ves. J. 55, 3 Bro. 12; and see *Ellison v. Ellison*, 6 Ves. 661. A meritorious consideration, as above defined, was sufficient (subject to certain restrictions), to empower the court, prior to the statute 55 Geo. III. c. 192, to supply the want of a surrender of a copyhold, see the cases 1 Fonbl. 39; and is yet sufficient to induce the court to interfere in aid of a defective execution of a power, *Sugden on Powers*, ii. 100. Yet a meritorious consideration, in the sense above described, is not now considered sufficient to authorize the court, in any case, to make perfect an imperfect gift or contract, as against the donor himself, or his representatives; see *Jefferies v. Jefferies*, 1 Cr. & Phillips, 138, 141, notwithstanding Lord Chancellor Sugden's decision in *Ellis v. Nimmo*, Lloyd & Goo. temp. Sugden, which must be considered, I presume,

as virtually overruled; as to which, v. *infra*, Chap. x. Sect. iii.

(*a*) *Wycherley v. Wycherley*, 2 Eden, 177; and see Lord Henley's note, 3 Bro. 14.

(*b*) *Antrobus v. Smith*, 12 Ves. 39, 46, 47.

(*c*) See *Garvard v. Lord Lauderdale*, 2 Russ. & M. 453-4, cited 2 M. & K. 511, 512.

(*d*) Constituted trusts, by assignments in trust for creditors, will be the subject of distinct consideration.

(*e*) *Williams v. Everett*, 14 East, 582. In *Scott v. Perchor*, 3 Meriv. 652, some pearls were sent by the owners at Madras to Messrs. Burney, in London, with directions to sell them, and pay the proceeds to Messrs. Perchor and Co., to whom the owners were indebted. Messrs. Burney acknowledged the receipt of the pearls, and undertook to pay the proceeds as directed. The owners afterwards directed that the pearls should be sent for sale to America, pp. 654-5, and subse-

This principle has been acted upon in the Court of Chancery in regard to conveyances and assignments of real and personal property in trust, to be applied for the benefit of creditors(a); and *à fortiori* if the direction to apply the money be in favour of a volunteer(b). It has been held, correctly or not, said Lord Cottenham, as regards creditors, that from the nature of the transaction the character of trustee and *cestui que trust* never existed between the creditors and the trustees of the trust deeds; but that the settlor himself was the only *cestui que trust*. "A man," said his lordship, "who without any communication with his creditors puts property into the hands of trustees for the purpose of paying debts, purposes only a benefit to himself by the payment of his debts; his object is not to benefit his creditors; it would, therefore, be a result most remote from the contemplation of the debtor if it should be held that any creditor discovering the transaction should be able to fasten upon the property and invest himself with the character of a *cestui que trust*"(c). Where such a trust is created under a contract with the creditors, or it is accepted and acted upon by them, it is valid and binding at law and in equity(d).

In the case of *Garrard v. Lord Lauderdale*, the Vice-Chancellor of England held, that though the solicitor of the trustees, who was also the solicitor of the Duke, the author of the deed, but without, as far as it appears, any express authority from him, sent a circular letter to the creditors, informing them of the nature of the trust deed

quently assigned all their property for the benefit of their creditors. Sir W. Grant said—This amounts to no more than a mandate from a principal to his agent, which can give no right or interest to a third person in the subject of the mandate. It may be revoked at any time before it is executed, or at least before any engagement is entered into with the third person, to execute it for his benefit; and it will be revoked by any disposition of the property, inconsistent with the execution of it; the assignment was such a disposition; and see *Malcolm v. Scott*, 3 Hare, 51. The general doctrine, particularly as regards assent of the trustee or bailee, and of the creditors, will be further considered under the head of "Assignments in Trust for Creditors."

(a) *Wallwyn v. Coutts*, 3 Meriv. 707; more fully, 3 Sim. 14; *Garrard v. Lord Lauderdale*, 3 Sim. 1; 2 Russ. & M. 454-6; and see *Page v. Broom*, 4 Russ. 24; that was a voluntary direction to a receiver by

deed poll, to pay the interest of a particular mortgage.

(b) See *Hughes v. Stubbs*, 1 Hare, 476. That was the case of a cheque drawn in favour of a third person, with directions to him to apply it for the benefit of one Ellen Gitting, but no communication was made to her on the subject, and the directions were not acted upon, nor could they be, as there was only a credit for the money.

(c) *Bill v. Cureton*, 2 My. & K. 503. In the case of *Gibbs v. Glamis*, 11 Sim. 584, Lord Lyndhurst, reversing the decision of the Vice-Chancellor of England, applied the doctrine to a case where the interests of a creditor were incidentally provided for in an arrangement between the debtor and other parties.

(d) See *Small v. Marwood*, 9 Barn. & Cr. 300-306; *Stephenson v. Hayward*, Prec. Chan. 310; v. *infra*, "Trust and Composition," "Deeds for Creditors."

and of its execution (a); still, as it did not appear that the creditors ever submitted to take the benefit of the deed, or conformed to its terms, or abstained from suing the Duke, this did not convert the assignees into trustees for the creditors, and that it could not be enforced; that as the deed *per se* conferred no interest on the creditors, notice to them could not enlarge the effect of the deed (b). Sir John Leach, in *Acton v. Woodgate*, considered that this doctrine was questionable as a general proposition, because the creditors, being aware of such trust, might be thereby induced to a forbearance in respect of their claims, which they would not otherwise have exercised (c).

Negligence or delay in this, as in every other instance in which the Court of Chancery is called upon to interfere, may extinguish or defeat the best-founded claim (d); nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting the court is passive and does nothing (e).

In this respect the analogy of the rules of the common law has been followed not only as to the remedies to enforce and preserve equitable estates and interests, but also in regard to their extinction. Thus, although there cannot, strictly speaking, be a disseisin, abatement, or intrusion as to a trust estate, yet if an adverse claimant continue in receipt of the rents and profits (which is equivalent to seisin at law) this may amount to an equitable ouster of the rightful claimant (f).

(a) The letter to the plaintiff in the suit stated that he was a scheduled creditor to the amount of 191*l.* 3*s.*, and that the deeds directed that the debts under 50*l.* should be paid in full, and the dividend between the remaining debts, without preference or priority; and added, "If you are not paid in full, what you receive is only to be taken in part." The plaintiff had so far renounced the deed, that he had come in under the decree, 3 Sim. 2, 13.

(b) 3 Simons, 13.

(c) 2 My. & K. 495. The Vice-Chancellor Wigram has lately intimated a similar opinion; see *Kirwan v. Daniel*, xi. Jur. 237. However, there must be considerable difficulty in carrying out this qualification of the doctrine if the case as regards each creditor is to depend upon the circumstances as affecting his particular case; but if, where the deed is irrevocable as to one, it is to be considered irrevocable as to all, so that each should be at liberty to come in and take the benefit of it, which has yet to be decided, then the case will be brought within the ordinary doctrines applied to trust and composition deeds for creditors, which will presently be noticed.

Mr. Justice Story, on Equity, § 1045, con-

siders the true test in these cases to be at whose risk the property is; if the trustees were to waste the property who would have to bear the loss?

(d) *Hercy v. Dinwoody*, 4 Bro. 269; *Case of Creditors*, 1 My. & K. 478; *Haworth v. Bostock*, 4 Y. & Coll. 16; *Campbell v. Graham*, 1 My. & K. 474, 483, an appeal from Leach, Master of the Rolls; *East v. East*, 5 Hare, 349-50.

(e) *Smith v. Clay*, Amb. 645; 3 Bro. 639, note; *Grenfell v. Girdlestone*, 2 Y. & Coll. 679.

(f) See *sup.* vol. i. 502, and see *Cholmondeley v. Clinton*, 2 Jac. & Wal. 191, Lord Redesdale; *Bond v. Hopkins*, 1 Scho. & Lefr. 428-9; *Hovenden v. Annesley*, 2 Scho. & Lefr. 630, 636; as to what shall be considered an equitable ouster, see Sir Thomas Plumer's judgment, *Cholmondeley v. Clinton*, 2 Jac. & W. 166, et v. *ib.* 156, 157. If any thing is done or said directly or indirectly to recognize the title of the rightful owner by the adverse possessor, that it seems may take the case out of the general rule, *ibid.* 175; but the new statute has done away with most questions as to adverse possession.

The Court of Chancery prior to the passing of the late Statute (a) of Limitations, which is mentioned in the former volume, and which is binding on all courts (b), acted by analogy to the rules of law in cases of a corresponding nature, as well as on principles of its own founded on public policy (c), independently of the bar which in natural justice ought to be interposed in cases of acquiescence (d). As the court had no legislative authority, said Lord Camden, it could not properly define the time of bar by a positive rule to an hour, a minute, or a year; it was governed by circumstances; but as often as parliament had limited the time of actions and remedies to a certain period in legal proceedings, the Court of Chancery adopted that rule and applied it to similar cases in equity: for when the legislature had fixed the time at law it would have been preposterous for equity, which by its own proper authority always maintained a limitation, to countenance laches beyond the period that law had been confined to by parliament, and, therefore, in all cases where the legal right has been barred by parliament the equitable right to the same thing (e) has been concluded by the same bar (f). The true reason why suits and remedies are barred by length of time is because the party has acquiesced or neglected to pursue his remedy, and the public peace requiring an end of suits, he abandons this right by submission, or forfeits it by neglect: the Court of Chancery, therefore, will in many cases refuse to give its aid in favour of an equitable claim, though a less period than the corresponding statutory period shall have elapsed, if the length of time and circumstances of the case require the application of that principle, more especially if by reason of such neglect or delay rights have been acquired which it would be unjust to disturb (g). The discretion which the Court of Chancery had acted upon by analogy to the time limited in regard to proceedings at law is taken away by the statute above referred to (h); but the act does not interfere with any

(a) 3 & 4 Will. IV. c. 27.

(b) See vol. i. p. 503. Sir E. Sugden, V. & P. 635, *et seq.*, has fully stated the effect of the act as regards suits in equity.

(c) 1 Jac. & W. 63. *Expediit Reipublicæ ut sit finis litium*, 2 Scho. & Lef. 630; *et v. supra*, vol. i. 503, n. (a).

(d) *Walker v. Symonds*, 3 Swanst. 64; and see *Broadhurst v. Balguy*, 1 Y. & Coll. C. C. 16, 32.

(e) *But v. supra*, vol. i. p. 503; *Hillary v. Waller*, 12 Ves. 252.

(f) *Smith v. Clay*, 3 Bro. 639-40, note.

(g) In *Bonny v. Ridgard*, cited 4 Bro. 138; 17 Ves. 98, Lord Kenyon, on the ground of

length of time alone, on rehearing, reversed a decree of Sir T. Sewell, by which he had set aside a purchase admitted to be fraudulent; and see the other cases cited 17 Ves. 99, by M. R. in *Gregory v. Gregory*, G. Coop. 201, though it was admitted that the transaction, if recent, could not have been permitted to stand; the lapse of eighteen years was held sufficient to prevent any relief being given; *Champion v. Rigby*, 1 Russ. & M. 539, to same effect. And see *Chalmer v. Bradley*, 1 Jac. & W. 59, a case of purchase by trustee, and the cases cited by Sir T. Plumer, *ibid.* 62-3; also *Wedderburn v. Wedderburn*, 2 Keen, 748.

(h) *V. supra*, vol. i. p. 503.

rule or jurisdiction of the Court of Chancery in refusing relief on the ground of acquiescence or otherwise to any person whose right to bring a suit may not be barred by the statute(*a*). There are, however, some cases to which the Statute of Limitations does not apply. Thus, as regards a charge on an estate, the 40th clause in the act assumes that there is not only a person capable of giving a discharge or release, but also an assignable person by whom the charge is presently payable, or who is capable of paying the principal or interest of the charge, or of making an acknowledgment of the right thereto: it cannot, therefore, apply where there is no assignable person liable to pay the charge, or person who by the delay could be induced to suppose that the charge was abandoned or merged(*b*).

But though the Court of Chancery will prevent as far as it is able those mischiefs which would probably result from persons being allowed at an inconvenient distance of time to disturb the possession of another, or to bring forward stale demands, yet it will not encourage or in any manner protect unrighteous conduct, or the abuse of confidence; and, therefore, no length of time will bar a fraud(*c*), unless there be negligence and delay after the fraud is discovered, the party not being under pressure or undue influence(*d*); even before the late act(*e*) no length of time would affect a direct trust, for the possession of the trustee has always for the most part been considered as the possession of the *cestui que trust*; and the case must have been attended with some peculiar circumstances in order that time might operate as a bar between the trustee and the *cestui que trust*(*f*). It is to be observed that although the statute expressly limits the time within which a legacy may be recovered, yet where a sum of money is bequeathed to an executor upon trust to be laid out upon certain trusts, as soon as it is severed from the bulk of the estate it ceases to be a mere legacy, and the bar of the Statute of Limitations does not apply, for it is then a case of express trust which is specially excepted(*g*). However, as regards trusts by implication and con-

(*a*) Sugd. V. & P. 636.

(*b*) *Burrell v. Lord Egremont*, 7 Beav. 212, 235.

(*c*) *Lord Talbot*, *Cotterill v. Purchase*, Forrest, 63; *Aldin v. Gregory*, 2 Eden, 285; *Purcel v. Macnamara*, 14 Ves. 91, 121-2; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607, 630.

(*d*) *Weston v. Cartwright*, Sel. Ca. Ch. 36; *Wharton v. Toone*, 5 Mad. 55; *Roche v. O'Brien*, 1 Ball & B. 338, 342.

(*e*) *Supra*, vol. i. p. 502, Stat. 3 & 4 Will.

IV. c. 27, § 25.

(*f*) *Parker v. Ash*, 1 Vern. 256; *Lord Kingsland v. Lord Tyrconnell*, 1 Vin. Ab. 186, pl. 10; *Townshend v. Townshend*, 1 Bro. 554; *Milnes v. Lawley*, 4 Pri. 103; *Chalmer v. Bradley*, 1 Jac. & W. 67; *Wedderburn v. Wedderburn*, 2 Keen, 749; 4 My. & Cr. 41; *supra*, vol. i. p. 502. See *Hill on Trustees*, 249, *et seq.* 296; *et v. infra*, "Remedies against Trustees."

(*g*) *Philippo v. Munnings*, 2 My. & Cr. 314.

structive trusts, and indeed all other equitable rights, the Court of Chancery, on the principle on which the Statutes of Limitation are grounded, will not interfere unless the claim be prosecuted within reasonable time, or unless a very sufficient reason for the delay be given (a).

This may be sufficient to show what is the general nature of an equitable estate or interest created by way of trust, and the general rules which affect such equitable interests.

(a) *Beckford v. Wade*, 17 Ves. 96, 97-8; *Hardwicke*, and see Sir T. Plumer's judgment, *Cholmondeley v. Clinton*, 2 Jac. & W. 139, 152; *S. C.* 4 Bli. 1.
et v. Selsey v. Rhoades, 1 Bli. N. S. 1, 8;
Townshend v. Townshend, 1 Bro. 554; *Llewellyn v. Mackworth*, Barnard, 449; Lord

SECTION V.—Of Trusts created by Precatory and Recommendatory Words.

General Rule.

Latterly Judges not inclined to extend the Doctrine.

Precedents followed.

Cases proceed upon Intention.

Each Case to be considered on the whole Context—the Circumstances—the Consequences.

It is to be looked to to see whether the Act is to be matter of Discretion only.

Rule laid down by Lord Alvanley ; approved by Lord Cottenham.

Words of mere Wish or of Expectation do not create a Trust.

Where the Gift embraces an uncertain Amount of Property to be otherwise obtained.

Other Instances where no Trust created.

Effect of Words of Recommendation in regard to Appointment of Receivers, Managers, and the like.

Certainty requisite to create a Trust.

General Rules adopted to reduce to Certainty Indefinite Expressions.

Such as "Family."

Relations.

How far the Statute of Distributions is to be taken as a guide.

Descendants.

Discretion vested in the Donee, how far it may be interfered with.

Estate or Interest which the Object of the Trust is to take.

Certainty required as to this point.

Difference in regard to Certainty where the Gift is for Charitable Purposes.

Difference as to the Person to whom the Property devolves in the case of a Direct and of a Recommendatory Trust, where the Trust fails.

Words of Direct Gift construed to import a Trust.

THE creation of trusts by words of recommendation, and the like, has been noticed in the former volume ; and the source from which the doctrine of the Court of Chancery on this subject may be supposed to have been derived has been pointed out (a).

It may be taken as a general rule (b), that when property is given

(a) *Sup.* vol. i. p. 436-40 ; p. 498-9.

(b) The language of many, I may say of most of the cases, (v. *infra*, and *inter al.* *Wright v. Atkyns*, Turn. & R. 157, Lord Eldon,) in which the doctrine of the certainty required in recommendatory or precatory trusts is mentioned or adverted to would seem to imply that there is something peculiar in regard to the certainty required

in trusts of this description, as distinguished from trusts imposed by positive declaration. And trusts of this description are distinguished by writers whose opinions are entitled to the highest respect, as belonging to the class of implied (Lewin on Trusts, 66 ; Jeremy, p. 99 ; 2 Roper on Legacies, 380, *et seq.*) or constructive trusts, (Story on Equity, § 1074,) not of express trusts ; but

absolutely to any person (a), and the same person is, by the person who has power to command, recommended (b), or intreated (c), or wished (d), to dispose of that property in favour of another, the recommendation, entreaty, or wish shall be held to create a trust—first, if the words are so used that *upon the whole* (e) they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; and thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain (f).

there does not appear to be any solid ground for making any distinction between the certainty required in trusts imposed by recommendatory words, and those imposed by express and positive direction or command. I believe it will be found, as one might expect on looking to the principles of construction applied to cases of trust generally, that the words indicating the subject and object and estate or interest, coupled with a gift to a person unequivocally, as a mere trustee, would receive exactly the same construction as that which they have received when coupled with a recommendatory trust: the principle, as regards each, is to ascertain the intention, by the ordinary rules of construction and interpretation, and carry it into effect; but in neither case can the intention be ascertained if certainty be wanting in any of the particulars above pointed out; and if the words are sufficiently indicative of the intention in the one case, they must be, one would suppose, in the other. It is to be remarked, that Sir Wm. Grant, in the case of *Cruys v. Colman* (9 Ves. 322, after noticed), does not confine his statement as to the three requisites, to precatory trusts, though the subject of his decision was a trust of that description. In regard to the supposed distinction, made with respect to trusts of this description, by classing them as implied or constructive trusts—for which certainly there is the authority of incidental expressions of Judges of the highest authority, (*int. al.* Lord Hardwicke, 1 Atk. 619.)—if, as is laid down in numerous cases, (see particularly *Cary v. Cary*, *infra*, p. 66,) the court acts upon the desire as a *command*, I am unable to discover why a trust created by what the court construes to be a command should be distinguished from a trust created by a command or direction unequivocally expressed; and I have accordingly treated both as being equally express trusts: lest however I should be labouring under some misapprehension, I have introduced the doctrine as to certainty, as I have found it in the authorities, conceiving however that it is equally applicable to every gift upon trust, without exception, (*vide supra*, Vol. i. p. 499,) and the modern case of *Morton v. Tewart*, before V.-C. Knight Bruce,

above cited, if authority be wanting, appears to me to warrant this conclusion.

(a) See *Knight v. Knight*, 3 Beav. p. 172, Lord Langdale, affirmed in Dom. Proc., viii. Jur. 925, 11 Cl. & Finn. 548; and see *Morice v. Bishop of Durham*, 10 Ves. p. 536, Lord Eldon.

(b) *Tibbitts v. Tibbitts*, 19 Ves. 656, 663; *S. C.* Jacob, 319; that was the case of a devise of a freehold estate, with a recommendation to the devisee to continue his cousins in the occupation of their farms: Lord Cottenham (5 Cl. & Finn.) considered that case had carried the doctrine further than any that had preceded it. "Words of recommendation or desire are always expounded a devise," *per* Master of the Rolls, *Eales v. England*, Pr. Ch. 202; affirmed, 2 Vern. 407; *Ford v. Fowler*, 3 Beav. 146; *Cholmondeley v. Cholmondeley*, 14 Simons, p. 590; *Johnson v. Rowlands*, xii. Jur. 769.

(c) *Prevost v. Clarke*, 2 Mad. 458, case of a residue of personal estate.

(d) *Hinzman v. Poynder*, 5 Simons, 546; many other cases are cited, (and see 3 Beav. p. 161,) showing that the words "not doubting," (but see *Flanders v. Clarke*, 1 Ves. 9,) or expressing "hope," or "request," or "confidence," and the like, will have the same effect; and even "authorize and empower" are sufficient, *Foley v. Parry*, 2 My. & Keen, 145. The principal cases are collected 2 Roper on Legacies, 373, 389; 1 Jarman on Wills, 334-7; Lewin on Trusts, 67, *et seq.*; Hill on Trustees, p. 32, *et seq.* The words, though "very gentle," may be sufficient, if they have a distinct object, Lord Thurlow, *Harland v. Trigg*, 1 Bro. 142. The testator, as some judges have said, in the cases referred to, may have desired to be courteous or civil in his command.

(e) *The Earl of Bute v. Stuart*, 1 Bro. P. C. 481, is a striking case to show that words apparently giving the donee power to dispose of the property as he pleases, may be confined, on looking to the circumstances and context, to a power in the nature of a trust to dispose of it in favour of particular persons only, *et v. infra*, p. 81, 82.

(f) Lord Langdale, *Knight v. Knight*, *ubi*

Latterly the judges have been inclined not to extend the rule of construction which gives an imperative effect to precatory words; and in modern times the judges, no longer referring to the authority of the *Corpus Juris*, have confined themselves entirely to the principles established by the decisions of their predecessors (*a*); to these decisions, therefore, we have now to look.

sup.; Lord Eldon, *Wright v. Atkyns*, Turner & R. 157. Lord Redesdale expresses the rule thus: "When a testator, having in his power to dispose of property, expresses a desire as to the disposition of the property, and the objects to which he refers are certain, the desire so expressed amounts to a command; and if he shows his desire, he in fact expresses his intention, provided the objects to which he refers are so defined, that a court can act upon the desire so expressed." *Cary v. Carey*, 2 Scho. & Lef. 189. As to the certainty required, *vide supra*, p. 65, and Vol. i. 499.

(*a*) See 1 Simons, 552; *Lawless v. Shaw*, 1 L. & G. temp. Sugd. 164; *Knight v. Knight*, 3 Beav. 172; *White v. Briggs*, 15 Law J., N. S. 182; 15 Sim. p. 33; but which was reversed, on appeal, *ibid.* 34: this is also an important case on the construction of the word "family," 15 Sim. 33, 300, *v. inf.* p. 73, 74; and see *Young v. Martin*, Vice-Chancellor Knight Bruce, vii. Jur. p. 1147.

In *Matin v. Keighley*, 2 Ves. 531, (a case on the construction of words of recommendation, which were there held to create a trust,) on the doctrine of the Roman law, before adverted to, being cited as it had been in *Pierson v. Garnett*, 2 Bro. p. 38, and several other cases, Lord Rosslyn said, "There is really no fair analogy to the Roman law;" but his Lordship appears to have taken a confined view of that doctrine, as to which, *v. supra*, Vol. i. p. 439. There can be little doubt that if these cases had come before the Court of Chancery, unprejudiced by authority, where there was an absolute gift of property with a request or recommendation annexed to it, it would have been left to the honour and moral feeling of the party to comply with it or not. There is an early case on this subject, (*Forth v. Gresley*, 30 May, 1 Jac. I. Reg. L. A. 1602, fo. 617,) to this effect: "This court, having well advised and considered of the will of the said Mr. D. Forth, findeth that the devise of the said leases is: absolute to the said lady, and no matter of trust is therein contained, but only a request of the said lady, that she would have regard of the said plaintiff, whereby this court conceiveth that she is left to her own conscience therein, and not to be pressed to perform the said request by suit;" the bill was accordingly dismissed; which case is also re-

ported somewhat differently by Sir Geo. Cary, p. 30, ed. 1665. Lord Ellesmere's judgment seems to imply, though there was also a want of certainty as to the subject of the request, that that word was not, as now, (see *Pierson v. Garnett*, 2 Bro. 46; *Foley v. Parry*, 5 Sim. 145, "words of request are as much words of legation as a direct gift," per V.-C. affirmed 2 My. & K. 144, 145,) sufficient to create a trust. Sir A. Hart, in *Sale v. Moore*, 1 Sim. 540, and Lord Chief Baron Richards, in *Meredith v. Heneage*, 1 Sim. 551, 552, clearly considered that, independent of authority, a recommendation to a person to whom property was absolutely given would not constitute a trust. Sir A. Hart says that "the first case that construed words of recommendation into a command made a will for the testator—for every one knows the distinction between them," 1 Simons, 510, *et v. ibid.* 552; it is plain that Lord Eldon entertained the same opinion, see *Dashwood v. Peyton*, 18 Ves. 41, and *Wright v. Atkyns*, 1 Ves. & B. 315-16: so that the doctrine can hardly be accounted for without attributing it to the influence of the Roman law on the minds of those who first established it. Lord Alvanley, however, in *Pierson v. Garnett*, 2 Bro. 39, 40, desired that the case before him might not be considered with reference to the Roman law, but upon the principles laid down in former cases; and from that time, though the doctrines of the Roman law have been continually cited at the bar, (*v. int. al. Knight v. Knight*, (1840,) 3 Beav. 161,) the judges have evidently founded their decisions solely on the cases decided by their predecessors. Probably this doctrine (like that of election, which Lord Eldon considered to have been derived from the Roman law,) was originally applied to pecuniary legacies only, but for a long series of years, as will be seen by the authorities referred to, no distinction has been taken as to the nature of the property; see *Tibbitts v. Tibbitts*, *supra*: and though there is no case that I am aware of in which the question has arisen on a gift *inter vivos*, (unless the case of *Stubbs v. Sargon*, 2 Keen, 260, can be so considered,) the general opinion appears to be that the doctrine as to recommendatory words would be equally applied in such a case, though in the former volume, p. 498, I had

These decisions, as will have been seen, have, to a considerable extent, bound the court in construing recommendatory trusts as regards the words which are to be considered, *primâ facie* at least, as imposing an obligation; yet all the cases proceed upon a consideration of what was the intention of the testator (a).

In the infinite variety of expressions which are employed, and of cases which thereupon arise, there is often the greatest difficulty in determining whether the act desired or recommended is an act which the testator intended to be executed as a trust, or which the Court of Chancery ought to deem fit to be or capable of being performed as such (b). The question never turns upon the grammatical import of words—they may be imperative, but not necessarily so; the subject-matter, the situation of the parties, and the probable intent must be considered (c); it is not every wish or expectation which a testator may express, nor every act that he may wish his successors to do that can or ought to be executed as a trust in this court (d). Each case must be considered upon the whole context and circumstances of the will (e), and the circumstances under which the testator stood as connected with the words used in his will; the consequences also that would result, or which might be deduced from interpreting the words as importing a trust to the extent insisted upon, particularly as affecting the positive devises in the will clearly importing beneficial enjoyment, may, or rather must, be looked to in order to ascertain what was the intention, whatever may be the weight attached to the words of recommendation standing by themselves (f).

As the circumstances and general scope of the will may have a material effect in repelling the presumed intention to create a trust, so they may also have the effect of confirming the construction of the words in a doubtful case in favour of the establishment of a trust. In one case the testator, after giving the interest of his property to his wife for life, and then the bulk of it to W. W. Foly, the son of a deceased nephew, added, "It is my particular wish and request that

treated the doctrine as peculiar to wills (where greater latitude is allowed in searching for the intention); and this seems to have been the impression of Mr. Fonblanque, ii. p. 36, and of Mr. Justice Story, Comment. on Eq. Jur. § 1068.

(a) Lord Cottenham, *Lawless v. Shaw*, ubi *infra*, dictum of Lord Thurlow, *Harland v. Trigg*, 1 Bro. 143; and see *Meredith v. Heneage*, Dom. Proc. 1 Sim. 550, *ibid.* to the same effect.

(b) Lord Langdale, 3 Beav. 172.

(c) Lord Loughborough, *Meggison v. Moore*, 2 Ves. J. 632-3.

(d) Lord Langdale, *Knight v. Knight*, 3 Beav. 172; in which case the subject was very fully considered.

(e) Lord Cottenham, C., *Foley v. Parry*, 2 My. & K. 144-5.

(f) See *Lawless v. Shaw*, 5 Cl. & Finn. 147, 153-4; and *Wright v. Atkyns*, Turn. & R. 158; and *Keroll v. Cottee*, before Lord Cottenham, 13 Jan. 1847.

my dear wife and Walter Williams (who was the grandfather of the said W. W. Foley) will superintend and take care of his education, so as to fit him for any respectable profession or employment." Evidence was entered into to show the previous acts of the testator in relation to the claimant, and it was held upon the intention to be collected from the general scope of the will and the circumstances, that W. W. Foley was entitled to be maintained out of the life interest of the widow during his minority, regard being had, as to the amount, to the fortune given to him by the will (a).

One most important feature, as deduced from the *authorities*, even where there may be all the requisites in other respects, is, whether the testator has not intended, looking to the whole context (b), that the act shall be a matter of discretion only, to be exercised or not at the pleasure of the donee, or as it may or may not suit his own convenience or inclination (c). The rule as laid down by Lord Alvanley and approved by Lord Cottenham is, that if a testator shows a desire that a thing shall be done, unless there are plain express words or necessary implication that the testator *does not mean to take away the discretion* (d) but *intends to leave it to be defeated*, the party shall be considered as acting under a trust (e).

Where from the different parts of the instrument it appears that the words are expressive of a mere expectation or wish (f) no trust will arise; as where the words are, that the donee will be kind to, or remember certain objects or classes (g), or the like; or where the donor

(a) *Foley v. Parry*, 5 Sim. 146; affirmed in appeal, 2 My. & K. 139, 146; and see *Broad v. Bevan*, *infra*.

(b) See *Meggison v. Moore*, 2 Ves. J. 633.

(c) *Knight v. Boughton*, in Dom. Proc., viii. Jurist, 925-6, 1844.

(d) See *Podmore v. Gunning*, 7 Sim. 665.

(e) *Malin v. Keighley*, 2 Ves. J. 335, affirmed *ib.* 533; *Knight v. Boughton*, *ubi sup.* Another passage was cited by Lord Lyndhurst, C.: "Whenever any person gives property and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it." Mr. Justice Story, referring to 1 Sim. 551, observes on this passage, "That it is open to some criticism;" indeed it is plain that the passage is defective.

(f) See 3 Beavan, 172.

(g) *Bardswell v. Bardswell*, 9 Sim. 319; *Pope v. Pope*, 10 Sim. 1; *Curtis v. Rippon*, 5 Mad. 434; other cases to this effect are cited, Lewin on Trusts, p. 69. The case of

Bardswell v. Bardswell was to the following effect:—Charles Bardswell, by will, gave all his estate and effects, both real and personal, to his son, Charles Bardswell, his heirs, executors, administrators, and assigns, to and for his and *their* own use and benefit, "*well knowing*" he will discharge *the trust* reposed in him by remembering his, the testator's, sons and daughters, William, Edmund, Martha, Eliza, and Maria; Charles Bardswell was also appointed executor. The Vice-Chancellor of England said the expressions, "*well knowing*," would have created a trust if it were pointed out *who* were the parties to take, and *what* they were to take; but the V. C. held that the testator had given the property to his son *absolutely*, and had given a *recommendation* only of his other children to the *kindness* of his son. He observed that the words of "*gift*" included executors, &c., and the words of "*trust*" related only to the son, p. 323. The manner in which the alleged trust was to be executed was left entirely to the son. His Honour disposed of the objection that a trust was impressed on the property and no trust

uses such expressions as trusting to the justice of his successors, and it is to be collected that it is their own sense of justice on which he relies (a). When the testator recommends, but adds that he does not absolutely enjoin, it is clear that the expressions are to be taken as precatory only and not imperative (b).

If it appears from the context that the first taker was intended to have a discretionary power to withdraw the whole or any part of the subject from the object of the wish or request (c), or if there are any words by which it is expressed or from which it can be implied that the first taker may apply any part of the subject to his own use, it will not be held that a trust is created (d). In the case of *Wynne v. Hawkins* (e) the testator, after giving to his wife the whole of his property, which he considered was only sufficient for her decent maintenance, added, "not doubting but that she will dispose of *what shall be left* at her death to our two grand-children." The wife died, and what was left might, of course, have been ascertained; but as on the context it was uncertain what property was subject to the confidence, for she might in her lifetime have disposed of the whole, Lord Thurlow, therefore, held that no trust was created (f). So if the recommendation is so worded that it necessarily implies a discretion which must be governed by the exercise of the donee's own individual judgment (g), it will not be treated as a trust; and in precatory as well as direct trusts, there may be a discretion so given to a trustee, that in the event of there being no trustee to exercise it, that trust cannot be exercised by the court (h). Thus, where the intention expressed was that after the death of the testator's son his widow should dispose of his property to such of his relations as should then stand most in need of it, and the widow died in the lifetime of the son, Sir J. Leach held that the trust intended never vested in her, but entirely failed, and that the testator must be considered as having died intestate (i).

declared (so that it must go to the next of kin on the doctrine of resulting trust), saying the testator had himself declared what the trust was, and it was no trust.

(a) *Knight v. Knight*, 3 Beav. 154, 176-7.

(b) *Young v. Martin*, 2 Y. & Coll. N. S. 582, 590.

(c) *Lechmere v. Lavie*, 2 M. & K. 201; see *Bland v. Bland*, 2 Cox, 354; *Pope v. Pope*, 10 Sim. 5; *Knight v. Knight*, 3 Beav. 174, and cases there cited; *White v. Briggs*, Lord Lyndhurst, 15 Law J. Chanc. 182.

(d) Lord Langdale, *Knight v. Knight*, 3 Beav. 173.

(e) 1 Bro. 179.

(f) The cases of *Pushman v. Filliter*, 3 Ves. 7; *Bland v. Bland*, 2 Cox, 349, 354; *Atty.-Genl. v. Hall*, cited *ib.* 355; *Sprange v. Barnard*, 2 Bro. 385; *Eade v. Eade*, 5 Madd. 121; *Horwood v. West*, 1 Sim. & S. 389; and many other cases have been decided on the same principle.

(g) As a recommendation to a wife to give a certain sum to each of her daughters who shall behave dutifully, *Otway v. Otway*, quoted in *Malin v. Keighley*, 2 Ves. J. 530-1.

(h) See *Ellison v. Ellison*, 6 Ves. 663, Ld. Eldon.

(i) *Ray v. Adams*, 3 My. & K. 244.

If there are annexed to the gift any expressions that may embrace any uncertain amount of property which the donee may obtain otherwise than through the gift to which the words of expectation or the like are annexed, it has been held that the words of recommendation in such a case will not create a trust (*a*); though where a trust is clearly fixed upon a specific sum, being the donor's own property, it will not be defeated because the testator has attempted to fix the same trust upon other distinct property over which he has no control (*b*).

Where the testator in one part of the will gives the property unfettered, it may be taken as a general rule, that the legatee is not bound to comply with a subsequent recommendation (*c*). Where a person gave all his property to his wife to and for her own use and benefit and *disposal* absolutely, and in a subsequent part of the will earnestly conjured her, under the advice of his executors, to proceed forthwith to

(*a*) *Lechmere v. Lavie*, 2 My. & K. 201; here there was nothing to prevent the donees from disposing of the whole of the property given during their lives. In *Flint v. Hughes*, 6 Beav. 342, the words "whatever she can transfer" were considered as too vague and indefinite to create a trust. In *Cunliffe v. Cunliffe*, Ambler 686, the testator gave his sugar houses, stock in trade there, and the appurtenances thereto belonging, to his son, Ellis Cunliffe; nevertheless, in case his son Ellis should happen to die without a son or sons, then, and in such case, he recommended it to him to devise the said sugar houses and joint stock in trade there to his brother Robert. Ellis died, leaving two daughters, but no son; the Lords Commissioners decided that no trust was attached, on the ground, as reported in Ambler, that the words were mere words of recommendation: if that was the ground the case is overruled by *Pierston v. Garnett*, 2 Bro. 43. But according to Lord Rosslyn, in *Malim v. Keighley*, 2 Ves. J. 533, "it did not turn upon the interpretation of the words of recommendation, but upon the nature of the property over which Ellis had full power to spend or waste it." If so, the principle of the decision is supported by subsequent cases: *Bland v. Bland*, 2 Cox, 351, 354; and *Attorney-Gen. v. Hall*, cited 355 & 356; *Bradley v. Westcott*, 13 Ves. 451, before noticed, and the other cases cited in Blunt's note; but the doubt is whether, as there was property of a *permanent* nature, namely, the sugar houses, &c., also property which was necessarily *fluctuating*, as was the stock in trade, and the recommendation applied to both as one entire subject, it was void altogether, because there was a part of the property to which the trust could not

attach—to say that Ellis might have spent and wasted the sugar houses is assuming the question. It is not precisely the same question as where on the context it is clear that the donee was to be at liberty to dispose as he pleased of the whole or any part of the property; see *Lemaitre v. Banister*, 2 Bro. 40; *Pope v. Pope*, 10 Sim. 6; 3 Beav. 174; *Tibbitts v. Tibbitts*, 19 Ves. 664; *et v. infra*, p. 71. If a person recommends that his own property and that of some one else, over which he has no control, should be settled; that does not prevent the trust from attaching on his own property; *Ford v. Fowler*, 3 Beav. 147, cited above.

(*b*) Lord Langdale, *Ford v. Fowler*, 3 Beav. 147; there was a separate sum of 10,000*l.* on which the recommendatory trust was held clearly to attach.

(*c*) *Meredith v. Heneage*, 1 Simons, 542; and see *Harland v. Trigge*, 1 Bro. 142; and 3 Beav. 174. In a leading case relating to direct trusts, the testator gave some real estates to his sons in fee, and directed his personal estate to be laid out in lands by his wife, (who was executrix,) to be settled on his two sons; he proceeded in these words—"my wife shall receive the rents and profits of all my estate, until my children attain the age of 21 years, and to maintain my children as she thinks convenient, and when they do come of age, she shall not be liable to give them any account of the rents and profits by her received at that time."—Lord Mansfield held, and his decree was affirmed in the House of Lords, that the interest of the moneys to be laid out, as well as the rents of the real estate was, by the will, given absolutely to the mother, and that the sons had no interest in it. *Thurston v. Essington*, 1 Jac. 361, n.

make *ample provision* for their only child and granddaughter; this was held to amount to a mere wish (a).

Another exception is, where the motive assigned is beneficence towards the donee; thus—where a person gave an estate to his daughter as a reward for her affectionate, unwearied, and unexampled attention to the testator, superadded words of recommendation were held not to create a trust (b).

If a person is in express terms appointed receiver, or auditor, or manager of the testator's estates, with a salary or other remuneration, the court will act upon such direction, provided misconduct in the execution of his duties be not proved against the person so appointed (c). Questions have arisen as to recommendatory words as applied to such a subject. Lord C. Sugden held, chiefly on the authority of *Tibbitts v. Tibbitts* (d), that the words "it is also my particular desire that my executors, whilst acting in the management of all or any of my affairs under this my will, as also my friend, William Shaw, when he shall enter into the perception of my said rents of Kentstown, &c., shall continue the said B. E. Lawless in the receipt and management thereof, and likewise shall employ and retain him in the receipt, agency, and management of the rents and issues of such other lands and premises as *shall and may be purchased and settled* in pursuance of the directions hereinbefore contained, at the usual fees allowed to agents, he having acted for me since I became possessed of the said estate fully to my satisfaction;" but the House of Lords reversed the decision, holding that the court could recognize these expressions not as imposing an obligation or *trust*, but only as importing advice (e). In a later case, where the testator used these words, "and inasmuch as my estate and property will require more management than I can expect of my trustees personally to bestow, it is my wish and desire that the hereinbefore-named Thomas Finden, in whose judgment and integrity I place great confidence, be appointed for all the purposes for which they or he, my said trustees or trustee, may have occasion for an agent, receiver, and manager of my estate and property;" and in case Finden should die or desire not to act, power was given to his wife's nieces (who were entitled to the rents, subject to an annuity) to appoint some other person. The Vice-Chancellor of England was

(a) *Winch v. Bruton*, viii. Jurist, 1088; Vice-Chan. of England, 1844, v. *supra*, p. 23.

(b) *Ex parte Payne*, 2 Younge & Coll. 636.

(c) *Hibbert v. Hibbert*, 3 Meriv. 683; *Williams v. Corbet*, 8 Sim. 349.

(d) *Supra*, p. 70, n. (a).

(e) *Lawless v. Shaw*, 1 Llo. & G. temp. Sugd. 154, 170 (reversing Lord Plunket's decision); S. C. Dom. Proc. 5 Cl. & Finn. 129.

clearly of opinion that it was imperative on the trustees to employ Mr. Finden (*a*); and that the ultimate decision of *Shaw v. Lawless*, in the House of Lords, did not govern this case: Lord Cottenham was as clearly of opinion that it did, and he reversed the Vice-Chancellor's decision (*b*).

If a person wills and desires that his devisee shall sell the estate in a particular way, as to a college, such a devise does not sever the beneficial interest, but is only an injunction to the devisee to enjoy the property in a particular manner; there is no resulting trust of the price for the testator's representative (*c*).

These illustrations may suffice to show the nature of the rules of construction and interpretation which have been applied, in order to ascertain the intention with which the words of recommendation, and the like, are used, and to give a general view as to when such words will be treated as imperative, and therefore as creating a trust.

But there are other requisites necessary for creating a recommendatory as well as a direct trust, of which the chief is certainty (*d*). If the objects are not such as can be ascertained with sufficient certainty,—if the giver uses a vague description of the object,—that is, a description by which the giver neither clearly defines the object himself nor names a distinct class out of which the first taker is to select (*e*), the gift will fail for want of certainty. It was observed by Lord Eldon, that wherever the subject to be administered is trust property, and the objects for whose benefit it is to be administered are to be found in a will not expressly creating a trust, the indefinite nature of the objects is always used by the court as evidence that the mind of the testator was not to create a trust, and the difficulty that would be imposed upon the court to say what should be so applied, or to what objects, has been the foundation of the argument that no trust was intended (*f*).

The Court of Chancery, with a view to prevent bequests of this description from being defeated, has established certain rules of interpretation for limiting, where it is practicable, general expressions as

(*a*) *Finden v. Stephens*, x. Jurist, 997 b.

(*b*) *S. C.* before Ld. Cottenham, x. Jurist, 1019. It was considered by the Lord Chancellor that the powers previously given to the trustees, for letting &c., were inconsistent with an independent manager being forced upon them, *ibid.* The Lord Chancellor adverted to another ground, namely, that it was only when the trustees had occasion for an agent, that Mr. Finden claimed a right to be employed, and a person cannot file a bill on

the probability of a future title upon an event which may never happen. Lord Redesdale, p. 156-7.

(*c*) Lord Hardw., *Hill v. Bishop of London*, on re-hearing, 1 Atk. 619; approved by Lord Cottenham, *Wood v. Cox*, 2 My. & Cr. 694.

(*d*) *Supra*, vol. i. p. 499.

(*e*) 3 Beav. 174.

(*f*) Lord Eldon, 10 Ves. 536; and Turn. & Russ. 159, to the same effect; and see *Harding v. Glynn*, 1 Atk. 470, *infra*.

to the objects, so as to confine them within such limits as will enable the court to carry into effect the intention of the testator as far as it can be reasonably accomplished.

The words "family" and "relations" are the expressions which are most common in devises of this description, and the court as to each has at length established certain rules of interpretation, which may be applied in most cases so as to give to those expressions a reasonable and sensible effect; not that these rules are peculiar to precatory or indeed to trusts of any description, inasmuch as the courts of law, as will be seen by some of the references which follow, in those instances in which they have had to construe words of this description in wills, have adopted the same principle of interpretation. The courts in this, as in every other instance, with the exceptions before alluded to (a), adhering to the rule that there should be uniformity of construction in all the courts.

It is evident, said Lord Langdale, that the word "family" is capable of so many applications, that if any one particular construction were attributed to it in wills, the intention of testators would be more frequently defeated than carried into effect. Under different circumstances it may mean a man's household, consisting of himself, his wife and children, and servants; it may mean his children, excluding the wife; or in the absence of wife and children it may mean brothers and sister, or his next of kin; or it may mean the genealogical stock from which he may have sprung. All these applications of the word, and some others, are found in common parlance; and in the case of a will we must endeavour to ascertain the meaning in which the testator employed the word, by considering (b) the circumstances and situation in which he was placed, the object he had in view, and the context of the will (c). This word, therefore, has had different meanings given to it in different wills, and according as it is directed to real or to personal estate, or to a fund in which both are mixed up (d). In fact, by the settled rules of construction, the same word may have

(a) Vide *supra*, vol. i. p. 525.

(b) According to the settled rules of construction, see vol. i. p. 755, and *Wright v. Atkins*, Turn. & R. 162-3.

(c) Lord Langdale, *Blackwell v. Bull*, 1 Keen, 181. Thus applying the above principles, the wife, on the *intention*, was declared entitled to share with the children in the real and personal estate devised; and see *Woods v. Woods*, 1 M. & C. 408; the words were "the overflush," (i. e. of the proceeds of the

sale, which was directed in a given event,) "to my wife towards her support and her family," p. 402.

(d) *Cruwys v. Colman*, 9 Ves. 323; *M'Le- roth v. Bacon*, 5 Ves. 159; *Wright v. Atkins*, Turn. & R. 154; *Morton v. Tewart*, 2 Y. & Coll. N. S. 81; *Doe dem. Chatteway v. Smith*, 5 Maule & S. 126-130, where the prior cases are observed upon particularly; *Pyot v. Pyot*, 1 Ves. 335.

different meanings in the same will, or even on the same clause, especially in reference to different subjects (a).

It was held by the courts of law, in the time of Dyer, that the words, “or else to remain to the house” (*scilicet familie*, as it was construed), must be intended in a devise of real estate to mean the chief and eldest and most worthy of the family, that is, the heir according to the course of the common law; and the Court of Chancery has adopted the same rule of interpretation in parallel cases (b); but when the proceeds of the sale of real estate is to go to the family, it will not be confined to the heir (c).

The objects to which the testator intended to apply the word “family” may sometimes be collected from the will itself; in such case his interpretation will of course be followed. Where a person devised his real estate to trustees in trust to receive the rents and make certain annual payments, and to distribute the remainder, if any, amongst certain “families,” according to their circumstances, &c., adding, “whose names are hereinafter mentioned, viz., William Copley, &c.” the Vice-Chancellor Wigram strongly inclined to think that upon this will the testator had put his own construction—that the persons named were the objects. He added, but if that were not so the cases of *Barnes v. Patch* (d), *Cruwys v. Colman* (e), and *Grant v. Lynam*, (f) were authorities that the court can and will put a construction on the word “family,” when it can reasonably be done, rather than that a devise should be void (g).

In some cases the rule laid down by the Statute of Distributions, 1 Ja. II. c. 17, has been called in aid as the best measure for setting bounds to such general words (h).

Where personal estate was given by will to a female for life, and with the testator’s absolute desire that she should bequeath the same to those of her own family who should behave well (thus giving

(a) *Doe v. Smith*, 5 Maule & S. 131-2; *Forth v. Chapman*, 1 P. W. 663; *Sheffield v. Lord Orrery*, 3 Atk. 288; *Stafford, Lord*, v. *Buckley*, 2 Ves. 180.

(b) Dyer, 333, No. (29), 2 Vern. 381, approved by Sir T. Clarke, *Crossly v. Clare*, Amb. 397; recognized by Lord Eldon, *Wright v. Atkyns*, Turn. & R. 156; Lord Ellenborough, *Doe v. Smith*, 5 M. & S. 129, 132. In *Doe v. Over*, 1 Taunt. 263, a devise of real estate, to relations, was held to mean those who would take according to the statute.

(c) *Woods v. Woods*, 1 My. & Cr. 408. See the note to Lewin on Trusts, p. 581-2, as to the construction, where the words “poor,”

or “necessitous,” or the like, are added, *et infra*.

(d) 8 Ves. 604, 606; there held that family meant children, and that they took *per capita*, the Statute of Distributions did not come in question.

(e) 9 Ves. 319.

(f) 4 Russ. 292.

(g) *Liley v. Hey*, 1 Hare, 583. Inquiries were directed to ascertain the state of the families of the several persons named. Family may extend to grandchildren as well as children. *Robinson v. Waddilow*, V. C. Eng. 8 Sim. 137.

(h) *Roach v. Hammond*, Prec. Ch. 402.

the donee a power coupled with a trust), and the donee made no disposition, the word family, on the circumstances and context, was held to mean kindred, and a trust was declared to exist for the benefit of the next of kin, according to the Statute of Distributions (a).

Where a testator directed the remainder of his estate "to be equally divided between brother Lancelot's and sister Esther's families," Sir W. Grant held, that the children were to take exclusive of the parents, and *per capita*, not *per stirpes* (b). Indeed, generally speaking, neither the husband (c) nor the wife (d) will be considered as included under the word family. But the husband has been included on the intention to be collected from the context, and of course the wife may be included in the same manner (e).

There is, however, as Lord Eldon observed, still great difficulty in giving a definite meaning to the word "family," except in those cases in which decision has affixed a definite meaning to the word (f). A gift of an estate to a person absolutely, hoping he will *continue it in the family*, has been held not to be sufficiently specific to enable the court to declare who were the objects (g).

The term "relations" is still more indefinite than the word family; but the court, upon grounds of convenience and to prevent the devise being void for uncertainty where the execution of a trust in favour of relations has fallen to the court, and where the context left the word undefined, has, in this instance also, adopted the rule of the Statute of Distributions and given the property, when personal, to the next of kin, according to the statute, with the same exclusion of the husband and wife (h). The statute, however, is only taken as limiting the

(a) *Cruwys v. Colman*, 9 Ves. 319, *et v.* 3 Swanst. 321.

(b) See *Barnes v. Patch*, 8 Ves. 606; and see *Cruwys v. Colman*, 9 Ves. 325; and *Wood v. Wood*, 3 Hare, 65; and 1 My. & K. 408.

(c) See *Brandon v. Brandon*, 3 Swanst. 321.

(d) "The wife cannot claim, the statute providing for her by the name of wife." Lord Thurlow, *Green v. Howard*, 1 Bro. 33.

(e) *M. R., M^{re} Lerott v. Bacon*, 5 Ves. 166-7, 8; and see 5 Maule & S. 130; and 4 Russ. 297; in *Wood v. Wood*, 3 Hare, 65, there was the additional reason for excluding the wife on the intention.

(f) *Wright v. Atkyns*, Turn. & R. 156, *et seq.*; and see *Liley v. Hey*, 1 Hare, 582.

(g) *Harland v. Trigg*, 1 Bro. 144. A devise of a moiety of a residuary estate "to my brothers and sister's family" was, though

unwillingly, held to be void, (*Doe v. Joinville*, 3 East, 172,) on the ground that there was not any certain means of defining what persons should take.

(h) *Cruwys v. Colman*, 9 Ves. 325; *Cole v. Wade*, 16 Ves. 27, 19 Ves. 400; *Pope v. Whitcombe*, 3 Meriv. 689; *Brandon v. Brandon*, 3 Swanst. 319-20; *Crossly v. Clare*, Ambl. 397. In *Edge v. Salisbury*, Ambl. 70, *v. infra*, "nearest relations" received the same construction. In the following, amongst other cases also, legacies of personalty and proceeds of real estate given to relations were held, according to the general rule, to go to the next of kin, not including the wife or husband, where the gift was to *all* the relations: *Carr v. Bedford*, 2 Chanc. Rep. 77; *Roach v. Hammond*, Prec. Chan. 402; *Thomas v. Hole*, Forrest, 251; Anon. 1 P. Wms. 326 (rule admitted); *Green v. Howard*, 1 Bro. 32;

range of objects; there being no indication in the will as to the *proportions*, it is considered that the directions of the testator are best observed by making the division amongst the objects let in *per capita*; thus, where there have been brothers and brother's sons, these last have been allowed to take, not by representation, but *per capita* (a).

And where the donee is intrusted with the selection, if he should think fit to execute the trust he may, in making his selection amongst the relations, go beyond the limit of the Statute of Distributions (b). Accordingly, where the testator gave to his wife 500*l.*, adding that it was his will and desire that his said wife might dispose of the same amongst her relations as she by will might think proper, a gift by the wife by will to her sisters for life, towards the maintenance of her children, and after her death to those children was supported (c). So where a person devised 15*l.* a-piece to each of his relations of the father's and mother's sides, the executors paid 15*l.* to Dorothy Smith, one of the next of kin, and four sums of 15*l.* to each of her children, and the payments to the children were held to be good (d).

Where there was a bequest to the nearest relation (e), and another to the nearest and next of kin (f); it was held to carry the money to a surviving brother in exclusion of the children of a deceased brother; but any deviation from the rule of taking the next of kin within the statute has depended on circumstances (g); extrinsic evidence as to

Rayner v. Mowbray, 3 Bro. 234; and see *Spring dem. Fitcher v. Biles*, in the note to 1 T. R. 118.

(a) Lord Thurlow, *Green v. Howard*, 1 Bro. 32. In *Blackler v. Webb*, 2 P. Wms. 383, where money was bequeathed to sons and daughters and grandchildren, it was held that they should all take *per capita*. It is to be observed, it is now settled that where the gift is to the "next of kin," those words are to be construed the nearest of blood, excluding those who would take by representation under the Statute of Distributions. *Elmsley v. Young*, *infra*.

(b) *Supple v. Lowson*, Ambl. 729; *Bennett v. Honeywood*, *ibid.* 708. Dict. Sir W. Grant, 9 Ves. 324; *Mahon v. Savage*, 1 Sch. & Lef. 111, which was a gift, with a power to distribute amongst "poor relations," *Grant v. Lynam*, 4 Russ. 292. In *Pope v. Whitcombe*, *ubi sup.* it was held, that the power of selection only extended to such as were next of kin; (but see *Turn. & R.* 161;) the same construction was given in *Edge v. Salisbury*, Ambl. 70, which was a trust to distribute amongst nearest relations, who might be objects of charity. Mr. Blunt has collected the cases on this subject in his notes to *Edge v.*

Salisbury; and see *Gower v. Mainwaring*, 2 Ves. 87; and the note to *Lewin on Trusts*, p. 581.

(c) *Forbes v. Ball*, 3 Meriv. 437.

(d) *Jones v. Beale*, 2 Vern. 381; this case was decided on previous precedents produced, particularly one of *Arnold v. Bedford*.

(e) *Marsh v. Marsh*, 1 Bro. 293; *Smith v. Campbell*, Geo. Coop. 275; 19 Ves. 400.

(f) *Brandon v. Brandon*, 2 Wilson, C. C. 14; 3 Swanst. 312. Mr. Justice Buller's decision in *Phillips v. Garth*, 3 Bro. 64, by which he let in surviving brothers, together with nephews and nieces, as representing deceased brothers and sisters, *per capita*, under a gift to "next of kin, share and share alike," is stated to be over-ruled by Sir T. Plumer, *Brandon v. Brandon*, *ubi sup.*; and by Sir W. Grant, *Smith v. Campbell*, 19 Ves. 400; see *Elmsley v. Young*, 2 My. & K. 87. In the last-cited case, Sir J. Leach held, that "next of kin" must be taken to mean next of kin according to the Statute of Distributions. *Vide ibid.* p. 88; and see, on this subject, *Lewin on Trusts*, 589-90.

(g) Sir W. Grant, *Cole v. Wade*, 16 Ves. 47; S. C. on appeal, 19 Ves. 425-6, "where the words are to relations, according to their

who the testator intended to embrace under the word relations cannot be admitted.

The word descendants includes all the issue of children as well as children (*a*), this word being construed on a different principle from the word relations or family (*b*). This difference in construction also applies to the nature of the interest given; a gift to descendants or issue not being governed by the Statute of Distributions, as is, as we have seen, a gift to relations or family, the individuals answering the description will take as joint tenants, and not as tenants in common, unless there be words of severance, as equally to be divided or the like (*c*).

The sense of the words as fixed by legal authority, said Lord Thurlow, is not to be altered by [evidence of] the language held on any occasion by the testator, or by his behaviour (*d*).

Where a discretion is vested in the donee of the property, or to whatever extent the family or relations may have an interest in the property, the court will not deprive the person to whom it is given of the exercise of such discretion (*e*); and so where there is an express trust to apply the interest of a trust fund for the benefit of children, in such shares and proportions and in such manner as the trustees or the survivor, his executors, &c., may think proper or advisable. This gives to the trustees a discretionary power as to the distribution, though it does not revoke or in any manner abridge the previous gift, therefore the surplus undistributed will belong to the children (*f*).

Where in such or any similar cases there is a trust or power, or a mixture of both, whether arising on a legal estate (*g*) or reserved

greater need, or 'according to their necessity,' the court has shown greater favour to one." Lord Thurlow, 1 Bro. 33; v. 2 Ves. 110. In *Warburton v. Warburton*, 2 Vern. 421, Com. Dig. Chanc. 4 W. 11, a double share was given to the heir, he having a smaller provision, or, as the report states, "as looking upon him as standing most in need thereof."

(*a*) *Pearson v. Garnett*, 2 Bro. 226; *Crossly v. Clare*, Ambl. 397; more correctly reported 3 Swanst. 320, note; *Parsons v. Baker*, 18 Ves. 476; *et v.* 1 Turn. & R. 162.

(*b*) Lord Thurlow, *Butler v. Strutton*, 3 Bro. 368; *Crossly v. Clare*, Ambl. 397; and Blunt's note; and see 1 Rep. on Leg. 122, *et seq.*

(*c*) *Davenport v. Hanbury*, 3 Ves. 259; 1 Rep. Leg. 138.

(*d*) Lord Thurlow, *Green v. Howard*, 1 Bro. 33. It was proved, in that case, that the testator knew that the word "relations"

meant more than next of kin; but Lord Thurlow held that there was no peculiarity in that will to alter the sense of the word relations; and he confined it, according to the general rule, to next of kin, within the statute; vide *supra*, p. 74. "Friends" may be so used as to mean relations, *Gower v. Mainwaring*, 2 Ves. 88, 89.

(*e*) See *Raikes v. Ward*, 1 Hare, 450; and *Bennett v. Honeywood*, Ambl. 710.

(*f*) *Bevor v. Partridge*, 11 Sim. 233-4.

(*g*) Lord Hardw. *Gower v. Mainwaring*, 2 Ves. 89; *et v.* S. C. 110; v. *infra*, p. 81; but in that case the Lord Chancellor held that a rule was laid down in the will, and the court could make the judgment as well as the trustees. In *Walker v. Walker*, 5 Mad. 426, Sir J. Leach held that where the discretion of trustees is to be exercised upon matter of opinion, the court cannot substitute the master for the trustees, but that it can, where the

to be exercised by trustees solely according to their discretion, the court, as will be noticed more fully hereafter, cannot put itself in the place of those trustees to exercise that discretion; and where the trustees have a power to distribute generally, according to their discretion, without any object pointed out or rule laid down, the court, in cases relating to private persons, does not interpose; and in the case of an absolute precatory gift to which such a discretion is annexed, the donee, according to the ordinary rule (*a*), would take absolutely; and if he exercise the discretion it is his own gift.

But where the act is necessary and proper to be done in the execution of the trust, the discretion vested in the trustees as to the mode and the like, will not be suffered to alter or affect the rights of the parties (*b*). It may be observed, that a discretionary trust cannot be delegated even to a co-executor or co-trustee (*c*).

If the giver leaves it uncertain as to what *interest* the object or class of objects is to take, in such case also there is such a want of certainty that a trust cannot arise (*d*).

As regards the subject as well as the objects, general expressions will be sufficient, if, from the context, with the aid of the ordinary rules of interpretation and construction, the particular subject intended can be ascertained. If a testator gives the residue of his estate, after certain purposes are answered, to a particular person by way of recommendatory trust, it has been considered that the residue of the property, though a subject to be ascertained, is nevertheless so clearly and certainly ascertainable, so capable of being made certain, that the rule is applicable to such cases (*e*). A power of selection in the donee or trustee may well be given so as not to make the gift objectionable as uncertain (*f*); and if a testator desires his executor to give to a particular person a certain sum of money, it will be treated by the court as a legacy, though the will should leave it to the executor's own free will when, how, and in what manner it shall be paid (*g*).

In those cases where a trust is raised by recommendation to

discretion is to be exercised on *matter of fact*, as to which distinction, see Hill on Trustees, 501.

(*a*) Vide *infra*, p. 70.

(*b*) *Crewe v. Dicken*, 4 Ves. 97; *Lewin*, 236.

(*c*) *Woods v. Woods*, 1 My. & Cr. 410.

(*d*) See 3 Beav. 174.

(*e*) *Lord Langdale, Knight v. Knight*, 3 Beav. 173.

(*f*) See *Brown v. Higgs*, 4 Ves. 716, corrected from Reg. Lib. 4 Russ. 296-7; affirmed,

8 Ves. 561, by Lord Eldon and by the House of Lords; *Burrough v. Philcox*, 5 My. & Cr. 73, where a person intreated the legatee to leave the property to the children or the grandchildren. *Prevost v. Clarke*, 2 Mad. 458 (in the statement the word *and* is used, but the case was argued as if it had been *or*). This was held to give a power of selection, not to render the gift void for uncertainty, and see *Jones v. Torin*, 6 Simons, 255, *et v. infra*.

(*g*) *Brest v. Offley*, 1 Rep. Ch. 246.

leave the property, after the first taker's death, to certain persons, that—equally as where the trust is direct and explicit—does not prevent the interest from vesting at the death of the testator (*a*); and those persons take a vested interest, subject to be divested by appointment; where the children of a particular person are the objects, if there be no appointment, children born after the death of the testator, and the representatives of those who may have died in the lifetime of the first taker, are entitled together with the survivors (*b*). Where, however, the testator expressed his will and desire to be that one-third of the principal of his estate and effects should be left entirely at the disposal of his wife, amongst such of *her* relations as she might think fit after the death of her sisters; this was held (she having made no disposition) to be a trust for her next of kin at the time of *her* death (*c*).

There is a material difference in respect of certainty of objects between a gift for charitable purposes and one for the benefit of private persons.

If a trust be created directly or by precatory words in favour of charity or for charitable purposes, the court will give effect to it, though the particular objects be not specified (*d*), or be left to the discretion of the donee. The court in these cases exercising a discretion, as having the general government and regulation of charity (*e*): if the *subject* be uncertain, a trust for a charity, it is presumed, can no more be carried into effect than one for individuals.

It cannot be presumed that a legacy intended to be given to a corporation, for certain purposes not ascertainable, is in trust for charitable purposes, so as to save the legacy from being void for uncertainty, though there is the strongest probability that such a legacy would not be given for any private purpose (*f*). The general subject of charitable gifts will be more fully considered hereafter.

The circumstance that in trusts arising purely from recommendatory

(*a*) Lord Thurlow, *Rayner v. Mowbray*, 3 Bro. 235, *et v. infra*.

(*b*) *Malin v. Keighley*, on further directions, 3 Ves. 150; *S. C.* 2 Ves. J., 333, on original hearing; and *ibid.* 529, on appeal.

(*c*) *Birch v. Wade*, 3 Ves. & B. 198; and see *Harding v. Glynn*, 1 Atk. 469; 8 Ves. 571-2, from Mr. Joddrell's note; and 2 Sugd. on Pow. 160.

(*d*) See Lord Eldon's judgment in the lead-

ing case of *Moggridge v. Thackwell*, 7 Ves. 69, 78, 83, 86, affirmed in the House of Lords, 13 Ves. 416; *Baker v. Sutton*, 1 Keen, 224; and see *Townsend v. Carns*, 13 Law J., N. S. Chanc. 169; see Hill on Trustees, p. 41, 42; *et v. infra*, "Charities."

(*e*) Lord Hardw. *Gower v. Mainwaring*, 2 Ves. 89; *infra*; and the cases in the last note.

(*f*) *Corporation of Gloucester v. Wood*, 3 Hare, 131.

words, the property is absolutely and *primâ facie* beneficially given (a) to the person sought to be affected by the alleged trust (and unless it be so the doctrine does not apply (b)), has caused a material distinction to be taken between trusts of this description and trusts created by positive words of command or direction, in cases where the intended trust fails in the whole or in part. In recommendatory trusts, if the words for any reason do not amount to a trust, or the intended trust fails in the whole or in part, the absolute interest remains in the donee; or if the trust established does not exhaust the property given, the donee retains, in virtue of the gift, so much of the property as is not affected with the trust, as has been adverted to in the former volume (c); whereas if property is given to a person as trustee, and only as trustee (d), if no trust be declared, or the trust declared or purporting to be declared should fail, then there is a resulting trust for the donor or those claiming under him; the donee can claim nothing beneficially, nothing being given to him but as trustee.

But words importing direct and absolute gifts may be so explained by the context as to show that these terms were only used in order that the donee might have absolute power to effect some purpose of trust ineffectually pointed out by the testator; thus, where a sum of money due on note was bequeathed to a married woman for her sole use and benefit, independent of her husband, for the express purpose of enabling her to present any part of it to either branch of the testatrix's family, as she might consider most prudent,—the testatrix adding, that in the event of the donee's death she should be empowered by deed or will to dispose of the money and the interest to either branch of the family she might consider most deserving,—it was held by Lord Langdale, and afterwards in appeal by Lord Cottenham, that the donee was merely the donee of a discretionary power in favour of others; that the bequest was not a gift subject to a charge, but an actual gift upon trust, and that as the trust failed from being indefinite, there was a resulting trust for the testatrix, and that the property formed part of her residuary estate (e).

(a) *Wood v. Cox*, 2 My. & Cr. 684.

(b) See *Bull v. Vardy*, 1 Ves. J. 270.

(c) Vol. i. p. 499.

(d) See the judgment of Sir W. Grant, *Ommaney v. Butcher*, Turn. & R. 270-1.

(e) *Stubbs v. Sargon*, 2 Keen, 597, on ap-

peal; 3 My. & Cr. 514; *Fowler v. Garlick*, 1 Russ. & M., which was a gift of a *residue* to the executors, upon an indefinite trust, proceeded upon a similar principle; the executors were held to be trustees for the next of kin. Lord Eldon.

SECTION VI.—*Powers in the Nature of Trusts.*

Distinction between Trusts and Powers.

Power may partake of the Nature of a Trust.

What Circumstances will give to a Power the Character of a Trust.

General Intention in favour of a Class, with Power to select the Individuals.

Instances where Powers have been held to be coupled with a Trust, and the contrary.

Discretionary Power given to secure an Act being done under the prudent Superintendence of another.

Hewett v. Hewett.

In what Cases the Court may exercise Discretion given to Trustee.

Gower v. Mainwaring.

Warburton v. Warburton.

Where the Court acts, the Maxim that "Equality is Equity" is followed.

Doctrine as to Illusory Appointments abolished.

Discretion controlled when fraudulently exercised.

SOMETIMES, as has been already noticed, a trust is imposed where at first sight a mere power (a), or a mere authority to exercise a discretion as to the disposal of property, would seem to be given. This most frequently occurs in wills.

Trusts and powers are in themselves of a perfectly distinct character. Simple powers are not imperative, they leave the act to be done at the will of the party to whom they are given; and as regards such powers, those at least which are purely discretionary and depend on opinion and judgment, the court, unless in cases of fraud, has no jurisdiction to interfere (b). Trusts are always imperative and are obligatory on the conscience of the party intrusted (c). A power given to a grantee for life to appoint to such one of a class of objects, answering to a particular description as the donee may select, is not a trust, but a mere power, and may be extinguished by a recovery (d). But a power may partake of the nature of, or be coupled with a trust, and the Court of Chancery will enforce the execution of such a power even in

(a) As to what a power is, see vol. i. p. 486.

(b) *French v. Davidson*, 3 Mad. 402; *Walker v. Walker*, 5 Mad. 427, and cases there cited.

(c) Lord C. J. Wilmot, *Wilmot's Reports*, 23. *Godolphin v. Godolphin*, 1 Ves. 21; see 2 Sugd. Pow. 158, 7th ed.; *Brown v. Higgs*, 8 Ves. 569, 570, 574; *Pushman v. Filliter*, 3 Ves. 7; *Morice v. Bishop of London*, 10 Ves. 536, et v. 1 Eden, 415, 419.

(d) *Smith v. Death*, 5 Mad. 371, 373-4. The

son, who was tenant in tail in default of appointment, joined in the recovery. The reason given by the Vice-Chancellor was that such a grantee or devisee could deal with the estate in respect of his freehold interest, and his dealing with the estate, so as to create interests inconsistent with the exercise of his power, must extinguish his power, upon the general principle that a person is not permitted to defeat his own grant.

favour of volunteers (a), and though the power should be extinguished at law by the death of the donee of the power or otherwise (b).

It may be stated in general that where, in case of a will or other instrument, the donor of the power shows a general intention in favour of a class, and a particular intention in favour of individuals of that class, and the particular intention fails by reason of no appointment being made by the donee of the power, the court will treat it as a trust (c), and carry into effect the general intention in favour of the class (d). The scope and object of the disposition taken together will necessarily influence the construction in each particular case (e); but though the power may extend to the selection of the objects as well as the distribution, that alone will not prevent a trust or an implied gift attaching in favour of the class in the event of the discretion not being exercised; as where the power is to appoint to "such" of a class as the donee of the power may select, more especially if children or relations are the objects (f): "such" may be introduced, in order to give a power of exclusive appointment (g). Lord Hardwicke's decision in the *Duke of Marlborough v. Lord Godolphin*, which has been the subject of much discussion, does not appear to controvert the rule as above laid down; for it was upon the intention to be collected from the scope and object of the will and the codicil, that his lordship held that no one was intended by the testator to take but those to whom there should be a gift by the Countess as well as himself; he considered that the power was introduced to secure the respect of the children for the Countess, to whom the testator had originally given the property absolutely (h).

(a) *Tollett v. Tollett*, 2 P. W. 490; 2 Sugd. Powers, p. 158; *Earl of Bute v. Stuart*, *sup.* p. 65.

(b) *Brown v. Higgs*, 8 Ves. 570, 574; *Richardson v. Chapman*, 5 Bro. P. C. 318.

(c) Sir E. Sugden observes, ii. 161, that there is a class of cases which it is difficult to distinguish, where the power is not treated as in the nature of a trust, nor is there an express gift to the objects, but the gift is so framed as to contain in itself both a power, and a gift by implication to the objects in default of appointment; but see 1 Chance, p. 74.

(d) *Brown v. Higgs*, 8 Ves. 561; 5 My. & Cr. 92; *Crucys v. Coleman*, 9 Ves. 323; *Burroughs v. Philcox*, 5 My. & Cr. 73, 92; *Griffith v. Evan*, 5 Beavan, 241; *et v. Wits v. Boddington*, 3 Bro. 95; 5 Ves. 503; *Birch v. Wade*, 3 Ves. & B. 198; and *Kennedy v. Kingston*, 2 J. & W. 434.

(e) Lord Eldon reconciles Lord Hardwicke's decision, in *Duke of Marlborough v. Godolphin*, 2 Ves. 61, with *Harding v. Glynn*, 1 Atk. 469, (from Reg. Lib. 5 Ves. 501,) on

the application of this rule of construction, 8 Ves. J. 576, *et v.* 5 Ves. 506.

(f) See Lord Eldon's observations in *Brown v. Higgs*, 8 Ves. 576; *Harding v. Glynn*, 1 Atk. 469; 1 Ves. 10; 2 Ves. 66; *Birch v. Wade*, 3 Ves. & B. 198; *Casterton v. Sutherland*, 9 Ves. 446, case of real estate; and *Wits v. Boddington*, 3 Bro. 95; the words were "to some one or more" of the children of the testator's only child. In *Brown v. Higgs*, *ubi sup.* the testator empowered his nephew to "employ the remainder of the rent for such children of my nephew B. as my nephew A. shall think most deserving, and that will make the best use of it, or to the children of my nephew C. if any;" 4 Ves. 709; and see *Burroughs v. Philcox*, *ubi sup.*, and 2 Sugd. Pow. 163-4.

(g) 1 Chance, 89, § 233; *Kemp v. Kemp*, 5 Ves. 857, Lord Alvanley. "Amongst" raises a trust for all, *ibid.* p. 858.

(h) *Duke of Marlborough v. Godolphin*, 2 Ves. 61, 74, 83; 5 Ves. Jun. 506. See 2 Sugd. Pow. 162-3; *Lewin*, 586; and 5 My. & Cr. 90, 91.

If a fund be given to certain objects, in such *proportions* as a third person shall appoint, it is clear that if no appointment be made, the objects named will take equally. And if a power be given to a person to leave property given to him for life to certain persons named, in such *manner* as he shall by will give and bequeath the same, and he makes no will, the same result will follow (a); and even it seems where the power does not necessarily imply an appointment of the whole fund (b). The case of *Harding v. Glynn* (before cited), which is a leading authority, was in effect this: Nicholas Harding, by will, gave to his wife certain property, "but did *desire* her, at or before her death, to give such property" (words stronger than those in the *Duke of Marlborough v. Godolphin*) "unto and amongst such of his own relations as she should think most deserving and approve of." The Master of the Rolls held, that this was a trust for the testator's relations, confining them, according to the general rule before mentioned, to next of kin, and in this case, living at *her* death (c). The principle of *Harding v. Glynn*, and of *Richardson v. Chapman* (d), and all these cases, said Lord Eldon, is, that if the power is a power which it is the duty of the party to execute,—made his duty by the requisition of the will,—put upon him as such by the testator, who has given him *an interest extensive enough* to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion whether he will exercise it or not; and the court in such cases adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it (e).

A distinction has been taken, to which Lord Eldon appears to advert in the last-cited passage, between those cases where the absolute interest, or an interest sufficient for the power to act upon, is given to the donee of the power, and where consequently the exercise of the power can take place only out of that interest; and where the person

(a) See *Burrell v. Burrell*, Amb. 660.

(b) *Dary v. Hooper*, 2 Vern. 665; *Supple v. Louison*, Amb. 729. In *Jones v. Torin*, 6 Sim. 255, the gift was to the children or the descendants of the aforesaid T. F. and N. S. his wife, in such proportions to each as my daughter may by will, &c. during her life direct: she made no appointment, the children alone were held to be entitled; it being held that descendants were intended to take substitutionally only. In *Longmore v. Broom*, 7 Ves. 128, the children and their parents were held to take *per capita*; so in *Tomlin v.*

Hatfield, 12 Sim. 167, *et v.* 2 Bro. 588; 5 Ves. 503; see *Broun v. Pocock*, *infra*, p. 84, note (e), and note (b).

(c) *Harding v. Glynn*, 1 Atk. 468; stated from Reg. Lib. in *Broun v. Higgs*, 5 Ves. 501; *Birch v. Wade*, 3 Ves. & B. 198.

(d) 7 Bro. P. C. 318, cited 5 Ves. 504-5.

(e) *Broun v. Higgs*, 8 Ves. 574; *Lewin*, 578, 587; 1 Chance, p. 77. See *Lancashire v. Lancashire*, xii. Jur. 363; and 3 Hare, 86; 4 Hare, 398, 540; 9 Beavan, 477; and 1 Coll. 111; *Whitcher v. Penley*.

by whom the power is to be exercised takes only a previous estate for life to which the power is only collateral. A testator by his will devised a freehold estate to his wife for *her life*: then followed these words, "and she *shall* dispose of the same amongst my children by her at her decease as she shall think proper." The wife not having made any disposition of the estate, it was held, upon this distinction, that there was no trust for the children, but that the heir at law was entitled to retain the estate (a). But this distinction appears to be exploded (b); the question to be looked to, says Lord Cottenham, is, whether there be found in the will a sufficient declaration of who, in the events which have happened, are to be the *cestuis que trusts*; and if that be sufficiently expressed, it is immaterial whether the donee of the power be also a trustee, or whether the trust be vested in others (c). If a person merely empowers another to give property, making no gift himself, the gift must be made or no person can claim, though the persons to whom the intended gift was to be confined are named (d), particularly where no property in the thing to be given is conferred upon the person so empowered to give (e). Or if the person be empowered to appoint to one only of a class, as it is evident that the

(a) *Crossling v. Crossling*, 2 Cox, 396; and see *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 74.

(b) Lord Chief Baron Eyre, in *Bull v. Vardy*, 1 Ves. J. 271 (1791), seems to have assumed that the cases had established that a devise to one *for life* or *absolutely*, with directions that he shall dispose of it to another at his death, would operate as an immediate devise, though no such disposition should be made. Sir E. Sugden thinks that the words, in *Crossling v. Crossling*, might properly have been considered as a power which it was imperative on the wife to execute, 2 Sugd. on Powers, 180. In the case of *Croft v. Adam*, 12 Sim. 639, Jane Thomson, a widow, on her intended second marriage, assigned a fund to trustees, securing to herself a life estate, and it was declared that the same, subject to her life estate, should, as and when she the said Jane Thomson should be advised or think fit, be settled for the benefit of Amelia Thomson, her daughter by her first marriage, for such rights and interests as should be agreed upon; there were other provisions indicating favour to Amelia Thomson, as respected this property; the Vice-Chancellor of England held on the general scope of the will that this was a trust. And in *Brown v. Pocock*, 6 Sim. 257, where a testatrix directed 8000*l.* to be set apart and the dividends to be paid to A. and B. during their lives, and by a codicil she gave to A. the power of leaving a moiety of the fund

to his wife and children, this was held by the same eminent judge to be a trust. In *Grieveson v. Kirsop* there was a power in the wife who had a life interest in real estate, to sell it, the testator adding, "she shall and may divide the proceeds amongst my children as she shall think fit;" this was held to be a gift in the nature of a trust for the children, 2 Keen, 657; and see the instances where the objects of a power have been held to take in default of appointment, collected by Sir E. Sugden, On Powers, ii. 165, *et seq.*

(c) *Burroughs v. Philcox*, 5 My. & Cr. 95; and see 2 Sugden on Powers, 164.

(d) *Bull v. Vardy*, 1 Ves. J. 270-1; Eyre, C. B., and three barons: the words were, "I further empower my wife to give away at her death 1000*l.*; 100*l.* of it to Eliz. Turner, 100*l.* to Mrs. Bennet, the other 800*l.* to be disposed of by her by will." The wife made no gift of the two sums of 100*l.*, and the bill filed by Elizabeth was dismissed; the testator devised some houses to his wife, but gave her no interest in the funds out of which the 1000*l.* was to come; so that she could not derive any benefit by non-appointment. *Lewis v. Lewis*, 1 Cox, 163; *Madison v. Andrew*, 1 Ves. 59. Even in charity cases, *Down v. Worrall*, 1 My. & K. 563. See 2 Sugd. on Pow. 161, *et v. supra*, p. 81-82; and *Civil v. Rich*, *inf.* p. 87.

(e) As to which see *Cruteys v. Coleman*, 9 Ves. 319, and *Whitmore v. Trelawney*, 6 Ves. 129.

whole are not intended to be benefited, and the donor has made no selection, and it is impossible to say which the donee would have selected, no one can claim if no actual selection be made (*a*); though it has been held, that on a bill filed during the life of the donee of the power in such a case, the court will give a day to the donee to make the nomination, and in default will itself make the selection, treating such a power as an imperative trust (*b*).

A power to sell for payment of debts and legacies, which may imply a power to mortgage (*c*), is generally in the nature of a trust (*d*).

Where a discretionary power is given to a trustee or other person, merely to secure that an act to be done for the benefit of another should be done under the prudent superintendence of such trustee or third person; his non-exercise of the authority so conferred, whether by design or accident, will not defeat the intended benefit. Power was given by a testator to successive tenants for life to cut such trees and wood growing upon the premises as the three trustees named in the will, or the survivors or survivor of them should assign, allow or direct by any writing under their hand: all the trustees died, and the difficulty was whether the power to cut timber had not thus become extinguished. Lord Northington in giving judgment said, "The trustees were interposed as *supervisors* only: it is absurd to suppose the testator meant his trustees should have an arbitrary volition whether the several tenants for life should have any benefit of the fall of timber. If a bill had been brought against the trustees to assign, allow, or direct timber mature and fit to be cut, would it have been an answer to say, We do not think fit to allow it—*stet pro ratione voluntas*? I think the court would not have been satisfied with such an answer. It is the duty of this court, and of all courts, to give devises, as far as their respective jurisdictions admit, their full and specific execution. The office of these trustees is not confined to any personal qualification, but such as is general, and may be substituted, viz., to see what is fit and proper to be cut." His lordship, therefore, directed a reference, to ascertain what timber and wood was mature and fit, and ordered that such should be felled with the approbation of the Master (*e*).

Though the court, as before observed, now at least, never exercises a mere discretionary power (*f*), yet the court has considered itself justi-

(*a*) 2 Sugden on Pow. 181; 1 Chance, 88, *sup.* p. 81.

(*b*) Com. Dig., Chan. (4 W 11,) citing Ch. R. 56, but I cannot find the case; and see *Moseley v. Moseley*, Finch, R. 33; *Piper v. Piper*, 3 My. & K. 159; 2 Sug. on P. 174; but see *Kemp v. Kemp*, *ubi sup.*

(*c*) *Ball v. Harris*, 4 My. & Cr. 264; *Mills v. Banks*, 3 P. W. 7. See 2 Sugd. P. 513.

(*d*) Sugden on Pow.; 1 Chance on Pow. p. 90.

(*e*) *Hewett v. Hewett*, 2 Eden, 332; and see *Maberty v. Turton*, 14 Ves. 499.

(*f*) *Kemp v. Kemp*, 5 Ves. 849; 1 Ves. 60;

fied in exercising the discretion in some cases where a guide has been afforded by the donor. This is done in cases of maintenance (a) and advancement (b). Indeed it has been said generally that where the discretion is to be exercised on matter of fact, the court will refer it to the Master (c). In *Gower v. Mainwaring*, which has been referred to in a former page (d), John Mainwaring had executed a trust deed by which the trustees were to give the residue of his real and personal estate amongst his relations, "where they should *see some necessity*, and as they should think most equitable and just." Two of the trustees had died, and the third refusing to act, it became a question how far the discretion of the trustees could be vicariously exercised by the court. Lord Hardwicke said, "What differs it from the cases mentioned is this, that here is *a rule laid down for the trust*. Wherever there is a trust (*sic*) or power, for this is a mixture of both, I do not know the court can put itself in the place of those trustees and exercise that discretion. Where the trustees have power to distribute *generally*, according to their discretion, *without any object* pointed out or rule laid down, the court interposes not, unless in a case of charity, which is different, the court exercising a discretion, as having the general government and regulation of charity (e). But here is a rule laid down; the trustees are to judge on the necessity and occasions of the family; the court can judge of such necessity: that is a judgment to be made of facts existing, so that the court can make the judgment as well as the trustees, and when informed by evidence of the necessity, can judge what is equitable and just in this necessity." And in that case Lord Hardwicke decreed a division amongst the relations (such relations to be restricted to those within the Statute of Distributions), according to their necessities and circumstances, which the Master was to inquire into, and he was to consider how the trust fund could be most equitably and justly divided (f). But in modern times the court has shown itself averse to the exercising any discretion in such cases (g); and when the execution of the trust has devolved on the court, the next of kin, according to the Statute of Distributions, have usually been declared to be entitled.

Lord Hardwicke; 2 Ves. 643, Sir T. Clarke; 2 Sugd. on Powers, 174; and see *Lancashire v. Lancashire*, *ubi sup.*, et v. *sup.* p. 78.

(a) *V. int. al. Maddison v. Andrew*, 1 Ves. 60.

(b) *V. int. al. Robinson v. Cleater*, 15 Ves. 528.

(c) Sir J. Leach, *Walker v. Walker*, 5 Mad. 426; and see *Lewis v. Lewis*, 1 Cox, 102.

(d) *Sup.* p. 79.

(e) *El v. Attorney-Gen. v. Glegg*, Ambl.

584; and *Attorney-Gen. v. Harrow School*, 2 Ves. 552.

(f) *Gower v. Mainwaring*, 2 Ves. 87; and see *Warburton v. Warburton*, 2 Vern. 420 (Amb. 100), confirmed on re-hearing in the House of Lords, though Lord Alvanley considered this case no longer of authority, 5 Ves. 859; and see *Flower v. Martin*, 2 My. & Cr. 474; et v. 2 Chance, 564.

(g) *Supra*, p. 85, note (c); *Longmore v. Broom*, 7 Ves. 129.

Sir Charles Booth by his will (in effect) gave the residue of his real and personal estate amongst such of his relations and kindred in such proportions, manner, and form as his executors should think proper, recommending that the greatest share should be given to those who should appear to be his nearest relations and most deserving. Sir William Grant said, "A disposition of this kind contains a mixture of trust and power. The trust must be exercised for relations and kindred of some description or other; the power of selection belongs to those to whom the testator has thought fit to confide it. Whether there is any person now entitled to exercise this power is the principal question; but *a trust exists* equally in whichever way that question may be determined. If there is any person entitled to exercise that power, the trust will be for those of the relations or kindred whom such person shall select. If the power is extinct the trust is for those who answer the description of relations and kindred according to the construction *this court may put* upon these words; there is no intestacy nor any resulting trust:" and the construction put on the words was that the next of kin were entitled, according to the ordinary rule before referred to (a). In all these cases, generally speaking, the court proceeds upon the maxim that "equality is equity" (b).

Where there is a gift over in default of appointment that precludes the raising any trust or implied gift to the objects of the intended appointment, unless under special circumstances (c).

Where a trustee has a power at his discretion, and he honestly exercises it, the Court of Chancery will not control his judgment; as where a man devises his lands, goods, and chattels to A. upon trust, to give his children and grandchildren, or his nephews and nieces, according to their merits (not creating a trust for all), and the trustee gives all to one, it has been held that the others shall not be relieved, for the testator submitted the whole to his judgment (d); but if it should appear that the donee has exercised no discretion or judgment in the selection, and has moreover acted from improper motives, the Court of

(a) Sir Wm. Grant, *Cole v. Wade*, 16 Ves. 43, 47, *sup.* p. 75. The principal cases where powers of "selection" have been given are collected in the last edition of Roper on Leg. 1422 *et seq.*

(b) *Doyley v. Attorney-General*, 2 Eq. Ab. 194, Sir J. Strange; *Jones v. Clough*, 2 Ves. 367, Sir W. Grant; *Longmore v. Broom*, 7 Ves. 129; and see 8 Ves. 859; Lewin, 582-3; Hill, p. 31. As to when the objects take as tenants in common and when as joint-tenants,

see 2 Jarm. 168.

(c) *Pritchard v. Quinchant*, 5 Ves. 596, note; *Kennedy v. Kingston*, 2 Jac. & W. 431; 2 Sugd. on P. 167; 1 Chance, § 230.

(d) *Civil v. Rich*, 1 Ca. Ch. 309; Com. Dig. Chanc. (4 W 11); and see Lewin, 430-1. In *Kemp v. Kemp*, 5 Ves. 857, Lord Alvanley has examined the cases, and stated the doctrine of the Court as to when the distribution must be made amongst all, and when some one or more may be selected.

Chancery is not precluded from interfering (a); and the court will, in such cases, avoid the appointment, and, according to its general rule, divide the property amongst all the objects equally, as was formerly the case where appointments were held void as illusory (b). But the statute 11 Geo. IV. & 1 Will. IV. c. 46, has abolished the doctrine of the Court of Chancery, which prevailed down to that time (c), that when the distribution must be amongst all, each should have a substantial share, which is, I believe, the only instance of any portion of the equitable doctrines established by the Court of Chancery having been extinguished by the legislature.

(a) See 1 Hare, 450, *Costobadie v. Costobadie*, V. C. Wigram, 1847, xi. Jurist, 346; *Cafe v. Bent*, 3 Hare, 245; and see *Potter v. Chapman*, Amb. 99, 1 Dick. 146; *Maddison v. Andrew*, 1 Ves. 59; *French v. Davidson*, 3 Mad. 402; and *Longmore v. Elcum*, 2 Yo. & Coll., C. C., 370. The fact of a wife intrusted with such a power having married again and having possibly been influenced by her second husband, would probably have some influence in these cases; see the note *Wall v. Thurborne*, 1 Vern. 414.

(b) See *Gibson v. Kinven*, 1 Vern. 66, and p. 414; and 2 Sugd. on Powers, 175. In the late case of *Lancashire v. Lancashire*, before cited, the V. C. K. Bruce, and the Lord Chancellor, on appeal, xi. Jur. 1031, and xii. Jur. 365, treated a discretionary power im-

properly exercised as a nullity, and gave effect to the gift, which might have been intercepted by a proper exercise of the power; both those learned judges holding that under the circumstances there was no trust in favour of the objects of the power. As regards the non-exercise of an authority required to vest or preserve the title to property, Lord Eldon observed, "The court has said that where a trustee has withheld his consent to a marriage for a vicious or unreasonable cause, that should not be permitted to affect the consent given by the majority, where it was reasonable they should consent." *Clarke v. Parker*, 19 Ves. 15, 18, 19; *et v. Mesgreth v. Mesgreth*, 2 Vern. 580; *Daley v. Disbouverie*, 2 Atk. 261; and 2 P. W. 628.

(c) See 1 Sugd. on Powers, 543, 544.

SECTION VII.—Of Restraints on Alienation, and Gifts over, and Clauses of Forfeiture, particularly as regards Bankruptcy and Insolvency.

It is to be observed that, under the Statutes relating to Bankrupts and Insolvents, the equitable as well as legal estate and interest of the bankrupt or insolvent will pass to his assignees. Any restriction against alienation annexed to what is in effect an absolute gift of the entire property, is by the general law repugnant and void (a). As regards a life interest given to a man who becomes bankrupt, although there may be positive words that he alone shall have the benefit of the trust, and it be declared that he shall not have power to sell or anticipate the rents, dividends, or interest, and that his receipts alone shall be a sufficient discharge; if in fact the trust be really for the benefit of a bankrupt or an insolvent, and there be no clause of forfeiture, no clause of *cesser*, no limitation over in the event of alienation or of bankruptcy or insolvency, any attempt to preserve it against assignees is void: if not aliened by voluntary act it will be subject to alienation by act of law, and will pass to assignees: the policy of the law does not permit of property being so limited that it shall continue in the enjoyment of a bankrupt, notwithstanding his bankruptcy (b). But a testator or other person may, if he shall think fit, make an annuity or other life interest so conferred determinable by bankruptcy, or insolvency, or alienation, or may expressly give it over on any one of those events, or on an attempt to alien (c): but

(a) See *Ross v. Ross*, 1 Jac. & W. 158; *Bradley v. Peirato*, 3 Ves. 325; and *Green v. Harvey*, 1 Hare, 432; and see *Piercy v. Roberts*, 1 My. & K. 7; there a legacy was directed to be paid in portions, at the discretion of the executors, any part unapplied was to go into the residue: it was held that the discretion terminated with the insolvency.

(b) *Graves v. Dolphin*, 1 Sim. 67; *Brandon v. Robinson*, 1 Rose, 197; 18 Ves. 429, 432, 433; *Green v. Spicer*, 1 Russ. & M. 395, 397; *Black v. Leicester*, V. C. Wig. 9 Mar. 1847; and see 3 Swanst. 522-3; *Younghusband v. Gisborne*, 1 Col. 402; *Snowden v. Dales*, 6 Sim. 524, *et v.* 1 Eden, 415; but see *Two-penny v. Paton*, 10 Sim. 488, noticed 1 Col. 402, *infra*, p. 89.

(c) *Ibid.*; and *Churchill v. Marks*, 1 Col. 441; and see *Lewes v. Lewes*, 6 Sim. 304, affirmed on appeal (2 Keen, 784); a case of an assignment for the benefit of creditors. "Why a provision" (said the V. C. K. Bruce, in

Churchill v. Marks, ix. Jurist. 157,) "that a man having a life estate shall not alienate that life estate, is more according to principle than a provision that a man having an estate in fee simple should not during his own life alienate, I have never been able to understand; but a long course of decisions seems to have settled the point." As to the distinction between a voluntary assignment and a transfer by act of law, as affecting a clause of forfeiture or a gift over, in the event of the donee mortgaging, assigning or encumbering, &c., see *Lear v. Leggatt*, 2 Sim. 479; *S. C.* 1 R. & My. 690; and *Dommett v. Bedford*, 6 T. R. 684; 3 Ves. 149; *Shee v. Hale*, 13 Ves. 404; and *Cooper v. Wyatt*, 5 Mad. 482, there referred to; *Lewes v. Lewes*, *ubi sup.*; *Brandon v. Aston*, 2 Y. & Col. 211; *Whitfield v. Prickett*, 2 Keen, 609; *Doe v. Carter*, 8 T. R. 61; *King v. Robinson*, Wightw. 387, *et inf.* p. 90, note (d).

it is not sufficient that the grantor may intend to exclude the assigns or assignees of the grantee; there must be a proviso for actual *cesser*, or a gift over to some one else (*a*). A trust simply prohibiting alienation annexed to a gift in favour of a married woman, for her separate use, stands on a different footing, and is effectual to prevent alienation; the reason is that, as it is the Court which makes her the owner of the property, and enables her as a married woman to alien, the court may equally afford the means of limiting the power so given over the property; but the case of a disposition to a man, who, if he have the property, has, as a necessary incident, the power of aliening, is essentially different (*b*): when the woman becomes single, and so long as she remains so, then she is in the same condition, in respect of such property, as a man.

Where the trust is that the trustees shall receive the income, and pay and apply the same unto and for the maintenance and support of a person, his wife and children, if any, or otherwise as they shall think proper; on the bankruptcy of such person, the assignees will take so much only of the income as shall not be required for the proper maintenance of the wife and children (*c*). In *Godden v. Crowhurst* (*d*), the Vice Chancellor of England held that a proviso, giving over the property, on the son, who was the first taker (*e*), committing any act by which the interest given to him might be forfeited or become vested in any other person, to trustees to be applied for the maintenance and support of the son and any wife and child or children he might have, and for the education of such issue or any of them, as his trustees in their discretion should think fit, was good, as against the son's assignees. His Honour considered that the benefit was given to the whole of the objects collectively, and that it did not follow that any thing of necessity should be *paid*; the property might be applied without their receiving any money at all, and he decided that the assignees had no interest under the trust (*f*). In *Twopenny v. Peyton* the same learned judge held, that where there was a trust to apply the interest of a trust fund in the maintenance and support

(*a*) See *Snowdon v. Dales*, 6 Sim. 527, and 18 Ves. 435.

(*b*) Lord Eldon, 18 Ves. 434-5; *Ross v. Ross*, 1 Jac. & W. 157-8; and see *Tullett v. Armstrong*, 4 My. & Cr. 405; *Baggett v. Meux*, 1 Col. 138; and *sup.* vol. i. p. 597.

(*c*) *Page v. Way*, 3 Beav. 20; and *Kearsley v. Woodcock*, 3 Hare, 189; the one arising on a settlement, the other on a will: in the latter case other material cases on this

subject are cited.

(*d*) 10 Sim. 655; a case arising on a settlement.

(*e*) It is to be observed, that the V. C. held that the son did not, under the words, take an *absolute* interest for life, p. 655.

(*f*) If a trader voluntarily settles his own estate with such a proviso it is clearly void, 10 Sim. 652; and see 1 Swanst. 481, n., where the cases are collected; and see Lewin, 102.

of an uncertificated bankrupt who was insane, at such times and in such proportions, &c. as the executors of the testator should in their discretion think most expedient, the trust was created for the mere special purpose of maintaining and supporting the bankrupt, and under such a trust the assignee could take no interest (a); but the authority of these cases has been impeached (b). If an estate for life be given to a person, and there be a proviso that, in the event of his bankruptcy, insolvency, &c., the rents and profits shall be applied for the maintenance of such person, his wife and children, or *any of them*, as the trustees may think proper; the right of those who take in substitution for the husband's life estate, on his becoming an insolvent, arises on the actual discharge of the person under the Insolvent Act; in such case the insolvency does not take away the discretionary powers from the trustees (c): but any benefit which may be given to the insolvent under such a settlement will belong to the assignees (d).

(a) 10 Sim. 489.

(b) See *Piercy v. Roberts*, *supra*, and *Younghusband v. Gisborne*, 2 R. Prop. Cases, 316; 1 Col. 401, 402; where the V. C. Knight Bruce stated that he dissented from the two last cited decisions of the V. C. of England.

(c) Vide *sup. Piercy v. Roberts*, 1 My. & K. 7; and see *Wetherell v. Wilson*, 1 Keen, 80, as to the effect of an assignment for benefit of creditors, on property given by way of trust to the father for the maintenance of his children; and *Kearsley v. Wocock*, *ubi sup.*;

and on the general question of the right of children to maintenance on gifts of this description, see *Rippon v. Norton*, 2 Beav. 63; and *Leach v. Leach*, 13 Sim. 308; *et v. Shepard v. Wilson*, ix. Jurist. 920.

(d) *Lord v. Bunn*, 2 Y. & Col. C. C. 103-4. Of the effect of presenting a petition under stat. 1 & 2 Vict. 110, by a person who is restrained from any attempt at alienation, see *Pym v. Lockyer*, 12 Sim. 394; *Brandon Aston*, 2 Yo. & Col. C. C. 24; *Churchill v. Marks*, 1 Col. 441; and *Martin v. Maugham*, 14 Sim. 234.

CHAPTER II.

THE DOCTRINE IN REGARD TO REMOTENESS.

This Doctrine is intimately connected with Trust Estates, particularly Trusts for Accumulation, though a Rule of Law equally as of Equity.

The Rule stated.

Important to distinguish between Words which defer Possession and those which defer Vesting.

Vesting a Question of Intention.

Rule as to Vesting in a Devise of Real Estate and Bequest of Personal Estate different.

Lord Mansfield's Statement of the Effect of Matthew Manning's Case, and of Boraston's Case.

Effect of Postponement in order to secure antecedent Benefits.

Devise of Real Estate "when" or "at" a particular Age.

Effect of the word "if."

Bromfield v. Crowder.

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Ferrand v. Wilson (1845), *Vice-Chancellor Wigram.*

Ker v. Lord Dungannon, in *Dom. Proc.*

Argument of Mr. Baron Rolfe.

Mr. Justice Patteson.

Mr. Baron Parke.

Judgment—Lord Chancellor Lyndhurst—Lord Brougham—Lord Campbell.

Observations on this Case.

How far in a Series of Limitations those only may be avoided which are not conformable to Law.

Mr. Baron Alderson's Opinion.

General Rule as to Gift to take effect after or on Failure of prior Limitation which is too remote.

When Contingency on which void Limitation is to take effect never happens.

Doctrine of Cypres.

Absolute Gift and attempt to restrict it by Limitations that are void.

THE rule against Perpetuities, or as it is sometimes and much more appropriately called, the Doctrine of Remoteness (a), is so intimately connected with the subject of Trust Estates and Interests, and more especially with Trusts for Accumulation, which will be the subject of a succeeding Chapter, and is of such constant reference in questions as to the validity of executory devises and bequests, which form a large proportion of the business of the Court of Chancery, that I have thought it right, although the rule is one of general policy, equally binding on the Courts of Common Law as on the Court of Chancery, to devote a separate Chapter to the consideration of this subject, but more especially of some of the later authorities, referring the reader to Mr. Lewis's able and ample work for the general doctrine and its modifications.

The true rule is this—not that a man must take under the gift within the time limited by law, but that he must take within that time *if he take at all* (b). Thus, a devise or bequest to the first person who shall climb up the cross of St. Paul's within twenty-one years from the testator's death, will certainly be good, though of course it must be wholly uncertain whether the event will ever take place; but a gift to the first person who shall do so, without that limit of time, will be bad. In the first case, the devise or bequest will necessarily

(a) *V. supra*, vol. i. 487-8, 472, 503, 422, *et v. infra*, chap. iii. For the reason of the rule see 1 Eden, 416, Lord Northampton.

(b) Lord Chancellor Sugden, *Ker v. Lord Dungannon*, 1 Con. & L. 349. Where there

is a gift over on an alternative contingency, the validity may be determined by the event; *Minter v. Wraith*, 13 Sim. 52; *Longhead v. Phelps*, 2 Sir W. Blackst. 704, *et v. infra*, in this chapter.

take effect within the limit if it take effect at all; in the second, it will not necessarily so take effect (a).

It is obviously of the first importance to distinguish between words which defer the *possession* to a period beyond the legal limits, and those which defer the *vesting*; in the former case, that is, where there is a vested gift, it falls within the ordinary rule: an illicit restriction, or an illicit qualification, cannot affect the gift; the gift remains as if the restriction or qualification, to the extent in which it exceeds the legal limits, were expunged.

The question as to when an estate devised or a chattel bequeathed vests in the donee, is one of intention, to be collected from the whole will, and all the collateral matter connected with the gift must be looked to to ascertain what is the correct meaning (b). The rule of construction, in regard to the vesting in a devise of real estate, and in a bequest of personal estate, differs in some respects. Amongst the other rules in regard to legacies, borrowed by the Ecclesiastical Courts from the civil law, and thence transmitted to the Court of Chancery (c), is this, that when a legacy is given to a person simply "at" 21, or any other age, or "if" or "when" the legatee shall attain that age, the gift is conditional, and if the legatee die before that time, the legacy lapses (d); and so it is, as after mentioned, in all cases where the time of payment is annexed to the legacy itself, that is, where the time appears to have been fixed by the testator as absolutely necessary to have arrived before any part of his bounty can attach to the legatee: but the former rule does not obtain as regards devises of real estate, to the extent to which it prevails in legatory matters; in the construction of devises, the words "when" and "at" have not the same conditional force as they have when applied to a legacy.

As regards devises of real estate—*Matthew Manning's* case (e), according to Lord Mansfield, establishes this proposition, that wherever the whole property is devised, with a particular interest given *out of* it, it operates by way of exception out of the absolute property.

(a) Baron Parke's argument in the House of Lords, *Lord Dungannon v. Smith*, p. 19.

(b) Vice-Chancellor of England, *Hunter v. Judd*, 4 Sim. 461; V. C. Wigram, 2 Hare, 18.

(c) V. *sup.* vol. i. p. 523.

(d) Sir W. Grant, *Hanson v. Graham*, 6 Ves. 243-4; *Leeming v. Sherratt*, 2 Hare, 17, 18; *May v. Wood*, 3 Bro. 473, "a case unimpeached in principle;" 2 Hare, 19; but see 6 Ves. 246. The distinction adopted from the civil law, between the effect of giving a

legacy at twenty-one and payable at twenty-one, is that the legacy is vested in the latter case, the payment only being deferred, 6 Ves. 245; see 1 Jarm. 761. In *Festing v. Allen*, 5 Hare, 576-7, the Vice-Chancellor Wigram construed the words, "to be divided," as equivalent to "to be paid." The general rules as to the vesting of legacies will be again noticed hereafter.

(e) 8 Co. 95; but this case related to chattel interests, v. *infra*.

Boraston's case (a), according to the same high authority, establishes that, where an absolute property is given, and a particular interest is given in the mean time, as until the devisee shall come of age, &c., and when he shall come of age, &c., then to him, &c., the rule is that that shall not operate as a condition precedent, but as a description of the time when the remainderman is to take in possession (b). When the interest given to the devisee is plainly postponed for the purpose of securing to him or to another some antecedent benefit commensurate with the interval of postponement, this offers a satisfactory reason for holding the gift to be vested (c), whether the subject be real or personal.

It has been held, in subsequent cases, that where there is a devise of real estate to a person "when" he shall attain a particular age, or "at" a particular age, and there is a gift over in the event of his not attaining that age, the estate vests immediately, subject to be divested, and that there is no substantial distinction whether the devise be in remainder (d), or by immediate devise (e); nor, in later cases, has it been considered that a gift over is necessary (f). Then, as regards the word "if." In *Edwards v. Hammond* (g), a surrender was made to the use of the surrenderor for life, and after his decease to the use of John Hammond the younger, his eldest son, his heirs and assigns, "if" it should happen that the said John Hammond, the younger, should live to attain 21; and if he should die before that age, then over: it was held that this was a vested remainder. In *Bromfield v. Crowder* (h), the testator devised his estates to his wife, E. Davenport, for life, then to Joshua Rose for life, if he should survive his wife, "and at the decease of the said E. Davenport and Joshua Rose, or the

(a) 3 Co. 19; 1 Jarm. 734; 9 Cl. & Fin. 591.

(b) *Goodtitle v. Whitby*, 1 Burr. 233, where the principle was applied to a devise of real estate. *Hanson v. Graham*, 6 Ves. 246; *et v.* 9 Cl. & Fin. 583, 591. In Comyn's Dig. Assignment, (C 1.) it is stated, If there be a devise to trustees till A. attain his age of 25 years, and then in trust for A., a mortgage by A. before the 25 years will be void; but I find no such case in Eq. Ca. Abr.

(c) See Sir Wm. Grant's observations on *Mansfield v. Dugard*, 1 Eq. Abr. 195, *Hanson v. Graham*, 6 Ves. 247; and 9 Cl. & F. 591.

(d) As in *Boraston's case*, 3 Co. Rep. before referred to; see 6 Ves. 246, and see 12 Sim. 99; *inf.* p. 97, note.

(e) Lord Ellenborough's judgment, *Doe v. Nowell*, 1 Maule & S. 334; *Randoll v. Doe dem. Roake*. Dom. Proc. 5 Dow. 202; *Doe v. Moore*, 14 East, 601; see 9 Cl. & F. 595.

(f) "The rest of my property to be invested

in land and given to my grandson T. F. Snow, when of age, to have a commission in the army, regulars, at 21, to remain in the army seven years, and not to be of age to receive this until he attains his 25th year, and to be entailed to him and his heirs male," was held by Lord Langdale to confer a vested estate tail, subject to be divested if he should not attain 25; there was no gift over; *Snow v. Poulton*, 1 Keen, 186, 189: *qu.* if "no" ought not to be inserted, p. 182, 12th line; and see the cases cited in the argument, *ibid.*, and Jarman on Wills, i. 742. The property upon which the devise was to operate was personal only, but it was to be invested in land; therefore it was argued as depending on the rule as to real estate; see 12 Sim. 193-99, *inf.* p. 104, and *Dunk v. Fenner*, 2 Russ. & M. 567.

(g) 1 New. Rep. C. P. 324, note; see *Green v. Potter*. vii. Jur. 737.

(h) 1 New. Rep. 313.

longest liver of them, I give all my real estate, of what nature or kind soever, to my godson, John Davenport Bromfield, son of Charles Bromfield, of St. Ann's-street, Liverpool, 'if' the said John D. Bromfield shall live to attain the age of 21 years;" in the event of his dying under 21, the testator gave his estates to his brother, Charles, if he should survive and attain 21; and in the event of both dying under 21, the testator gave his real estate to his godson, John Vale. Sir James Mansfield, in delivering the judgment of the court, said, "In fact, this is an immediate devise, to the plaintiff, J. D. Bromfield (then an infant), to take place on the death of the two preceding devisees. There is nothing in the will to prove that the testator meant the plaintiff not to take a vested estate unless he survived 21. Indeed the true sense of the thing is that the deviser meant him to take it as an immediate devise in himself, but that it was to go over, in the event of his dying under 21." "No precise words are necessary to make a precedent condition in wills; they must be construed according to the intention of the parties; and it would be absurd, considering the various circumstances under which wills are made, to require particular words to express particular meanings; the apparent intention, as collected from the whole will, must always control particular expressions." "No doubt," continued his lordship, "the general meaning of the word 'if' implies a condition precedent, unless controlled by other words; but in this case there is a variance between the expression and the meaning;" and all the judges certified that the plaintiff took a vested estate in fee simple in the freehold and copyhold estates, determinable on the contingency of his dying under 21 (*a*). The Vice-Chancellor of England lately observed, that the effect of these cases is, that where there is, in the first place, a gift to the party intended to take, and then follow the words "at," "if," or "when" that party shall attain a particular age, it is held that these words are used merely for the purpose of pointing out the time at which the devisee is to take in possession (*b*); but where there is no gift but to

(*a*) *Bromfield v. Crowder*, 1 New. Rep. 324, affirmed 9 Adol. & Ell. 605; and see *Doe dem. Cadogan v. Ewart*, 7 Ad. & E. 663-5, and 9 Cl. & F. 591. Lord Mansfield mentions from Cicero de Oratore and Orat. pro Cecina, a remarkable case which was much agitated before one of the Roman tribunals: a man thinking his wife was with child, devised his estate to the child his wife was enceinte of, and "if" such child died under age, then he devised it over; his wife was not with child, and the question was whether the devise over

could take effect; it was decided that it could: and on a similar devise the same decision was come to in the Court of King's Bench, 3 Burr. 1623-4; "if" was construed as a word of limitation, not of condition.

(*b*) *Newman v. Newman*, 10 Sim. 58; and see *Jackson v. Majoribanks*, 12 Sim. 93, 99; and *Milroy v. Milroy*, 14 Sim. 48, but which was determined on the particular expressions, see p. 54; and see Fearn, Cont. Rem. 241, *et seq.* Mr. Jarman however states it as clear that a devise to a

such as shall attain the specified age, no one can take who does not answer this description (a); and if a contingent remainder be limited so that no one can take but a person who has attained the prescribed age, and there is no one who has attained the age at the time of the determination of the particular estate, the remainder necessarily fails (b). But any form of expression, though apparently importing contingency, may be controlled by the context.

Even in the case of a legacy, though the word "if" generally imports a condition precedent (c); yet it has been laid down that, in every case, the strict construction of the word will yield to an intention appearing upon the will, and requiring a different construction (d).

The terms of the gift over, if any, have always been considered as an *indiciu*m for ascertaining the intention, more or less valuable, according to the context and the accompanying circumstances (e), where the direct gift is, in its terms equivocal, and does not expressly limit the quantity of estate given (f): it may be presumed that the party, in

person, "if" he shall attain any particular age standing alone, that is, without being followed by any limitation over, is clearly contingent; *et v.* 9 Cl. & Fin. 591, C. J. Tindal, *Lister v. Bradley*, v. Jur. 1034: it is a stretch of indulgence towards testators to allow a simple gift over on the devisee not attaining the age specified to control the effect of so plain a word, but there seems no ground for controlling it where it is found without any such adjunct. As regards personal estate, it seems clear that such a gift is contingent, see *Butcher v. Leach*, vii. Jurist, 74; and *Taylor v. Bacon*, 8 Sim. 100. The V. C., in *Newman v. Newman*, 10 Sim. 57, said he thought that *Doe v. Ward*, 9 Adolph. & Ellis, 582, was within the terms of *Boraston's* case, 3 Co. 21: the case was this; the testator gave his freehold and leasehold estates, after the death of his daughter, to such of her children as she then had or might have, if a son or sons, at his or their age or ages of 23. In *Boraston's* case the term or chattel interest given to the executors was so given that (as it was held) it must have endured until the period when Hugh Boraston attained or would have attained 21 (3 Co. 20 b), if he should die in the interval; so that there was a prior interest given which filled up the entire interval between the death of the testator and Hugh Boraston attaining 21: it was therefore held, that the two estates being consecutive, the estate of Hugh Boraston vested at the death of the testator, to begin in possession at the end of the term (*ib.* 21a); but, in *Doe v. Ward*, whether there would be a son to take in possession immediately on the death of the daughter, was altogether contingent; the daughter might have died

leaving a son under 23, in which case the estate, for the interval between the death of the daughter and the son attaining 23, would have been undisposed of, at least in terms, so that in *Doe v. Ward* there was greater reason for saying that the attainment of the age was personal to the devisee; *Goodtitle v. Whitby*, 1 Burr. 228, and *Tomkins v. Tomkins*, in Ch. 17 Geo. I., cited *ibid.* 243, appear to be exactly *Boraston's* case. Lord Ellenborough, in the case cited, considered that, according to these authorities, whether the gift is in remainder or direct makes no difference, *sup.* p. 95.

(a) *Newman v. Newman*, *ubi sup.*; and see *Duffield v. Duffield*, 3 Dow. N. S. 260, 328, 333-4; *et infra*, p. 102: but see *Marg. of Bute v. Harman*, 9 Beav. 320, *infra*, p. 103, S. C.

(b) See *Festing v. Allen*, 12 Mee. & W. 301; which was very elaborately argued; the contest was whether the infants took vested estates liable to be divested on their not attaining 21. Such cases are not helped by the stat. 8 & 9 Vict. c. 106, § 8, *sup.* vol. i. 292, though they appear equally to require it.

(c) And see 1 New Rep. 326.

(d) Vice-Chancellor Wigram; *Lister v. Bradley*, 1 Hare, 12, 13, (1841).

(e) See *Bland v. Williams*, 3 My. & K. 417; *Boughton v. James*, Vice-Chancellor Bruce, 1 Coll. 44; Jarman on Wills. 734, *et seq.*; and see, on this subject, Smith's Original View, p. 174 *et seq.*

(f) As to which see *Fry v. Bromfield*, before the Vice-Chancellor of England, 9 Sim. 538; and the subsequent certificate of the Court of Exchequer, 10 Sim. 94; in a case sent to that court, afterwards sent to the

making the gift over, takes a retrospect of what he has actually given; what he is about to do is to give the property to some one else, if the previous gift shall not take effect in the manner and to the extent in which he intended it to operate. A gift over upon a contingency may be called in aid to show that no present interest was intended to pass (*a*), but it will not alone prevent the vesting of a gift (*b*); it may, as we have seen as regards real estate, have the opposite effect. Lord Mansfield, on delivering judgment in *Frogmorton v. Holyday*, said, if the first taker was barely to take an estate for life, the time of his death must be immaterial to the devise over; but limiting it over only upon the contingency of his dying in his minority, shows that the testatrix intended to give him an absolute estate in fee, which he might dispose of if he came of age; and unless he lived to be of that age (when he might dispose of it), she meant it should go to her daughters (*c*). A gift over which is too remote cannot defeat the vested interests previously given (*d*).

Where an estate is given to trustees to pay debts, and then to a person designated and his heirs, &c., such person takes *at once*, subject to the debts (*e*), so that no objection, on the ground of remoteness, can arise on such a gift.

Where there is no gift to any donee but such as shall sustain the character of attaining the age of 22, or some other age, the attainment of that age is, as is noticed above, part of the constitution of the character of the original taker (*f*), unless there be something in the will to control that construction. In these cases, that is, where the given age is part of the description, the court has held the devise contingent, upon the ground that no one can claim who cannot predicate of himself that he is of the age required—that otherwise he does not answer the entire description (*g*).

Where a life estate in a fund is given directly, and on the death of the tenant for life the fund is given to trustees to divide and pay amongst the members of a class so that the only gift to them is in the

Court of Queen's Bench, *ib.* 224, and see *Murray v. Addenbrooke*, 4 Russ. 420; and 1 Mad. 481.

(*a*) Sir Wm. Grant, 3 Meriv. 341; *et v.* Amb. 450.

(*b*) However, in *Hunter v. Judd*, 4 Sim., the gifts over turned vested legacies into contingent ones; see pp. 456 to 461.

(*c*) 3 Burr. 1623; and see *Doe v. Cundell*, 9 East, 403; and *Taylor v. Wharton*, cited 2 Mod. 291; Dyer, 124 a, *et v. sup.* p. 95; *infra*, p. 99, n. (*d*).

(*d*) *Blease v. Burgh*, 2 Beav. 226.

(*e*) *Graham, B.*, sitting for M. R.; *Bacon v. Procter*, Turn. & R. 40; *et v. Tregonwell v. Sydenham*, 3 Dow, 194; 1 Col. Jurid. 214; 1 Jarman, 743.

(*f*) *Newman v. Newman*, 10 Sim. 58, *sup.* p. 97; *Ring v. Hardwicke*, iv. Jur. 242; *Butcher v. Leach*, vii. Jur. 74; *Taylor v. Bacon*, 8 Sim. 100; *Boughton v. James*, 1 Col. 42.

(*g*) *Festing v. Allen*, 12 Mees. & W. 279; 5 Hare, 571; *Botsford v. Kibble*, 3 Ves. 363, *et v.* 2 Meriv. 385, 387; 3 Meriv. 342; 3 Sim. 532, *et v. sup.* p. 94.

direction to divide and pay, those only who survive the tenant for life acquire vested interests (a); but where there is a gift for life and a direction that after the death of the tenant for life the fund shall be divided amongst certain persons named, then it is considered that there is an immediate gift, and the legatees take vested interests in remainder (b): and in all cases where the raising the payment or distribution appears to have been postponed, not from considerations personal to the legatee, but only in reference to the interests of other persons, or for the convenience of the estate or the fund, the vesting of the legacy will not be postponed, even though there be no gift but in the direction to pay or distribute at a future time (c).

Where there is a devise to a child, at 21 or any other specified age, and the property is given over if the devisee should die under that age, the court has discovered an intention, expressed in the will, that the first devisee shall take all that the testator has to give, except what he has given to the devisee over; and in order to give effect to that intention, has held, by force of the language of the will, that the first devise was not contingent, but vested, subject to be divested upon the happening of the event upon which the property is given over (d).

As regards personal estate, it has been held that where there is an immediate gift of a fund—a sum of stock for instance—which is to be separated from the bulk of the estate and vested in trustees, and the trust is to accumulate the income till a person named attain 25, and then to transfer and pay the stock and accumulated interest to him his executors, &c., and there is no gift over in the event of his not attaining the prescribed age, the trustees are trustees for such person from the first; he takes a vested interest at once, the enjoyment only is postponed (e), and at 21 he may claim payment of the legacy (f); but the mere necessity of making a severance from some cause not connected with the legacy itself will not vest the legacy (g). These instances may suffice to give a general view as to the vesting of gifts *in futuro*.

(a) *Beck v. Burn*, 7 Beav. 495, 13 Law J., N. S. Chanc. 319; and see *Cheraux v. Aislable*, 13 Sim. 71, 74; and *Ford v. Rawlins*, 1 Sim. & S. 328.

(b) *Cockrane v. Wiltshire*, 16 Law J., Ch. 366; and see *Farmer v. Francis*, 2 Bing. 151; and 2 Sim. & S. 505.

(c) See *Murkin v. Phillipson*, 3 My. & K. 257; and *Butterworth v. Harrey*, 9 Beav. 130; and 1 Jarm. 756-7, 763; *et v. infra*, chapter on *Portions*.

(d) 5 Hare, 571; *Phipps v. Ackers*, 9 Cl. & Fin. 583; 4 Man. & G. 1107; 9 Bli. N. S. 430; 3 Cl. & Fin. 703; reversing *S. C.*, 5 Sim.

44; and see 1 Jarm. 739 and note, 740, 774, 775, note; *v. sup.* p. 98.

(e) *Saunders v. Vautier*, 1 Cr. & P. 248. The decision proceeded on the direction for an immediate separation of the legacy from the estate, and the gift of the intermediate interest, as to which *v. infra*, p. 100: the immediate gift of the legacy to the executors was also an important feature, *ibid.* p. 249; and see 2 Hare, 20; and *Massey v. Kemp*, before V. C. Wigram, 16th July, 1845.

(f) *Ib.* and 2 Hare, 20.

(g) *Festing v. Allen*, 5 Hare, 240. An express direction will supersede all general

There is some uncertainty as to what effect is to be given to a direction to apply the interest of an expectant share, which on the words of gift taken by themselves would not become vested until some period beyond the legal limits, in the maintenance of the legatee during the whole interval, or during minority (*a*). In the case of *Newman v. Newman* (*b*), before cited, the words were, "in trust for all and every my grandchildren, children of my son Charles, &c. respectively lawfully begotten who shall attain the age of 24 years, equally to be divided amongst my said grandchildren attaining that age as tenants in common;" 2,000*l.* was given to all and every the children of his daughter, Eliz. Slutter, who should attain 24, equally to be divided as above: the testator directed that the trustees "do and shall pay and apply the dividends, interest and annual produce of the respective portions or shares of and in the aforesaid trust funds, to which my said grandchildren shall respectively be entitled *in expectancy or contingency*, for and towards the maintenance, education, and benefit of my said respective children, until they respectively attain the age at which the said portions or shares in the said respective trust-funds will become absolutely vested:" notwithstanding that the whole interest might have been applied for maintenance, this was not considered as sufficient to vest the legacies before the time when the legatees should attain the age pointed out; the shares were expressly described as *contingent* (*c*).

In another case (*d*) there was (*int. al.*) a bequest of 3,000*l.* for all the children of T. Fry (except four named), equally to be divided between them, their shares to become vested interests and to be paid to them respectively as and when they should attain 25; if any died before their shares were vested leaving issue their shares were to go to such issue; if without issue, then the share of such one was to go to and vest

rules, *Russell v. Buchanan*, 7 Sim. 633; 4 Tyrw. 384.

(*a*) See 1 Jarm. on Wills, 776-7.

(*b*) 10 Simons, 52. The general rule is (see 1 Jarm. 764-6-7), that where the *whole* of the intermediate interest is given to the legatee, or directed to be applied for his maintenance, and there is no gift over, it is to be presumed that the testator intended that the legacy should vest in the legatee, though he may in the original gift have used words which of themselves would not vest it; *Watson v. Hayes*, 5 My. & Cr. 133; *Hammond v. Maule*, 1 Col. 284; *Vawdry v. Geddes*, 1 Russ. & M. 203, "because for the purpose of interest the particular legacy is to be immediately separated from the bulk of the property," *ibid.* p. 208; but not if the contingency extends to the interest; *Knight v. Knight*, 2 Sim. & St. 490.

A direction to maintain the legatee out of the interest does not afford such, or at least so strong, a presumption, 2 Meriv. 387, *et v.* 3 Bli. N. S. 293, and 4 Sim. 460; and a gift over simply on death before the prescribed age repels it, 1 Russ. & M. 208, 3 Russ. & M. 417, Sir J. Leach; but on this point see *Davies v. Fisher*, and *Marquis of Bute v. Harman*, *infra*. A distinct gift of maintenance has no effect upon the question of vesting, 5 My. & Cr. 134; *Batsford v. Kibble*, 3 Ves. 363; and see 3 Bro. 419; *Butcher v. Leach*, 5 Beav. 392; and Roper on Leg. p. 573, *et seq.*

(*c*) But see *Milroy v. Milroy*, 14 Sim. 55, a special case.

(*d*) *Compert v. Austen*, 12 Sim. 222-3, July, 1841, (not cited in *Davies v. Fisher*, 5 Beavan, *infra*, p. 102.)

in the survivors or others, and be paid and assigned in like manner as their original shares; and the trustees were directed in the mean time and until the shares became payable to the children, to apply the income for their maintenance, and under certain circumstances to apply part of the capital for advancement (a). There was also a bequest of 6,000*l.* (b), in trust, for all the children of J. Fry born, or thereafter to be born, equally to be divided, and to be paid and transferred to them at their respective ages of 25, with a like benefit of survivorship and provision as to the issue of any one of such children who might die and for maintenance out of their shares; there was a reference to a bequest of 12,000*l.* in the same will, which had some influence on the decision (c): by a codicil, the testator revoked the power to apply the principal of the legacies for the advancement of the children, adding “and I do declare and direct that the said legacies shall vest and be payable, assignable and transferable to the said legatees respectively, as if no such power were therein contained.” The Vice-Chancellor was of opinion that the gifts of both the legacies were void: he considered, upon the whole will and the codicil, that the testator had blended together, as constituting the same fact, the vesting, the paying, the assigning and the transferring, and that he had done that with respect to every thing which those children might take by way of legacy; that, although he had not used the word vested in the legacy of 6,000*l.* given amongst all the children, yet that he intended the words pay, assign, and transfer, which are found in the bequest of the 6,000*l.*, should be taken to denote the time of vesting; that these legacies fell precisely within the scope of Sir Wm. Grant’s decision in *Leake v. Robinson* (d).

In *Bull v. Pritchard*, the testator, after giving a life estate to his daughter Mary Bull, for her separate use, directed that his trustees should convey his freehold estates unto and equally amongst all and every the child and children of his said daughter, who should live to attain 23, his, her and their heirs, &c., as tenants in common; if no child should attain 23, then there was gift over. The testator bequeathed some leasehold estates to trustees, upon the same trusts. This bequest was declared to be void (e), but the court (Lord Gifford, M. R.), declined then to give any opinion on the devise of the real

(a) P. 224.

(b) P. 227.

(c) P. 249.

(d) 12 Sim. 250. His Honour did not particularly advert to the clause authorizing the trustees to apply the interest for maintenance.

(e) *Bull v. Pritchard*, 1 Russ. 213. In *Bland v. Williams*, 3 Myl. & K. 417, Sir J. Leach appears not to have approved the decision in this case; and as to this case, see Mr. Jarman’s remarks, vol. i. pp. 772, 776.

estate : this question now came on before the Vice-Chancellor Wigram. There was a clause, enabling the trustees to apply the interest of the child's shares, or so much as they might think necessary, to their maintenance. The Vice-Chancellor was of opinion that the description of the devisee, in this case, was such as to make the given age part of that description, and unless the clause directing maintenance would alter the case, he was of opinion the devise was void. With respect to the clause of maintenance, the Vice-Chancellor said, he could not allow that clause to have any effect upon the description of the devisee, which description, without that provision, included as part of it the age of 23 years. "The devise," said his Honour, "is not to the children, 'at' or 'when' or 'if,' but in effect to such only as attain the age of 23 years; and the interim gift has no legitimate bearing on the question (a)," and this seems to be a sound conclusion (b). However, in *Davies v. Fisher*, the testatrix directed her trustees to stand possessed of her residuary personal estate, upon trust, to pay the income to Wm. Davies the younger; and after his death, in trust for the children of the said Wm. Davies the younger, as they severally attained the age of 25 years, equally to be divided, if more than one; the income to be applied, during *their respective minorities*, by the guardian for the time being of the children, for their respective support, maintenance, and education, with a gift over, in case no child should attain 25: the children claimed to have vested interests, insisting that the payment only was deferred. Lord Langdale, agreeing that the effect of the direction to divide amongst the children as they severally attained 25 by itself would make the gift invalid, held upon the direction for maintenance, though limited to the minority of the children, that they took vested interests (c); and Lord Langdale, not agreeing in the general doctrine of Sir John Leach's dicta in *Vaudry v. Geddes* (d), and *Bland v. Williams* (e),—namely, that when the testator has expressly given the legacy over on the legatee not attaining the prescribed age, the presumption in favour of the vesting of the legacy from the gift of the intermediate interest entirely fails,—was of opinion that the gift over, in the event of no child attaining 25, could not affect the vesting, which his lordship, on the construction which he put upon

(a) Sir J. Wigram, *Bull v. Pritchard*, 5 *Hare*, 572.

(b) "None of these clauses make any new gift to the grandchildren, nor can they alter the terms or conditions of that which is already made."—Sir W. Grant, *Leake v. Robinson*, 2 *Meriv.* 388; and see *Vaudry v. Geddes*, and *Bland v. Williams*, *ubi infra*.

(c) See 5 *Beav.* 212. In p. 210 and 211, Lord Langdale examines all the cases in which the gifts have been treated as vested by reason of the gift of interest. *Minority* may mean until 25, *Milroy v. Milroy*, 14 *Sim.* 15.

(d) 1 *Russ. & M.* 208, *sup.* p. 100, note; and see as to this case, 1 *Jarman*, 773-4.

(e) 3 *Myl & K.* 417; see 1 *Jarm.* 776.

the will, considered to have taken place (a). Here it will be observed there was a direct gift in trust for the children generally "as" they should attain the prescribed age, not to such as should attain the specified age, or even "when" or "if" they should attain that age (b). But in the *Marquis of Bute v. Harman*, the testator bequeathed to trustees 50,000*l.*, in trust for Lady Pole for life, and after her decease upon trust, to assign and make over the same securities unto and equally amongst *such* child or children of the testator's said niece, Lady Pole (being a son), as should attain the age of 25 years, or, being a daughter, should marry under that age with consent, the right or share of such child or children respectively to be a vested interest, and transmissible to his, her, or their personal representatives, notwithstanding his, her, or their *subsequent* death in the lifetime of his said niece (c); and the testator gave to his trustees full power during the minority of the children, or until marriage of the daughters, with such consent as aforesaid (*i. e.* of their parents or the survivor), to apply and dispose of all or any part of the income of his, her, or their *expectant* (d) shares of and in the said securities, for or towards their respective maintenance and education, and as to any surplus, to invest the same in like securities, together with the interest of the accumulations, and to stand possessed of all such accumulated securities, in trust, for the person or persons who should be ultimately entitled to the principal; if there should be no son who should attain 25, or daughter who should attain that age or marry with consent, then the trustees were to stand possessed of the said securities and all accumulations, in trust for his said niece, Lady Pole. Lady Pole had three children, and the question was whether the gift was void for remoteness. *Davies v. Fisher* (e), and *Newman v. Newman* (f), were the only cases cited. Lord Langdale said, "he could not doubt the validity of the gift." His lordship's opinion was no doubt influenced by the clause giving the interest by way of maintenance, as it was in *Davies v. Fisher*; but, looking to the language of this will in reference to the preceding cases, and Sir James Wigram's reasoning in *Bull v. Pritchard*, it is impossible not to entertain considerable doubts as to the propriety of this decision.

(a) *Davies v. Fisher*, 5 Beavan, 214; 6 Jur. 249; see 3 Bli. N.S. 312. It is stated that there is an appeal pending in the House of Lords.

(b) See *Cockrane v. Wiltshire*, *supra*, p. 99; Sir W. Grant, in *Leake v. Robinson*, 2 Mer. 384, 386, also takes the distinction where there is no direct gift but in the direction to pay; and see *Milroy v. Milroy*, 14 Sim. 48,

and *May v. Wood*, 3 Bro. 471.

(c) That is, as it is presumed, after having attained 25, or marriage.

(d) *V. supra*, p. 100, and note (b), and Lord Eldon's observation on the word "presumptively," 3 Bli. N.S. 293.

(e) *Sup.* p. 102.

(f) *Sup.* p. 96.

It has been held that not only must the gift vest within the time limited by the rule against perpetuities, but the interests of the respective parties in the property must be capable of ascertainment within that period, or the gift will be void (*a*).

When land and personalty are devised together, with a direction to invest the personalty in the purchase of land, the rules which govern devises of land will be applicable also to the personalty which is to be invested in the purchase of land (*b*).

There is frequent occasion for the application of the doctrine as to remoteness to cases of Powers (*c*). It will be remembered that a person who takes under an appointment made under a power given under any instrument, takes exactly in the same manner as if the gift conferred through the appointment had been inserted in the instrument by which the power is given (*d*): this is the key to the decisions on powers; what a person cannot effect by limitation, he cannot effect through the means of any authority or directions given to others or by proviso or condition (*e*). If a power in terms authorizes an appointment to such issue as are born within due limits as regards remoteness, an appointment to a more extensive range of issue will be good as respects those who are within the limits; and the converse will hold, namely, where the power is so extensive as to embrace issue generally, that is those within and those without the limits, but the appointment itself is confined to those within the limits, the appointment will be good. But if the power and the appointment both embrace objects not within the prescribed limits, the appointment being made to issue, or others as a class, it will, according to the general principle deduced from the authorities by Sir Wm. Grant, to be presently mentioned, be void *in toto* (*f*).

The question whether general powers, which taken in their unrestricted form would be clearly void, could be so modelled as to be good in part, though void for the remainder, was at one time a matter of question. The observations of Lord Eldon, in *Ware v. Polhill*, had thrown a doubt as to whether a power of sale, introduced into a deed or a will, containing limitations in strict settlement, and which was not

(*a*) *Curtis v. Lukin*, 15 Beav. 147, 155-6.

(*b*) *Jackson v. Majoribanks*, 12 Sim. 98; *Snow v. Poulden*, 1 Keen, 186.

(*c*) See Lord Rosslyn's able and comprehensive judgment in the *Duke of Marlborough v. Lord Godolphin*, 1 Eden, 417 *et seq.*

(*d*) *V. supra*, vol. i. p. 486-7; 1 Jarm. 248.

(*e*) See *Duke of Marlborough v. Lord Godolphin*, 1 Eden, 415, 417, 420-3. "You

shall not give a legal estate, and divest it of legal incidents," is another principle that comes into operation in such cases, *ibid.* 417, 423; *King v. Burchell*, *ibid.* 424.

(*f*) 1 Jarman on Wills, 250; *Routledge v. Dorril*, 2 Ves. Jun. 362-3; the words there were "amongst all and every," *ibid.* p. 358, and see 2 Meriv. 391.

in terms restricted as to its exercise to the limits allowed by law, was valid; but it has been decided that such a power, where it is co-extensive with an estate tail, is good, inasmuch as, like the estate tail, it may be barred (a): it may therefore be exercised at least during the tenancies for life; but it may still be a question during what period beyond this the power is capable of being exercised (b).

A term for years may be limited, so as to be expectant on an estate tail, that is, on failure of the issue in tail, for then it may be defeated by the execution by any tenant in tail of a disentailing deed, which takes the case out of the mischief which the rule against remoteness was intended to provide against (c). But if the term be precedent to the estate tail, and the trusts are such that they can only come into operation on failure of the issue who are to take under an entail, then the trusts are wholly void, as they may not come into operation within the legal limits, and they cannot be barred (d). So, if a power be given, which is only to take effect on a general failure of the issue, and the estate is so limited that there might be issue of the marriage not inheritable under the settlement, as no tenant in tail could bar the power, such a power is void (e).

It was laid down by Sir John Leach, that "you cannot limit to an unborn person for life, unless the remainder vests in interest at the same time (f)." But it is now settled that there is no restriction on the

(a) *Waring v. Coventry*, 1 My. & K. 252-3; *Powis v. Capron*, 4 Sim. 138, note, both before Sir J. Leach. *Biddle v. Perkins*, 4 Sim. 135, appears to have been decided on the same ground (1 My. & K. 252), though no reasons are given. It may be noticed that Mr. Preston, in the argument of *Waring v. Coventry*, stated that these decisions were not inconsistent with Lord Eldon's decision in *Ware v. Polhill*, for there the estates in question were leasehold and had vested in the first quasi tenant in tail, which was equivalent to the estate and the power being barred; so that if the power had been held good in that case, it would have been equivalent, as Sir E. Sugden remarks (on Powers, ii. 493-4,) to giving one man a power over another man's estate, and for no purpose in which any other person was interested: and see *Boyce v. Haning*, 2 Crompt. & J. 334; *Wood v. White*, 4 My. & Cr. 460; *Nelson v. Callow*, 15 Sim. 354; 1 Jarm. on Wills, 250; 2 Sugd. on Powers, 494-5-6. As to the case of *Ware v. Polhill*, see also *Ferrand v. Wilson*, *infra*.

(b) Sir E. Sugd. on Powers, ii. 470.

(c) See Jarman on Wills, i. 223, 224, refer-

ring to *Gulliver v. Ashby*, 4 Burr. 1929; and by consequence, though there might be infant tenants in tail, no one of whom of course could bar the entail for 100 years and more, yet the term, if not exhausted, would subsist.

(d) *Carr v. Drosier*, 2 Keen, 774; affirmed 5 My. & Cr. 249; and see *Roper v. Hallifax*, 8 Taunt. 869. That the term would not be affected by a disentailing deed, see *Eales v. Conn*, 4 Sim. 65, affirmed 9 May, 1831.

(e) *Bristow v. Boothby*, 2 Sim. & S. 469. There could be no doubt, said Sir J. Leach, that if it had been pointed out to the parties that the estate was not limited to all the issue of the marriage, and the power expressed was therefore void as too remote, the deed would have been altered, but how no one could say; he was therefore compelled to construe the deed as he found it, *ibid*. But failure of issue may be confined to those who take under the limitations upon the context of the instrument, *Malcolm v. Taylor*, 2 Russ. & M. 442.

(f) *Hayes v. Hayes*, 4 Russ. 316; *Deerhurst v. Duke of St. Albans*, *ubi inf.*, and Mr. Jarman's note, i. 236, et 239-40.

giving a life estate to an unborn person either in real or personal estate, provided it vest within the legal limits. "As estates in fee," says the Vice-Chancellor K. Bruce, "may be well given, so life interests may be well given by will to the children of a living person, who is a bachelor at the testator's death. But as an estate in fee, to be devised validly, must be so devised as to vest within the compass of lives in being at the death of the testator, and twenty-one years after the death of the survivor of them, so must a life interest; that the latter is limited in its duration can make no difference" (a): and an estate for life in personal estate may equally be limited to an unborn child (b). But a limitation to the children or issue of an unborn person to whom such life estate is given, is bad, for the children of such person might not come *in esse* until more than twenty-one years after a life in being (c); though a remainder on such a gift may be limited to competent persons (d).

There is no objection to a life estate, devised to a person not in existence at the testator's death, being made to *cease* before its natural termination, at any time, or upon any event; but a provision in a will as to such life estate, that the property so given for life shall *shift* from the tenant for life, and, the estate for the life not ceasing, be enjoyed during the residue of his life in some other manner upon the happening of a contingent event beyond the compass of lives in being and more than twenty-one years after the death of the surviving life, cannot be good (e).

It was decided by Sir W. Grant, after a full consideration of all the previous authorities, that where a gift is to a class, including, in one description, persons capable and persons who may be (f) incapable

(a) *Boughton v. James*, 1 Col. 46 (1844), and see *Beard v. Westcott*, 5 Taunt. 393; 5 Barn. & Ald. 801; and Mr. Russell's note, 4 Russ. 316. Mr. Lee intimated that Sir J. Leach was himself dissatisfied with his decision in *Hayes v. Hayes*; and see 2 Ves. Jun. 366.

(b) *Beard v. Westcott*, *ubi sup.*

(c) See *Duke of Marlborough v. Lord Godolphin*, 1 Eden, 415, and Jarman on Wills, i. 240.

(d) *Ibid.* 241-2. See Mr. Jarman's remarks on *Cooke v. Bowler*, 2 Keen, 54, *ibid.*

(e) *Boughton v. James*, 1 Col. 46; Vice-Chancellor K. Bruce. There is a strong decision of Sir John Leach, *Arnold v. Congreve*, 1 R. & M. 215, by which, where a testatrix by her will had given absolute interests to her grandchildren, and by a codicil confined them to life interests, limiting the property to their

children on their deaths, which could not be done, he, to effectuate the general intention, rejected the codicil altogether. This case, which has never been disputed, was followed by the same judge in *Carrer v. Bowles*, 2 R. & M. 307; but there absolute interests were actually given, and the testatrix used the words "so far as she lawfully could," *ibid.* p. 308; that case arose under a power. This case has since been acted upon in *Ring v. Hardwicke*, Rolls, iv. Jur. 242; and *Kampf v. Jones*, 2 Keen, 756, which carries it a little further, as the words "so far as she lawfully could" were supplied in that case. In *Church v. Kemble*, 5 Sim. 529, the appointor only meant that the disposition should take effect if she had the power to make it.

(f) *V. int. al. Holford v. Palmer*, 4 Russ. 407.

by reason of remoteness, that is who may happen not to be born at all within the legal limits, or who may not attain the age appointed for the vesting within the legal limits, the entire gift is void. The court cannot, in such case, so remodel the will as to support the bequests in favour of those who are capable, rejecting the rest, for that would be to make a new will for the testator; and to wait to see what number of objects will come into existence, and give proportionate shares to the proper objects, would introduce the mischief intended to be provided against, by tying up the property in the interval (a): it cannot be said, with certainty, that the testator would merely have excluded those who were not within the legal limits; he might also have given less to those who are within the limits (b). The same reason, and therefore the rule, applies, where there is an appointment to a class, some members of which are not proper objects; those who are capable of taking cannot be treated as the sole objects (c): the appointment is void altogether. Subsequent events cannot be regarded, possible events are what are to be looked to, excepting as will hereafter be mentioned in the case of devises over, to arise on one of several alternative events; therefore the rule applies, even though it may happen that all the possible objects actually become capable within the legal limits (d).

One very important instance of the application of the rule against

(a) *El v. sup.* p. 104; *Bristow v. Boothby*, 2 Sim. & St. 469.

(b) *Leake v. Robinson*, which was a case of a gift of a residue, 2 Mer. 363, 388, 390; *Jee v. Audley*, 1 Cox, 324; 1 Dr. & War. 533; and *Porter v. Fox*, 6 Sim. 485. There the gift was to a nephew by name and the testator's grandchildren, to be distributed as they should attain 25. This decree was appealed from, and on the hearing of the appeal by Lord Lyndhurst a case was directed to the Common Pleas, but before it was argued the suit was compromised; and see *Powell v. Squire*, Rolls, 13 July, 1841; and the arguments of Mr. Justice Patteson, *Lord Dungannon v. Smith*, in Dom. Proc. p. 15, of the printed arguments; and that of Mr. Baron Rolfe in the same case, *infra*.

(c) *Routledge v. Dorril*, 2 Ves. Jun. 363, 366.

(d) See *Deerhurst v. Duke of St. Albans*, and *Ibbetson v. Ibbetson*, *infra*; *Jee v. Audley*, 1 Cox, 324; *Proctor v. Bishop of Bath and Wells*, 2 H. Blackst. 358; *Palmer v. Holford*, 4 Russel, 403; but see the note 1 Jarm. 231 as to this case; see also 1 Jarm. 232, 233,

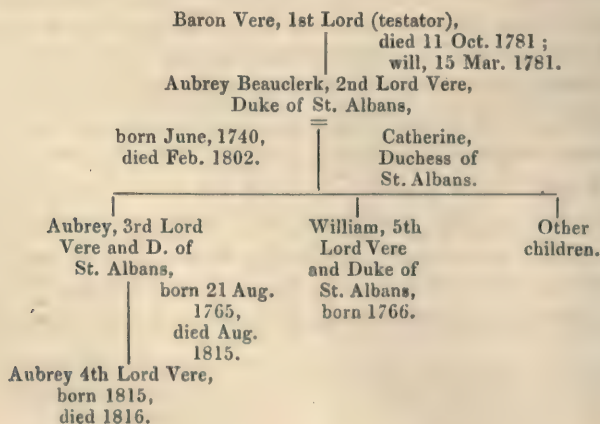
and *Lewis on Perpetuities*, p. 659, *et seq.*, where also the cases to which the general rule does not apply are stated. Mr. Jarman had entertained an opinion that, in deciding on the validity of gifts to a class, the state of events at the death of the testator might be looked to; but he seems since to have convinced himself that the rule will apply, if it be shewn that events might possibly have occurred subsequently to the date of the will which would have let in objects beyond the legal limits; see his observations, i. 227, 242, 243, note, on *Dodd v. Wake*, 8 Sim. 616; but *v. infra*, p. 125-6, as to gifts on alternative events, and *infra*, Mr. Baron Parke's opinion in *Ker v. Lord Dungannon*. As to the destination as between the heir at law and devisee of particular estates which are void in their creation, and especially in the case of a term carved out of a devised estate the trusts of which are void in their creation or in event; see 1 Jarman, 513 *et seq.*, and the judgments of Lord Redesdale and Lord Eldon in the important case of *Tregonwell v. Sydenham*, 3 Dow, 194, *et v. infra*, p. 121, note.

perpetuities, has arisen upon bequests of personalty, to be enjoyed in succession by several persons who shall sustain a particular character. Mr. Jarman observes, "that there is no principle of law which prevents a testator from so framing or moulding his disposition as to make its validity depend upon subsequent events: thus, he may give prospectively, estates to persons in succession who shall sustain a particular character, of one quantity if the person taking should be alive at his death, of another quantity if he should not be alive at his death; and the same observation applies to prospective limitations by way of trust: but this is difficult to be accomplished by direct devise, or by executed trust, so as to sustain the more limited interest to any one not specifically named" (a).

The case of *Lord Deerhurst v. The Duke of St. Albans* is one of the most important cases on this subject. It first came before Sir J. Leach in 1820 (b). At the time of the death of the first Lord Vere, the testator, in 1781, he had a son (Aubrey Beauclerk, afterwards second Lord Vere and Duke of St. Albans), and two grandsons living; each of them became Lord Vere: the elder, Aubrey, third Lord Vere, died in 1815, leaving a son Aubrey, fourth Lord Vere, who was born in 1815, and died in 1816. On his death, William, the second son of the second Lord Vere, became fifth Lord Vere and Duke, and was such at the institution of the suit. The testator, by his will, bequeathed certain chattels to trustees, in trust, for his wife for life, then to his son Aubrey the second Lord Vere for life, and after the decease of the survivor, the testator directed that his trustees should stand possessed

(a) 1 Jarm. 234.

(b) *Deerhurst v. Duke of St. Albans*; *Tollemache v. Coventry*, 5 Mad. 235; 2 Cl. & Fin. 611; 8 Bli. N. S. 547.



of the same, in trust, for such person as should from time to time be Lord Vere; it being his will and intention that the same should, after the death of his wife, go and be held with the title of the family, "as far as the rules of law and equity would permit" (a). There were three claimants of these chattels—the personal representatives of Aubrey, the third Lord Vere; the representatives of the fourth Lord Vere; and William the fifth Lord Vere. It was held by Sir J. Leach, and that has not been disputed, that this was an executed trust. "By the rules of law and equity," said his Honour, "every person who was living at the death of the testator might be limited to the use and enjoyment only; the son and grandson were living at his death, and were both therefore limited to the use and enjoyment only; but," said Sir J. Leach, "the child who succeeded the grandson, as Lord Vere and Duke (the fourth Lord Vere), was not living at the death of the testator, and could not be limited to the use and enjoyment only" (b); he therefore, as Sir J. Leach held, took an absolute interest, which was then vested in his personal representative. From this decree there was an appeal to Lord Lyndhurst, who affirmed the decree, and then to the House of Lords (1834) (c), where the decree was reversed; and it was held, that the chattels vested in the eldest grandson, that is, the third Lord Vere, who, as before mentioned, was living at the testator's death. Lord Brougham, in moving the judgment of the House, stated, that he considered that this kind of limitation was a novelty unauthorized by law; a construction could not be put upon the instrument to meet that which had accidentally happened after the date of the instrument (d); there might have been an abeyance or corruption of blood: what was to become of the chattels during the abeyance? a Lord Vere might come into existence many years afterwards; and as to the words "as far as the rules of law will permit," the law will not permit a limitation if there be any possibility of the period of vesting absolutely exceeding twenty-one years after a life in being: the "limitation," said his lordship, "is absolutely void, not for the excess only" (e). As to the third Lord Vere being *in esse*, on the determination of whose life estate the fourth Lord Vere was to take, the *man* was *in esse*, not the *peer*; there was *not* a Lord Vere (who was to take) *in esse* (f). To argue from the fact that the *person* was *in esse* at the date of the will who became Lord Vere, was to rely upon an accident; *the event might have been otherwise*; he

(a) *Lord Deerhurst v. Duke of St. Albans*, 5 Mad. 235; see Jarman on Wills, i. 235. & Fin. 611; 8 Bli. 547.
 (b) *But v. supra*, p. 106. (d) 2 Cl. & Fin. p. 626, 630, 633.
 (c) *Tollemache v. Earl of Coventry*, 2 Cl. (e) *Ibid.* 628, 630.
 (f) *Ibid.* 630-31.

would not *ex necessitate* answer the description within the allowed period. A limitation to be supported, must be definite and certain to the *man* or to the *peer as an individual*. It is not allowable to contend that at one time, and for one purpose, it is to the man, and for another time and purpose to the peer. The estate must be certain, so as within the time to vest in the person described, either in his natural or his politic capacity. In the politic capacity there was no such Lord Vere *in esse* in whom the estate would within that time *certainly* vest" (a).

Lord Brougham acknowledged that some of the arguments he had used, particularly respecting attainder and abeyance, would apply to the case of the third Lord Vere as well as the fourth; but he said he was bound by decision and authority in the one case, and could not deny the right of the third Lord Vere, who was living at the date of the will, without reasoning in the face of authority, and accordingly the third Lord Vere, the eldest grandson, was declared to be absolutely entitled (b).

The principle of this decision appears to be, that if life estates with remainders over are intended to be given to a person sustaining a particular character, being a peer for instance, the individual so to take being left to be determined by the event, any person who claims a life estate, or any interest whatever in the property, must show that it *must* have fallen to him if at all within the legal limits; if a person claims a remainder on such life estate, he must show that not only the life estate but the remainder *must* have taken effect within the legal limits: if at the time of the death of the testator, or at the date of the instrument if it be a deed, there be a person in existence who is in the line of the peerage, the gift will be good as to him if he become the peer, for though it is uncertain whether he will become the peer or not, yet if he ever does, it must be within the permitted limits (c).

(a) 2 Cl. & Fin. pp. 630-31.

(b) *Ibid.* 633. Sir E. Sugden, Lord-Chancellor of Ireland, though acknowledging the binding force of the decision, seems to have thought that, as the arguments for the reversal would equally apply to the 3rd Lord Vere, who, though *in esse*, was not *in esse* as Lord Vere at the testator's death, therefore his claim should also have been rejected. 1 Drury & W. 536-7. Mr. Justice Cresswell entertaining the same view, in *Lord Duncannon v. Smith*, before the House of Lords, after mentioned, said the decision must be taken only as a declaration, not that the bequest was good as to the 3rd Lord Vere, but that it was bad as to the 4th. Mr. Justice Patteson and Mr. Baron Parke, taking it as a

decision that it was good as to the 3rd Lord Vere, rely upon it as an authority for their opinions, pp. 16 and 22. Printed Opinions of the Judges; and see 10 Simons, 508. There is this difference in the cases: the 3rd Lord Vere was living at the date of the will and at the testator's death, though not as Lord Vere; in *Duncannon v. Smith*, as to which *v. infra*, the claimant was not living at the date of the will, or at the testator's death.

(c) In *Mackworth v. Hinaman*, 2 Keen, 662, A.D. 1838, which however is not reported in a very satisfactory manner (see Sir E. Sugden's remarks on this case, 1 Conn & L. 355), personal property was given to a trustee in trust to pay the interest, dividends, and profits to the testator's nephew, Sir Gilbert

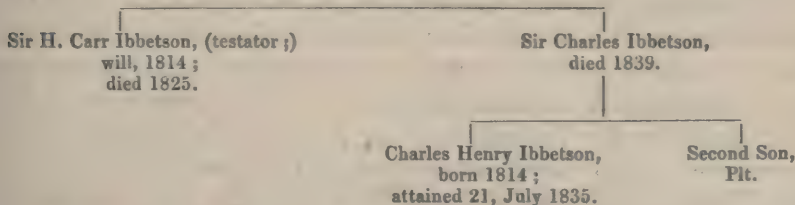
In *Ibbetson v. Ibbetson* (1840) (a), the testator devised the reversion in fee of his mansion-house, to the use of his brother, who afterwards became Sir Charles Ibbetson, for life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the first and other sons of his brother, Sir Charles, in tail male, with remainder to the use of J. W. Ibbetson, and his issue male in like manner in strict settlement, with remainder to the use of his own daughters successively in tail male, with remainders over. The testator then gave to trustees all his plate, &c. in and about his house at Denton Park, upon trust, "to permit the same to be used and enjoyed by the person or persons who, for the time being, should be entitled to the possession of his mansion-house, under or by virtue of the settlement made upon his marriage (b), or of the limitations contained in his will, until a tenant in tail of the age of 21 years should be in possession of his mansion-house; and then the plate, &c. were to go and belong to such tenant in tail." The testator then gave the residue of his personal estate, after payment of debts and legacies, to the person who at his death should be beneficially entitled to his mansion-house: there

Affleck, for life, and after his death to the eldest son of Sir G. Affleck for the time being; but in case Sir Gilbert Affleck should die leaving no son, then in trust to pay the interest and dividends unto the person on whom the baronetcy (which was originally granted in tail male) should devolve, it being the testator's will that the said interest, &c. should never be alienated from the title, but that each succeeding baronet should enjoy the said interest, &c. for his natural life, and after the extinction of the baronetcy, if that should happen, then the property was to fall into the residue of his estate.

In 1799 the testator died. Sir Gilbert and his two younger brothers, James and Robert, were then living. In 1808 Sir Gilbert died without issue, and the baronetcy devolved on his brother, Sir James. In 1833, he died without issue, and the baronetcy devolved

upon his brother, Sir Robert. The representative of Sir James Affleck, the elder brother of Sir Robert, claimed the property absolutely, and it was decreed that he was entitled. Lord Langdale seems to have thought that to carry life estates further than him was not possible; it is obvious that he might have had a son, who might have died in his father's lifetime, leaving a son who might have been the next baronet; but a life estate could not be limited to him. Sir James himself, it is to be remarked, was in no wise pointed out as a donee, otherwise than as he was in the line to succeed to the baronetcy; but he was within the rule in this respect, that if he was to take at all, he must have taken within the legal period; this decision therefore appears to be in accordance with Lord Brougham's doctrine.

(a) 10 Simons, 495, confirmed on appeal, 5 My. & Cr. 26.



(b) As the testator had no issue, the limitations in this settlement became abortive, and he was in fact seized in fee.

were no words to qualify the tying up, "so long as the rules of law and equity will permit." Upon the testator's death, in 1825, Sir C. Ibbetson took possession of the plate, &c.: he died in 1839, leaving two sons—the eldest of whom, afterwards Sir Charles H. Ibbetson, (who was the first tenant in tail, and who attained 21,) was born in the testator's lifetime—and a daughter. It was contended that the limitation of the plate, &c. was void for remoteness; the tenant in tail, spoken of in the will, was not of necessity to be a child either of the testator or of the tenant for life under the will, but might be any tenant in tail, however remote from the testator, or from the tenant for life under the will; and that the trust, after the estate for life to Sir Charles, was therefore void. It was contended, in answer, that, although a gift to a class of persons to take concurrently, if bad as to some is bad as to all, that objection did not apply to a case like the present, where the class of persons were not to take concurrently but *successively*; it might be bad as to the remoter links, but good as to the nearer ones, like the case of heirlooms: it was not a case where there was a suspension of the enjoyment of the property until a period that was too remote; but the property here was to be enjoyed by the persons in possession of the estate, in the mean time, and until there should be a tenant in tail in possession of the age of 21 (*a*).

The Vice-Chancellor of England said, "Under this will, the suspension of the vesting of the chattels might have continued for ages. The fact that a tenant in tail, of the age of 21 years, had become possessed of the mansion-house within twenty-one years from the death of the testator, was immaterial; unless the gift were such as that if it ever took effect at all it must of necessity have vested the absolute property in some one within the period allowed by law, it would be bad when the testator died, and must be so then:" and his Honour held, that so far as the gift was framed to take effect after the death of Sir Charles Ibbetson, it was void, and that the plate, &c., after the death of Sir Charles Ibbetson, fell into the residue of the testator's estate (*b*). Lord Cottenham affirmed this decision (*c*). In regard to the argument raised on the direction for possession, his lordship observed, "that the son, Sir Charles H. Ibbetson, the appellant, never, under this direction, had any interest in the property, for, at the moment of his father's death, he being tenant in tail in possession, of the age of 21, the event happened which determined the application of the rents under the former direction, nor would the case have been different if

(*a*) P. 505. (*b*) *Ibbetson v. Ibbetson*, 10 Sim. 515-6. (*c*) *S. C.*, 5 My. & Cr. 26.

the appellant had at the time been tenant in tail in possession under 21, for the special words excluded the title of any one as mere tenant in tail" (a). "It may be said," added his lordship, "that if the gift to the first tenant in tail in possession at 21, is too remote, so must be the direction for the application of the rents till that event should happen: if there be that objection to the direction which the testator has made in his will, it will afford no reason for introducing into the will a gift of an estate tail, which he not only has not directed, but was evidently anxious to avoid; the gift to a tenant in tail in possession at 21, negatives any intention of benefitting any one who should not answer to the whole description" (b). It is to be observed that Sir Charles H. Ibbetson was alive and in the line of succession, as tenant in tail, at the time of the testator's death; but it could not be said that he was in the line of succession of tenants in tail who should attain 21; it was not only, as in the cases just stated, uncertain whether he would become tenant in tail in possession, but there was the additional uncertainty whether he or indeed any tenant in tail would attain 21, and the person to take must answer the whole of the description.

The next case on this subject, which is material for the observations which were thrown out by the Vice-Chancellor Wigram, in his judgment, is the case of *Ferrand v. Wilson* (1845). The testator, Benjamin Ferrand, by his will, after creating a term of twenty-one years, for payment of debts and legacies, and other specific purposes, so far as his personal estate should be deficient, and devising the estate in strict settlement, empowered his executors, during and after the term until some person who should be entitled to the estates devised by him for an estate tail or for some greater estate should have attained 21, to enter and cut timber of mature growth for sale, and to apply the proceeds in payment of his funeral expenses, debts, and legacies until the trusts of the term should be satisfied (c); and then, with the consent of the devisees in possession, to invest the surplus in the purchase of other lands in fee, to be settled to the same uses. A considerable quantity of timber was cut by the first tenant for life and the trustees; it was not wanted for the purpose of payment of debts and legacies, as they were all satisfied (d): the plaintiff, who had become

(a) *S. C.*, 5 My. & Cr. 28.

(b) *Ibid.* p. 29.

(c) 4 Hare, 344; see the terms of the power, 351-2-3, and *ib.* 371. There were no words such as "so far as the rules of law will allow."

(d) There were annuities still payable

during the first tenancy for life, but the tenant for life, as the Vice-Chancellor held, was entitled to the beneficial enjoyment during the remainder of the term, keeping down the interest, the annuitants being entitled to the benefit of the term to enforce the payment of arrears, if necessary, *ib.* 368-9.

tenant in tail under the settlement, insisted that the proceeds ought to have been laid out in the purchase of other lands: the great question was, whether the power was void *in toto*, or whether it might be construed to be good, so far as the rules in regard to perpetuities and accumulation of rents and profits would allow, or, in other words, could it be modelled or apportioned (a).

The Vice-Chancellor was clearly of opinion, if the power was to be treated as imperative, that it was void to the extent in which it was given; the event of a tenant in tail attaining 21, might not occur for ages; and his Honour held, that the timber must, for the purposes then under consideration, be considered in the same sense as rents and profits; "timber upon parts of an estate must, for the present purpose, be considered and treated in the same way as it would be in the case of a timber estate" (b). If the power were permissive only, and not imperative, it was at least concurrent with the right of the infant tenant in tail, and to the extent to which it derogated from that right was liable to objection as creating a perpetuity (c). The question then was, whether the power, bad as a whole, could be modelled, so that it might be sustained, as far as the rules of law and equity would allow, or to any extent.

In discussing this question, the Vice-Chancellor took this important distinction. If the will of the testator resolves itself into a *single* intention that a particular act shall be done, or a particular limitation shall take effect, at a period which possibly may be more remote than the law allows in favour of a party designated, it is obvious that the court may not be able to model the power, and at the same time give effect *even in part* to the actual intention of the testator, and the limitation may necessarily be void *in toto*. "But," said his Honour, "I cannot see why such cases are to furnish a rule for other cases in which, at the *death of the testator*, the state of parties is such that some at least of the estates given by the will may be supported,

(a) 4 Hare, 372-3, 376.

(b) P. 373. His Honour further observed that even if the timber was not to be considered in that light, the power in its terms could not be sustained, for to sustain this timber trust to the full extent would be to allow a party by his own act to make that inalienable for ages which by law is alienable notwithstanding infancy; for though by force of a strict settlement, which the law allows, the corpus of an estate may be rendered inalienable for an indefinite time, the rents and profits are in a course of uninterrupted enjoyment and distribution as part of the per-

sonal estate of the tenant in tail, though an infant; and this observation applies as well to the timber as to the other profits.—Tenant in tail cannot be restrained from committing waste, *Duke of Marlborough v. Earl Godolphin*, 1 Eden, 404.

(c) 4 Hare, 376. It will be observed this was not a power limited upon an estate tail but accompanying it, and to be exercised under circumstances that prevented its being barred, *v. sup.* p. 105; and it was not, like a general power, capable of being apportioned, *v. sup.* p. 104-105.

though others may be too remote (a). Thus, in the case of *Lord Southampton v. Marquis of Hertford*, (*supra*,) an attempt was made to accumulate the rents and profits of an estate, for the benefit of a party who, by possibility, might not have come into existence for ages; now it is admitted, on all hands, that the validity of the limitations in a will must be determined at the death of the testator, and not by events; and upon that principle the power in that case could not be sustained to the extent to which it was given. It was therefore void, unless it could be modelled; but could it be modelled so as to preserve *even partially* the intention of the testator? If the court had sustained the accumulation for a period allowed by law, for what purpose could it have done so? The trust of this limited accumulation would have been void, on the ground that it was given to a person who by possibility might not be born for ages. The same observations applied to *Marshall v. Holloway*. "The case of *Ware v. Polhill*," his Honour observed, "requires more explanation; but as the first tenant for life was dead before the question arose, the case is not, upon the facts, a *decision* against the validity of the power during such *first* life estate. If the effect of Lord Eldon's language might be reduced within the exigencies of the case before him, and if that language had not commonly received (in the case of Powers) a construction co-extensive with the full meaning of Lord Eldon's words abstracted from the facts of the case, I should have thought that an apportionment of the power in this case would not conflict with *Ware v. Polhill*." His Honour, after some further comments on *Ware v. Polhill*, observed, "that Lord Eldon's decision must have been the same, whether the power was void from the beginning, or void only so far as it extended beyond Nathaniel, the first tenant for life." "*Ibbetson v. Ibbetson*," his Honour proceeded, "falls within the like observation. Sir Charles Ibbetson, the first tenant for life, was dead. The Vice-Chancellor of England expressly saved the question, whether the bequest might not have been good during the life of Sir Charles Ibbetson; and there is nothing in Lord Cottenham's judgment on the appeal, inconsistent with the validity of the limitation for the life of Sir Charles. I cannot but think that, consistently with those cases, a trust like that in question in the present case—a trust to be carried out by successive acts, to be done from day to day, each of which as

(a) And his Honour, to a certain extent, relied upon this in *Liley v. Hay*, 1 Hare, 580, which was a trust to distribute the rents of certain estates every St. Thomas's Day. His Honour held that there was no reason for

holding the will void as to those objects to whom an interest not extending beyond their *own lives* was given immediately on the testator's death.

far as it goes is an exact fulfilment of the testator's intention, both as to the thing done and the party to be benefited, is a trust which may perhaps be executed within the limits of a life estate, commencing at the death of the testator, though void as to the excess. The principle involved in the cases I have referred to, appears to me only to have decided that a power shall not be modelled, when by so doing the intention cannot even partially be effected." His Honour thought the cases he had suggested would be more properly assimilated to the cases under the Thellusson Act, or to devises of estates, the earlier of which are good at the death of the testator and the more remote only void for remoteness, than to the cases above cited. "Why," said he, "should not courts of justice apply the general directions of a will to the circumstances of the case as they exist at the death of the testator, in the same manner as he might have himself specifically applied them to the same circumstances, sustaining those directions which he might have lawfully given?" However, his Honour did not think that, sitting in that place, he ought to do otherwise than follow the language of Lord Eldon, in the concluding passage of *Ware v. Polhill*, leaving it to a higher tribunal to correct the law as regards the application of that decision, if it should be thought to require correction; and his Honour accordingly decreed that the tenant in tail was not entitled to an account of the timber felled during the life of the first tenant for life, nor to an account of the produce of the timber, up to the period to which the power might have lawfully extended, the will itself not having apportioned the power, and the authorities, as they stood, not, as his Honour conceived, justifying him in making such an apportionment by construction (a).

These observations of the Vice-Chancellor Wigram were pointedly referred to in the late important case of *Ker v. Lord Dungannon* (1846). The question turned on the devise of a term in the will of Lord Dungannon, which was in the following words—"in trust to permit my grandson, Arthur Trevor, and his assigns, to take the profits, &c. for and during his natural life, and from and after his decease to permit such person who for the time being would take by descent as heir(b) male of the body(c) of the said Arthur Trevor my grandson, to take the profits thereof until some such person shall attain the age of 21 years, and then to convey the same unto such person so attaining the age of 21 years, his executors, administrators and assigns; but if no such person shall

(a) *Ferrand v. Wilson*, 4 Hare, 377-380.

(b) Sic.

(c) Not sons of the body, as in *Stephens v.*

Stephens, Ca. Temp. Talb. 232. See Lord C. J. Tindal's argument, x. Jur. 723 b.

live to attain the age of 21 years, then in trust to permit such person or persons successively, who for the time being shall take by descent as heir male of the body of Arthur Trevor, my son (father of the grandson), to take the profits of the same leaseholds until one of them shall attain 21, and then to convey the same to such heir male first attaining that age, his executors, administrators and assigns (a).

Arthur Trevor, the grandson, survived the testator; he attained 21 in 1784, in the lifetime of the testator, and died in 1837, leaving a son, Lord Dungannon, who was not born at the death of the testator, but who attained 21 before the death of the testator's grandson, Arthur Trevor. The great question was whether he was entitled to the term under the devise contained in the will of his great grandfather. When the case came before Sir E. Sugden, Lord Chancellor of Ireland, though the decision turned on another point, his lordship expressed an opinion that this was a general gift until some person answered the full description, and was quite as much a gift to a class, though the persons within the class were to take successively, and finally only one of them absolutely, and not jointly and together, as in the case of *Leake v. Robinson*; and though at the death of the testator, Lord Dungannon, who was the heir male of Arthur Trevor, had attained 21, the Lord Chancellor intimated an opinion that he was not entitled. "I must, I fear," said his lordship, "hold the whole limitation to be void, for I have not power to take out of the clause, so as to effectuate the intention, a separate limitation to support Lord Dungannon's title" (b).

On this opinion a bill was filed, in which the question was distinctly raised. Sir W. Blackburne, M. R. in Ireland, decided in conformity

(a) *Ker v. Lord Dungannon*, 1 Dru. & W. 510, 530. It is to be observed that a devise of land in the same terms as this executory bequest would clearly have been good as a

contingent remainder, for if it vested at all, it must have vested at the instant of the termination of the previous estate for life, v. *infra* in this chapter.

(b) 1 Dru. & W. 533.

Earl of Donegal, testator, died 1771;
will 19 June, 1770.

Arthur Trevor, died in life of testator.

Arthur Trevor, the younger (Lord Dungannon), the grandson, and tenant for life, living at death of testator,
born 1763,
attained 21, 1784,
died 1837.

Arthur Trevor (Lord Dungannon), the defendant, on whose title the question arose,
born 1797, after the testator's death,
attained 21 in 1818.

with Sir E. Sugden's opinion, from which there was an appeal to the House of Lords.

Questions were put to the judges with a view to obtain their opinions as to the validity of the bequest; and there being a difference of opinion amongst them—nine, including Lord C. Justice Tindal (*a*), being of opinion that the bequest was invalid; two, namely Mr. Baron Parke and Mr. Justice Patteson, that the bequest was valid—the judges gave their opinions *seriatim*.

Most of the judges adopted the view which was taken by Sir E. Sugden, that this was a bequest to a class; they contended that the testator gave no preference to any one over the others simply as heir male of the body, but preferred him who should first attain the age of 21, it being quite uncertain who that one would be, or when he would be ascertained.

Mr. Baron Rolfe, in the opinion which he delivered, which was particularly referred to by Lord Brougham, so ably and clearly exhibits the points on which the question turned, that I have thought it would be advantageous to give some full extracts from it.

"Though a devise of rents and profits, no doubt," said the learned Baron, "is generally the same thing as a devise of the corpus, yet it is competent to the testator to make, within certain limits, a temporary severance of the rents and profits from the corpus, and that has clearly been done in the present case. What may have been the disposition of the rents and profits in the mean time appears to me quite unimportant. Even though the same person should, under the limitations of the will, take first the rents and profits during minority, and afterwards the corpus on attaining 21, yet he will take them as *distinct bequests*. It may be that the same person may first fill the character which entitles him to the rents, and afterwards that which entitles him to the corpus; but this is an accident, it is not the result of any necessary connection between the two gifts: and I am therefore of opinion that the will must be construed in the same way as if the rents and profits accruing between the testator's decease and the time when some one shall be entitled to call for an assignment of the corpus, had been given to strangers, or had been undisposed of" (*b*).

The rule applied, he thought, to the person who should be the *first* heir male equally as to all others.

(*a*) His lordship's argument may be seen x. Jur. 722, *et seq.* Mr. Baron Parke's is also set forth at length, *ibid.* p. 721, *et seq.* I have quoted from a printed copy of all the argu-

ments, lent to me by my friend Mr. Lee, Q.C.

(*b*) Lord Chief Justice Tindal's argument was to same effect, see x. Jur. 723 a.

“ There is no gift to him in terms different from the gift to all others who may be able to bring themselves within the terms of the gift. The person who shall be heir male at the death of the tenant for life was intended by the testator to take at 21, not because he would stand in any category different from that in which succeeding heirs male would stand, but because he would stand in the same. The testator intended that the first heir male who should attain 21 should take, whether he should be the heir male at the time of the death of the tenant for life or not : and where a testator has made a general bequest, embracing a great number of possible objects, there is no authority for holding that a court can so mould it as to say that it is divisible into two classes, the one embracing the lawful and the other the unlawful objects of his bounty.”

“ The general language used by the testator necessarily includes that which, if it had stood as a distinct gift, would have been good, yet including, as his language certainly does, gifts too remote as well as those not too remote, the whole is bad, for the gift is *an entire gift*, and it is impossible to say of it in *all* its different contingencies that it must have effect within the prescribed time.”

“ The reason why a gift to a class, as children or the like, is void when it may embrace some objects too remote is this : There is no intention to give to any number short of the whole class ; and therefore if the prescribed limit *may* be transgressed before the class is filled up, the whole gift fails, because it does not necessarily take effect within the prescribed period. In the case of a gift to a class, just as in the present case, there will be many events in which the bequest might be upheld if the courts might do what is here proposed, namely, separate the gift into two or more parts, on the ground that such parts are necessarily included in the general words used by the testator.”

The learned judge, after stating the case of *Jee v. Audley* (a), said : “ If in any case the court could be warranted in dividing a general bequest into its necessarily component parts it would have been that case, where it is quite clear from the age of the parties that the testator never had in his contemplation any daughters, except the four already born. But no one ever suggested that the court could mould the words of the bequest so as to divide it, as it were, into what was and was not lawful ; though, by such a course, it would have introduced nothing into the gift which was not necessarily included in the words used by the testator.”

“ Where a testator has made one entire gift, under which no one can

claim, except by showing that he fills a particular character, which character it may be possible that no one will fill within the prescribed period, then the whole is void; and it is not material that the testator might have attained his object, as to some of those he meant to benefit, by splitting his gift into different parts. If the testator had so done, those who would take, would take not because they fill the character designated in the general bequest, but because they fill some other character, or fill the general character with some other super-added qualification or restriction necessarily confining the period of vesting to a life in being and twenty-one years afterwards."

Mr. Justice Patteson was of a contrary opinion. After noticing that the case was one of *construction*, he said, "At the death of Arthur Trevor *one person* only would answer the description in the will, whether he were son, grandson, or great grandson of Arthur Trevor; this person seemed to him therefore to be the individual intended, the person designated by the words of this bequest, just as much as if the will had been drawn in more extended terms, making a distinct gift to each individual who should take by descent as heir male: the direction to convey did not, as he thought, stand alone; in this case the bequest of the enjoyment of the chattels by an heir male, during his minority, could not be separated from the other bequest (*a*), so that the bequest, under one alternative or the other, must come into immediate operation on the death of the grandson (*b*); he saw no reason to doubt that the court must, in the event of the person who was heir male of the body of the grandson *being a minor*, have given him the profits of the leaseholds during his minority (*c*). "The bequest," said the learned judge, "construed as it fairly and even necessarily must be, requires no modelling nor alteration; it is a bequest first to the individual who fills the character of heir male of the body at the death of Arthur Trevor the grandson; and that individual, be he what descendant he may of the grandson, must, if he live to be twenty-one at all, attain that age within the legal limits,"

The argument of Mr. Baron Parke corresponded in most particulars with that of Mr. Justice Patteson, though the learned Baron made larger concessions. "In order to determine the question," said the

(*a*) Distinguishing it from *Lord Southampton v. Marq. of Hertford*, 2 Ves. & B. 61, which was an attempt to *sever* the surplus rents from the legal estate, for a period which might exceed the legal limits; p. 15 and 16 of the argument.

(*b*) See Baron Parke's argument to same

effect, p. 20.

(*c*) See Baron Alderson's argument, p. 17; Baron Parke's, p. 19, 20; Justice Cresswell's, p. 2; each of whom seems to have thought that the bequest of the profits during minorities, standing alone, was open to the same objection as the bequest of the corpus.

learned Baron, "there is no doubt of the course to be pursued. We must first ascertain the intention of the testator, or more properly the meaning of his words in the clause in question, and then endeavour to give effect to them, as far as the rules of law will permit; our first duty is to construe the will, and this we must do exactly in the same way as if the rule of perpetuity had never been established." When the words are construed, the rule of law against perpetuity is to be applied, and there is no doubt what the rule is; the limitation is to be construed as it would be read at the opening of the will, and is not to be governed by subsequent events: the difficulty arises upon the interpretation of the clause in question, rather than the application of the rule of law to it.

"It must be admitted," said the learned Baron, "that if the bequest of the estate itself and of the profits had been two *distinct bequests*, each in a separate instrument unconnected with each other, *each* of them would have been *bad*. A bequest to the first heir male of the body of B., who should attain 21, supposing that the heir male *was not of age at the time of the testator's death*, would be clearly bad, as it might be a century before any heir male might attain that age. In like manner, supposing the heir male were not a minor at the time of the testator's death, the direction to permit the heir male of the body, for the time being, being a minor, to take the profits till his minority, *if it stood alone*, would be void, because it would be uncertain, at the death of the testator, whether any heir male of the body would answer the description within the prescribed limits." Neither of these limitations, taken by itself, could be correctly expanded into a series of bequests, in the manner which had been suggested in the argument.

"In the first of the above cases, I have supposed," said the learned judge, "that the heir male of the body *was not of age* at the testator's death; *if he was of age*, then as the will speaks *quoad* the person to take as at the time of the testator's death, the bequest to that heir male would, I apprehend, be *good*; and, in like manner, in the second case, if the heir male of the body *were a minor* at testator's death, the bequest to him would also be *good*." The question put by the Lords to the judges, as he considered, related to a person not living at the testator's death (*a*).

"But in this case," said the learned Baron, "the bequest of the rents and profits and of the corpus is in the same instrument, and it

(*a*) That was, of course, the fact; see judgment, *Tregonwell v. Sydenham*, 3 Dow. 194, and *sup.* pp. 110, 111, 112.
the pedigree. See on this point, Lord Eldon's

might, he thought, be expanded into a *series* of bequests, of which the first was unobjectionable." "It is clear," said he, "that according to the true construction of the words of this conjoint bequest of both rents and profits and corpus, reading them at the testator's death, *some* benefit would belong to the person who should be, at the death of B., Arthur Trevor, heir male of the body, in whatever degree of descent he might be such, and would necessarily take effect within the limits, for that heir must have either the rents and profits or the estate at the death of B. Immediately on the death of the tenant for life, the trustees must do something with the profits or estate; if the heir be a minor, they must give the profits, if a major convey the corpus. There is a trust for the person who should fill that character at that time, under all possible circumstances (a). The case is the same as if the testator had directed the trustees, at the death of B., to give the profits to the heir male *then in being*, if a minor, and the estate if he should be a major; and if he should die under 21, then to the next, and so on in a series of consecutive limitations."

"As to the first number of the series, nothing is wanting to enable him to take the bequest, except that he should be heir male in existence at the death of B.; and that condition must be fulfilled, if ever it is fulfilled, at the death of B., and in that respect he *differs from any subsequent member of the series*; with respect to them the bequest may or may not take effect within the limits, and is therefore void."

"The distinction is clear between a bequest to a class who are to take concurrently (as in *Jee v. Audley*, and *Leake v. Robinson*) and where the title depends upon a contingency common to all, that is, being in existence and filling a particular character at a particular time, and a gift to a *series* of persons who are to take successively, and the title of the first of whom is different from the rest, and depends upon a contingency *not common to the others*."

The learned Baron thought that this case might be distinguished from *Ibbetson v. Ibbetson*; nothing that was said by either of the judges interfered with the validity of the gift to Sir Charles Ibbetson for life.

Lord Chief Justice Tindal concluded the argument, by giving a decided opinion in favour of the judgment pronounced by the court below.

(a) But the first heir male being a minor might have died during his minority, and he might have left a son who must have been a

minor; it is difficult to say what was to become of the profits in that case, supposing the first would have been so entitled.

The Lord Chancellor (Lyndhurst) concurred in thinking that the direction relative to the rents, was clearly a separate disposition from the bequest of the leaseholds. The testator, he thought, had only one object in view, to benefit one individual, answering a particular description, not to create a *succession of events*; he had no such idea in contemplation: he thought that if the House were to do it in this case, it might have been done in almost every case where a gift has been held void for remoteness, for instance, in *Jee v. Audley*. *Ibbetson v. Ibbetson* he thought was not distinguishable from the present. Lord Cottenham concurred in affirming the decision. "It was attempted," his lordship said, "to make the gift good by *accident*, (the party answering the description having in fact attained 21, within the prescribed limits,) the *possibility* was the other way." Lord Brougham and Lord Campbell also concurred (a).

The judgment in this case determined that no heir male of the body, not even the first, though he had attained 21, could take under this limitation; but it seems to follow that any heir male of the body who had not attained 21 would have been exactly in the same condition: the words "for the time being" apply to both; and it was equally uncertain whether there would be an heir male under 21 as that there should be one who had attained 21 (b). The decision in this view amounts to this, that although the testator had so given the rents until an heir male of the body should attain 21, and the corpus in that event, that if the gift to an heir of the body of the grandson should ever vest at all, it should vest, as regards the first at least, within the legal limits, (for such heir of the body, if any such there ever were, must have been a minor, or of age at the death of his father); yet the limitation was void as regards the profits and the corpus: what then takes the case out of the protection which, in ordinary cases, would be extended to such a provision? it is, it would seem, the use of the words "for the time being." This expression appears to have been considered as showing that the testator had no intention to benefit the first heir male of his grandson, as distinguished from the others; he was but one of a class, no preference being given to any one, no one indeed being the particular object of bounty; the first was therefore put upon the same footing as the others (c).

It is obvious that in coming to this decision, if this be the correct view of it, the spirit and object of the rule was entirely disregarded; whether the clause in question is to be considered as two separate

(a) x. Jurist, 728.

(b) See Mr. Baron Parke's argument, p. 19.

(c) See 1 Dru. & W. 534.

devises, one of the rents, the other of the corpus, or as one single devise, it must have vested in possession, if it vested at all, within the legal limits; the rule against perpetuities therefore could not be infringed in fact, if there ever was an heir male of the grandson living at his death: as a contingent remainder it would clearly have been good (a). In the event that happened, there was a person to take the corpus; that event was excluded from consideration, according to the general rule that the event shall not determine that to be good which in another event would have been considered void; here no event could possibly have happened that would have suspended the vesting, in an heir of the body of the grandson on one or other of the alternations, beyond the legal limits (b). Looking to the second alternative, namely, that the heir male of the grandson had been under 21, he would then have been entitled to the receipt of the rents, subject to a gift over, in the event of his not attaining 21, which alone would have given him the estate in the event of his attaining 21 (c): if, as was assumed by more than one of the learned judges, he might have taken the rents during his minority if he had been under 21 (d), it is not obvious why, having attained 21, he should have been excluded; both alternatives were uncertain.

Assuming that the above is a correct view of the reasons of the judgment, if the trust had been in such terms as that each heir male of the body of the grandson had been separately an object of bounty, the decision no doubt would have been different. Mr. Baron Alderson, in his argument, admitted there was no doubt that where a testator has, by his will, made a series of successive limitations, some of which fall within, whilst others exceed the period limited by the rule, the courts who construe such wills, have, in various cases, carried that intention into effect, as far as relates to the limitations conformable to law, and avoided those only which are unlawful; and even if the testator has used general expressions, which in their generality would include both classes but with some express qualification clearly showing his intention, the courts, availing themselves of such qualification, may perhaps separate the lawful from the unlawful limitations, accord-

(a) *Fearne*, p. 4; *Jarman*, i. 230.

(b) *V. supra*, p. 122, et *v. infra*, p. 126, in this chapter, as to alternative events.

(c) *Tomkins v. Tomkins*, cited and approved by Lord Mansfield, 1 Burr. 134; and by Lord Ellenborough, *Doe v. Cundall*, 9 East, 404; and in other cases, *et v.* 9 Cl. & Finell. 601; see also *Neuland v. Sheppard*, 2 P. W. 193. For these authorities I am indebted to my

friend Mr. Lee.

(d) See Mr. Baron Maule's argument, p. 9. Mr. Justice Patteson, p. 15, said he saw no reason to doubt that the court must have given the profits to the claimant had he been a minor, though, as before mentioned, he was not living at the testator's death; but see Mr. Baron Parke's argument, cited above.

ing to the testator's express desire, and give effect to the former class alone (a).

It is to be observed that the question whether or not, in case Lord Dungannon (the son of the testator's grandson) had been living at the testator's death, the limitation would have been good, is untouched by the decision. Mr. Baron Parke was of opinion that the limitation in such case would have been valid (b); but the decision, looking to the grounds on which it was given, throws some doubt upon this position.

It not unfrequently happens that there is a limitation over to a person capable of taking, if the limitation were made to him directly which is expectant upon the failure of a limitation, which is void, as made to embrace objects not capable of taking. The general rule is, that all gifts to take effect after or on the failure or determination of a prior limitation which is too remote, are affected by such invalidity, and are likewise void; and that although the object of the prior devise should never come into existence; and though the subsequent limitation is made to a person *in esse* at the time of the creation of the gift, and therefore *per se* capable of taking (c). The same principle will of course hold if a limitation made under a power is such as to be void for remoteness; the remainders dependent upon it will not be accelerated, they are prevented from taking effect. If it were shown that no objects could come into existence, to take under the void limitation, there might be some show of reason for contending that the void limitation ought to be considered as out of the will, but authority has precluded such an argument being used; of course it could not be contended that though the property was appointed to the remainder-man on failure of the existence of persons incapable of taking, yet notwithstanding they exist he should take as if it was well appointed to them, and they had failed (d). But where the bequest over is to arise on an alternative event, one branch of which is within, and the other is not within the prescribed limits, if in such case the event

(a) Baron Alderson's argument, p. 17.

(b) *V. sup.* p. 121, *et v.* 110, 111, 112.

(c) *Proctor v. Bishop of Bath and Wells*, 2 H. Blackst. 258; *Lord Chatham v. Tothill*, 7 Bro. P. C. 453; *Ker v. Lord Dungannon*, 1 Con. & Laws. 358; and the other cases cited, 1 Jarman on Wills, 242, *et seq.*, who remarks, on the above-cited case of *Proctor v. Bishop of Bath*, there was only a possibility of the rule of law being transgressed, as Thomas Proctor might have had a son who

had taken orders in his lifetime, or even in the lifetime of the testator, *ib.* p. 243, note; Fearne, 508, and Butler's note; and see on this subject, Lewis on Perpetuities, 466, 660 *et seq.*, who, p. 661, points out an exception to the rule, referring to *Beard v. Westcott*, 5 Taunt. 393.

(d) *Routledge v. Dorrell*, 2 Ves. J. 364-5; *Brudenell v. Elwes*, 1 East, 442; Fearne, Cont. Rem. 508, and Butler's note; Smith's Orig. View, p. 411.

should bring the former alternative into operation, the gift over will take effect (a). Thus, if before the late Statute of Wills there had been a limitation over in the event of there being no son, or if there should be a son and such son should die without issue; if the contingency had happened that there were no son, the remainder over would have been good (b): and it may be observed as regards the influence of events, that, according to Mr. Fearne, it is now settled, that whatever number of limitations there may be after the first executory devise of the whole interest, any one of them which is so limited that it must take effect, if at all, within twenty-one years after the period of a life then in being, may be good *in event*, if no one of the preceding executory limitations which would carry the whole interest *happens to vest* (c).

It has already been mentioned (d) that the doctrine of *cypres* cannot be applied to personal estate, so as to give effect to a void limitation as it may in regard to real estate. In the case of real estate, where there is a limitation for life to a person unborn, (upon which no limitation to children or issue can be engrafted (e)), with remainders in tail to the first and other sons; as they cannot take as purchasers, but may as heirs of the body, and as the estate is clearly meant to go in a course of descent, the express gift for life to the parent is, by construction, turned into an estate tail, in the person to whom the life estate is given; the person thus made tenant in tail may indeed, by a disentailing deed, intercept the descent, but if he do not, then the estate goes to his issue, and the intention is thus effected as far as the rules of law will allow (f). But as regards personal estate; all that could be done in such case would be to give the property to the parent absolutely, and then it would not go in a course of descent to the children, but would go to the executors of the parent, and be liable for his debts (g). However, it may be observed, that though in such a case the tenant for life cannot obtain the absolute interest by this rule of construction, it seems he may, in some cases at least, by another; for, according to Mr. Fearne, wherever a term is given to one for a day or an hour, it is held to be a gift of the whole term, if the gift over be void and it appear to be the intention of the testator to dispose

(a) Jarman on Wills, i. 244-7.

(b) Lord Hardw., *Gower v. Grosvenor*, 5 Mad. 344; *Longhead v. Phelps*, 2 Sir W. Bla. Rep. 705, *et v. infra*.

(c) Fearne, 517, 521; and see *Gower v. Grosvenor*, 5 Mad. 345-6, Barnardist. 59-60.

(d) *Supra*, vol. i. pp. 533, 534.

(e) *V. supra*.

(f) See on this subject Lewis on Perpetuities, p. 426 *et seq.*

(g) *Routledge v. Dorrell*, 2 Ves. J. 365; Lewis on Perpetuities, 435, *sup.* vol. i. 534; but, in conjoint dispositions of real and personal estate, it seems the rule may be applied, Prior on Issue, 66, 174; the cases are cited p. 66.

of the whole from his executors (a); and from the illustration he gives, in the same page, it would appear that the intention to give it away will be inferred from any gift which purports to dispose of the whole interest (b), though Sir E. Sugden has expressed his decided disapprobation of that doctrine (c). Where there is an absolute gift, and an attempt to restrict such gift by limitations which are void or which become of no effect, it is clear that the gift remains absolute and unaffected (d).

(a) Executory Dev. 488, referring to the dictum of Lord Macclesfield, *Portk v. Chapman*, which does not seem to support the proposition.

(b) And see *Doe v. Cooke*, 7 East, 296; *Tollemache v. Lord Coventry*, 2 Cl. & Fin. 612, 633; and *Mackworth v. Hinxman*, 2 Keen, 658, 662.

(c) *Ker v. Lord Dungannon*, 1 Dru. & W. 528-9.

(d) *Whittell v. Dudin*, 2 Jac. & W. 279;

Ring v. Hardwick, 2 Beav. 353; and see *Kampf v. Jones*, 2 Keen, 756, 761, a case arising upon an appointment; and see *Carver v. Bowles*, 2 R. & M. 201, there cited. *Campbell v. Brownrigg*, on appeal, 1 Phil. 301. was decided on a similar principle; there was a gift to a daughter to go to her children, if she had any; she had none, and it was held she took the absolute property; *et v. int. al. Blease v. Burgh*, *sup.* p. 98.

CHAPTER III.

OF EXECUTORY TRUSTS.

SECTION I.—*Introduction.*

Executory Trusts those which are not Complete in themselves.

Marriage Articles afford an instance—Usually contemplate a formal Deed—Often to be found in Wills.

May arise not only where Testator expressly directs the Execution of a formal Instrument, but where he leaves such a Direction to necessary Implication.

When Trust imposed by Will, whether executed or executory, no Necessity for inquiring into Consideration.

Rule that Court will not execute a Trust in fieri, for Volunteers, does not apply.

THE trusts which will now be considered, are those which are not complete in themselves, but contain heads or minutes for the disposition of property which are to be carried into effect in a more formal manner, according to the intention to be collected from the instrument (a). The general doctrines have been stated in the former volume (b); but they require, from their frequent occurrence, a more minute consideration. Marriage articles, which must constantly be prepared under circumstances which preclude much deliberation, very frequently are of this description: these instruments are almost always drawn in contemplation of a formal deed being prepared to carry out and complete the provisions which they contain, which are merely set down by way of minutes, to be perfected by a more formal instrument, under proper advice.

In wills also it frequently happens that the trusts upon which a testator desires to settle his property, and the powers and privileges that are to be enjoyed by the successive takers, are designedly, or from the inability of the testator fully to carry out his meaning, left, in the way of heads or instructions, rather than of complete and perfect devises or bequests; hence the court is frequently called upon to expound a meaning and execute a purpose, which the testator himself has not fully explained in their detail; and the court is then driven

(a) *V. supra*, vol. i. p. 525; and see *Gower v. Grosvenor*, before Lord Hardw. 5 Mad. 349.

(b) Pp. 525-6.

to the necessity of giving such directions as it conceives to be nearest to a probable and rational purpose in the testator's mind (*a*). Trusts of this description may arise not only where the testator expressly directs the execution of a formal settlement, but also where he leaves such a direction to necessary implication (*b*).

Where a trust is imposed by a will, whether executed or executory, any inquiry as to consideration is out of place, and though it is said that all persons who claim under a will are volunteers, yet where a trust, though executory, is declared in favour of any specified objects, it is a constituted trust, the objects are *cestuis que trust*: the general rule, that the court will not enforce a trust *in fieri* for volunteers (*c*), does not apply; the paramount rule, that the will of the testator is to be performed, supersedes it; the objects of the devise or bequest are, as *cestuis que trust*, entitled to the aid of the court in having the trust carried into effect (*d*): how far, and in favour of what objects, the consideration will extend in a trust created by contract or articles, will be considered in a subsequent chapter.

(*a*) Vice-Chancellor of England, *Woolmore v. Burrows*, 1 Sim. 525. The testator there had directed his money to be laid out in land, "to be closely entailed," &c.; and see 5 Simons, 268.

(*b*) "I say where there is an executory trust—where the testator has directed something to be done, and has not himself, according to the sense in which the court uses these words, completed the devise in question, the court has been in the habit of

looking to see what was his intention, and if what he has done amounts to an imperfection with respect to the execution of that intention, the court inquires what it is itself would do, and it will mould what remains to be done so as to carry that intention into execution." Lord Eldon, 1 Jac. & W. 570.

(*c*) *Supra*, chap. i. sect. 4, p. 52, *et v. inf.*

(*d*) Forrester, 19; and see *Lechmere v. Lord Carlisle*, 3 P. W. 222; *Austin v. Taylor*, Ambl. 376, *sup.* chapter i. sect. 4, p. 51.

SECTION II.—Construction of Executory or Directory Trusts of Real Estate, particularly as regards Issue, in reference to the Rule in Shelley's Case.

Rule attaches on an Executed Trust, without reference to Intention.

In Executory Trust Intention may be referred to.

Not all Executory Trusts to which this Observation applicable; "Directory," therefore, will be used to designate this Description of Trust.

Whether a Trust is Executed or Directory a question of Intention.

Forms of Expression which have been considered as not making the Trust Directory.

Instances where the Trust will be considered as Directory, and where not.

Distinction established by—

Leonard v. Earl of Sussex.

Earl of Stamford v. Hobarts.

Papillon v. Voice.

Glenorchy v. Bosville.

Where there is a Direction in a Will that a Conveyance be executed, and the Estates to be given are pointed out, that must be followed.

As regards Personal as well as Real Estates.

True Guide according to Lord Northington.

So in case of a Voluntary Deed containing a Directory Trust.

Stoner v. Curwen, before Vice-Chancellor of England.

Distinction between Articles and Will—In the former the plain Object of Consideration in them is the Issue.

What Expressions in a Will will confine Estate to Tenancy for Life.

When Intention ascertained no Distinction between Articles and Wills.

Rochfort v. Fitzmaurice.

General Rule where Issue take Real Estate by Purchase.

Trevor v. Trevor, before Vice-Chancellor of England.

Estate of Wife controlled.

Court takes care of Interests of Daughters as well as Sons.

Where the Parties have shown that they know the Distinction, the Court will not vary the Limitation.

Where Articles and Settlement both executed before Marriage.

Rule in Boraston's Case, as applicable to Estate devised to Trustees in Trust to Settle.

Where Trust as to Real Estate in a Will to a line of Issue would create a Perpetuity, the Estate may be tied up as far as the Rules of Law will allow.

Humberstone v. Humberstone.

IN the case of Articles under which real estates are contracted to be settled on the husband and wife, and the issue of the marriage, and in Devises of estates by will, in which a settlement on particular persons and their issue is directed to be made, the respective estates which are

to be enjoyed by the Parents and the Issue are frequently left in so much doubt that they can only be settled by the Court of Chancery. There are forms of expression, as was noticed in the former volume (a), which, whether in a deed or in a will, will, under the rule in Shelley's case, give to the parent an estate tail, quite independent of intention, and even though the intention, without reference to legal construction, may appear to have been only to give to the parent an estate for life. In executed trusts, whether by deed or by will, that is, where the estates are actually given, the rule of law must prevail; the apparent intention must give way to those fundamental rules which for ages have served as landmarks in the disposition of property (b); the legislature alone can now interfere to alter the rule of law, whether it affects a trust estate or a legal estate; though, as will presently be mentioned, the testator in a will, or the parties in a settlement may, in this as in all other cases (c), by apt words give an interpretation to the terms they have used differing from that which the law would affix on such terms standing by themselves. Where, either in articles or in wills, the intention is that the estates should be conferred by some instrument to be afterwards executed, and the limitations are not specifically pointed out, the rule of law does not necessarily attach itself upon the expressions used in a trust so created; but the general rule of the Court of Chancery, applicable to the construction of all trusts, namely, what is the intention, is then the governing rule, not only as to whether the trust is to be considered as executed or executory, but, in the latter case, as to what estates or interests are to be given.

Some confusion has been produced by the word "executory" having been in this instance used in reference to this particular description of trust. There are, as will be observed in the following pages, many trusts that are executory, to which the distinction above adverted to can have no application; as where, on the original limitation or by subsequent events, an estate is vested in a trustee, and the only trust to be performed is to convey it to his *cestui que trust*: also where an estate is conveyed to a trustee, in trust, for sale to pay debts and the like, the trust is executory, but the rule above adverted to can have no application to it. It may be convenient therefore to take the word

(a) Vol. i. pp. 142, 503.

(b) V. *supra*, vol. i. p. 142, and *int. al.* Jones v. Morgan, 1 Bro. 206, 222; Jervoise v. Duke of Northumberland, 1 Jac. & Walk. 571, and the cases there cited; Kinch v.

Ward, 2 Sim. & S. 416, 418, and the other cases after cited in this chapter.

(c) See *int. al.* Holloway v. Holloway, 5 Ves. 401; Cholmondeley v. Clinton, *sup.* vol. i. pp. 552-3.

“directory” (a), which is often applied to designate such trusts, rather than executory, not as in itself more appropriate, but only for the sake of perspicuity.

It is obvious, from what has been said, that it is often of the greatest importance, in reference to the interests of the issue, to ascertain, in the first place, whether a trust is an executed or a directory trust; and this is a question of intention which is not always very easy to determine: some general rules may be collected from the decisions in regard to wills (b). A gift upon trust for any person is a direct gift, and not an executory trust, even though it be uncertain who is to take under it (c). Where a testator authorizes his trustees to correct any defect or incorrect expression, that does not make the trust executory, or authorize the trustees or the court to model or new mould the limitations, if they are in themselves explicit (d). Where there is a direct devise to a person for life, with remainder to the heirs of the body, adding the words “in tail,” with remainder over, with a declaration that all the aforesaid limitations are intended by the testator to be in *strict settlement*, that will not, it seems, alone make the gift executory, nor will it justify the court in giving a construction to the limitations, different to that which it would have received without the addition of those words (e).

Where lands are directed to be conveyed or to be purchased and settled (f) upon certain trusts not clearly and specifically pointed out, it may be stated, as an universal rule, that the court will treat every such case as a case of directory trust, and model the limitations accordingly, in conformity with the presumed intention in favour of the issue, where issue are objects of the trust (g). Some of the cases would seem to imply that, in the opinion of the learned judges who decided them, it is sufficient to make a trust directory, if a conveyance is to be executed; but it is conceived, as will be noticed more particularly hereafter, that such is not the rule of the court.

(a) This is Lord Hardwicke's expression, see 5 Mad. 349.

(b) Mr. Lewin has (p. 60) pointed out the forms of expression which have been considered as creating a trust of the one description or the other in wills of personal estate, and see Append. II. Mr. Jarman has a chapter on this subject, vol. ii. p. 252, *et seq.* to which the reader will do well to refer.

(c) Sir J. Leach, 5 Mad. 277.

(d) *Stanley v. Stanley*, 16 Ves. 511.

(e) *Douglas v. Congreve*, 1 Beav. 71.

(f) “Certainly the word ‘settled’ does

sound something like executory;” Lord Eldon, *Burrell v. Crutchley*, 15 Ves. 552; *Trevor v. Trevor*, 13 Sim. 139, was decided on the legal import of the words.

(g) See *Papillon v. Voice*, 2 P. W. 478; *Bastard v. Proby*, 2 Cox, 6; *Meure v. Meure*, 2 Atk. 265; *Harrison v. Naylor*, 2 Cox, 247; 2 Jarm. on Wills, 257-8; but see *Austen v. Taylor*, 1 Eden, 361; Amb. 376, *infra*. In *White v. Carter*, 2 Eden, 368, there were words indicating an intention that the estates purchased should be settled in strict settlement; in *Leonard v. Countess of*

The distinction above adverted to, in the construction of directory, as distinguished from executed trusts, was established by the cases of *Leonard v. Earl of Sussex* (a), and *Earl of Stamford v. Hobart* (b), before Lord Cowper; *Papillon v. Voice* (c), before Lord King; and *Glenorchy v. Bosville* (d), before Lord Talbot. In the case of *Papillon v. Voice*, the distinction is particularly observable, for Lord King allowed the legal rule to prevail as to that limitation in the will, which gave a direct interest, and was therefore executed; but he allowed the intent to control the legal rule as to that part of the same will which was executory or directory, though the words of the will were, except as to this difference, almost identical (e).

Lord Talbot, in *Lord Glenorchy v. Bosville* (f), laid down the rule thus: "But there is another question, namely, how far, in cases of trusts executory, as this is, the testator's intent is to prevail over the strength and legal signification of the words; I repeat, I think, in cases of trusts executed, or immediate devises, the construction of the courts of law and equity ought to be the same (g); for there the testator does not suppose any other conveyance will be made; but in executory trusts," added his lordship, "he leaves somewhat to be done; the trusts to be executed in a more careful and accurate manner" (h).

"The true criterion," said Lord Northington, "is this: where the assistance of trustees, which is ultimately the assistance of this court, is necessary to complete a limitation, in that case the limitation in the will not being complete, that is sufficient evidence of the testator's intention that the court should model the limitations: but where the

Sussex, 2 Vern. 526, there were also some special words shewing the same intention. In *Lord Glenorchy v. Bosville*, Forrest. 3, Lord King seems to have thought the circumstance that there was a direction to convey was sufficient, pp. 5-8; but he considered that case as very like that of marriage articles, p. 9: Lord Talbot seems to have founded his decree simply on the direction to convey, as making it a case of a directory (executory) trust, p. 19. The other principal authorities will be noticed in the following pages. Mr. Jarman has collected and examined these cases, 253, *et seq.*; according to his text, p. 253, a direction to convey, without more, would appear in his opinion to be sufficient to make a trust a directory trust; but see the Summary, p. 263. *Et v. Allanson v. Clitherow*, 1 Ves. 24; 1 Atk. 608; 1 Ves. 103; 19 Ves. 366.

(a) 2 Vern. 526; *et v.* 1 Ves. 149; 2 Atk. 281.

(b) 3 Bro. P. C. 31.

(c) 2 P. W. 478.

(d) Forrest. 3; 1 Atk. 608; that case turned upon the construction to be given to the word "issue," p. 19.

(e) See 1 Jac. & W. 571-2.

(f) Forrest. 19.

(g) V. *sup.* vol. i. pp. 520, 524. It is a maxim that "in the case of a voluntary devise the court must take it as they find it, and not lessen the estate, or benefit the legatee, although upon like words in marriage articles it might be otherwise." Lord Cowp. 2 Vern. 537, *Sweetapple v. Bindon*; there money was directed to be laid out and settled.

(h) See 1 Fonbl. 409-10. Mr. Fonblanque has there treated of this subject in an elaborate note, and he has there discussed Lord Hardwicke's apparent denial of the distinction in the case of *Bagshaw v. Spencer*, 2 Atk. 583, (see Fearn's Conting. Remain. 124, *et seq.*) which seems to amount merely to this, that Lord Hardwicke objected to the use of the word executory, as peculiarly applicable to trusts of this description; as did Lord Northington, 1 Eden, 366.

trusts and limitations are expressly declared, and nothing is left for the trustees to do but to buy the land, or to convey it only upon the trusts declared, the court has no authority to interfere, and make them different from what they would be at law" (a).

Where there is a direction in a will that a conveyance shall be made, and the estates to be given are pointed out in explicit terms, the authorities establish that, though the trust is clearly, in one sense, directory, the conveyance must be made so as to give such estates as are specifically pointed out in the will (b); and the same construction will be put upon a gift of personal estate (c); it certainly would appear to be difficult to find a principle on which to say, that where a testator has expressed his will, it shall be carried into effect in a different manner than that in which he has expressed it (d).

In *Papillon v. Voice* (e), before referred to, Lord King declared, (reversing the decision of the Master of the Rolls, as to that part of the case,) that where lands were devised to B. for life, though without impeachment of waste, with remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of B., this remainder was within the rule in Shelley's case, and must operate as words of limitation, and consequently create a vested estate tail in B. (f). The reason was, that in the case of a direct devise the particular intent

(a) *V. supra*, vol. i. p. 525, n. (d); Lord Keeper Henley, *Austen v. Taylor*, Ambl. 378; *S. C.* 1 Eden, p. 368. Lord Eldon, 1 Jac. & W. 570, uses similar expressions, and see *Wright v. Pierson*, 1 Eden, 125. The propriety of the decision in *Austen v. Taylor* has been doubted, and Lord Eldon is supposed to have disapproved of it; (2 Powell on Devises, by Jarman, p. 445; 2 Jarman on Wills, 256, 261;) but Lord Eldon does not appear to have objected to the principle there laid down. If an intention can plainly be collected, as in *Papillon v. Voice*, that the first taker should take for life only, Lord Northington did not deny (1 Ed. 365) that such intention is to be followed, (see 17 Ves. 76.) As regards the direct devise; though the direction to insert trustees to preserve contingent remainders did not prevent the operation of the rule of law, which has nothing to do with intention, see 1 P. W. 478, and 2 Ves. & B. 370; still such a direction is a mark of intention which may be followed in a trust to settle, 2 Ves. & B. 371, *v. infra*. Lord Northington, it is to be observed, according to Mr. Eden's Report, did not use the words which Lord Eldon objected to, see 1 Eden, 369, note.

(b) *V. sup.* vol. i. p. 525, n. (e); and see *Seal v. Seal*, Prec. Ch. 421; *S. C.* 1 P. W.

290; *Sweetapple v. Bindon*, 2 Vern. 536; *Blackburne v. Stables*, 2 Ves. & B. 370; *Synges v. Hales*, 2 Ball & B. 508; *Britton v. Twining*, 3 Mer. 176, a case relating to personal estate, a very important decision; *Marshall v. Boussfield*, 2 Mad. 166; which, as Mr. Jarman has observed, (Powell on Devises, ii. 450—on Wills, ii. 261,) is a strong case; and he refers to Lord Eldon's subsequent decision, in *Jervoise v. Duke of Northumberland*, as materially affecting this case, and *Blackburne v. Stables*, p. 455; 2 Jarman on Wills, 261; *Lord Deerhurst v. Duke of St. Alban's*, 5 Mad. 260, Dict. Sir J. Leach; *Rochford v. Fitzmaurice*, 1 Connor & L. 171; 2 Dru. & W.; *Franks v. Price*, 3 Beav. 211; and see Lewin on Trusts, 56, *et seq.*; Hill, p. 321-9.

(c) *Samuel v. Samuel*, ix. Jurist, 222. The words were "to be settled on them for the sole use of themselves and their lawful issue;" the parents were held by the Vice-Chancellor of England to be absolutely entitled.

(d) See 2 Ves. & B. 370, Sir W. Grant's judgment.

(e) 2 P. W. 471.

(f) 2 P. W. 477, *supra*, p. 131; and see *Jones v. Morgan*, 1 Bro. ubi *infra*, and the other cases in Smith's Original View, p. 224-5, and the cases cited 1 Eden, 364, 365.

is disregarded; it was immaterial that the testator meant the first estate to be an estate for life; I take it, said Lord Thurlow, in a case of this description, that in all cases the testator means so; "I rest," said his lordship, "on what he meant afterwards (a), his paramount intent, which brings into operation the rule of law." But, as has been mentioned before, as to that part of the will where the trust was executory, the same words—with the addition only of a power to jointure (b), which does not necessarily imply an estate for life, as such provisions may be introduced only to prevent delay or the necessity of actually barring the entail (c)—were construed as proper to be executed by limitations in strict settlement; here, no estate being directly *given*, the Court might look to the words, to see what estate was *intended to be given*.

In the case also of a voluntary deed containing a directory trust, if the terms are clear and explicit, it would seem that they must be followed: though the trust may be so far executory as to leave something to be done, yet the party may afterwards have become, as it is styled, "his own conveyancer;" that is, he may have so clearly defined his intention as to the limitations to be introduced into the settlement, as to leave no room for ambiguity or doubt (d), which is equally applicable to a will as to a deed. "There is nothing irrational," said Lord Chancellor Sugden, "in the limitation to the son of the settlor in tail: we must suppose that those who use technical words, use them in a technical sense, unless something to the contrary appears" (e). Lord Hardwicke says, generally, that if the words in voluntary settlements lean more strongly to the one construction than the other, it must prevail (f). In a recent case, the Vice-Chancellor of England stated the doctrine thus:—"And, although I apprehend the law to be that, whether the trust be executed or executory, the same construction must be put on the words; yet that means only in those cases where the words which declare the executory trust are so clear in themselves, as to point out what the trust is to be." If the words are doubtful, and the estate is not given, but intended to be given, by some instrument to be prepared, that is, if the trust is directory in the sense as above explained, then the court will look to the general intention, and mould the limitations accordingly (g).

(a) See *Jones v. Morgan*, 1 Bro. 220; *Roe v. Bedford*, 4 Maule & S. 364-5, a remarkable case; and see Hargr. note, Co. Lit. 376 b, note (1); Fearne, Cont. Rem. 8th ed. 187.

(b) See 1 P. W. 472.

(c) See 1 Jac. & W. 575.

(d) Lord-Chancellor Sugden, 2 Dru. & W.

21; Lord Eldon, 12 Ves. 238; 19 Ves. 366.

(e) *Rochford v. Fitzmaurice*, 2 Dru. & W. 20, 22, 23: the Lord-Chancellor is there treating the deed as voluntary.

(f) *Hodgeson v. Bussey*, 2 Atk. 91.

(g) *Stonor v. Curwen*, 5 Simons, 268; and see *Banks v. Le Despencer*, 10 Sim. 592, 594, a

It has already been noticed that there is a material ingredient in arriving at the intention in the construction of trusts created by articles which are the result of contract, as regards limitations to parents and their issue in reference to the rule in Shelley's case; namely, as to when the parent shall take an estate tail, or, as regards personal estate, its equivalent, with all its incidents, and when an estate for life only, which does not exist as regards trusts created by will or voluntary conveyance (*a*). The reason of the distinction is clearly pointed out by Sir John Leach. "You are guided," said he, "to the meaning of the articles by the plain object of consideration in them—the issue of the marriage; but you know nothing of the motive and object of the will but what you can collect from its language (*b*);" and the same observation will apply to a merely voluntary deed. Conformably to this it has been held, that in a *will*, a mere direction to settle an estate on one for life, to be followed by a remainder to the heirs male of his body, is not sufficient to make the trust directory only or to induce the court to direct a conveyance in strict settlement (*c*); there must be some expression of intention that the estate shall be confined to a tenancy for life only (*d*), as that trustees to preserve contingent remainders shall be interposed or that the estate of the first taker shall be without impeachment of waste or the like (*e*). But if *articles* express in plain words that the estate is to be settled on the husband for life, with remainder to the heirs of his body, though nothing can

case on a directory clause in a deed for settling estates to go with a title, (p. 578), before the same judge. "The books are full of instances in which the court has interfered to carry into effect the general intention of the parties of having a settlement made where only general words are used," *ibid.*; and see *Cholmondeley v. Clinton*, 4 Bli. N. S. 115; Dict. Lord Redesdale; *Brown v. De Laet*, 4 Bro. 527.

(*a*) Vol. i. pp. 525, 526, and the notes. Mr. Jarman has examined the cases in which estates given by will have been directed, contrary to the legal import of the words, to be settled in strict settlement; Powell on Devises, ii. 441, 445; on Wills, ii. 258-66; to which I would refer.

(*b*) *Lord Deerehurst v. Duke of St. Alban's*, 5 Mad. 260; but the decision was reversed, 2 Cl. & Finell, 611; and see 1 Ball & B. 25; 2 Ves. & B. 369; and 1 Jac. & W. 574; *Macquire v. Scully*, 2 Hog. 113; Lewin, p. 49.

(*c*) But in a direct devise, if there be a limitation for life, followed by a remainder to trustees to preserve, &c., and a remainder to the heirs of the body, still the union will take place, so as to create an estate tail, *Colson v.*

Colson, 2 Atk. 246-7; 2 Strange, 1125; 1 Jac. & W. 573; 2 Dru. & W. 17; *et v.* 1 Inst. 22 b, 319 b; and *sup.* p. 134, n. (*a*).

(*d*) See *Roberts v. Dixwell*, 1 Atk. 607.

(*e*) See *Bagshaw v. Spencer*, 1 Ves. 153; *White v. Carter*, before Lord Northington and Lord Camden, Amb. 671; *S. C.* 2 Eden, 366-8; *Bastard v. Proby*, 2 Cox, 6, a naked case, there was nothing whatever in the will, except the expression, "as counsel should advise," to warrant the court to interfere to model the settlement; Lord Eldon, then Mr. Scott, conceded the point; and see 2 Dru. & W. 18, 23 to 28 (*Rochfort v. Fitzmaurice*), and the cases there cited; *Stonor v. Curwen*, 5 Sim. 269; *Thomas v. Bennett*, 2 P. W. 342; *Honor v. Honor*, 1 P. W. 124; *West v. Erissey*, 2 P. W. 349; *Trevor v. Trevor*, 1 P. W. 623, 631; *S. C.* 1 Eq. Abr. 390, more full; *Glancville v. Payne*, 2 Atk. 39; *S. C.* Barnardist. 18; *Cordwell v. Mackrell*, Amb. 515; *S. C.* 2 Eden, 344. It cannot be inferred from a power of leasing, more beneficial than that which the law would give, that no estate tail was intended, at least where the trust is executed; Lord Harcourt, *Bale v. Coleman*, 1

be less ambiguous, yet this court, by reason of the implied consideration for the issue in a marriage settlement, would construe the articles as giving an estate for life only; *à fortiori* when any such expressions as above are inserted: a direction to settle on one and his heirs, as counsel shall advise, or as the executor shall think fit, is a strong collateral circumstance to show that a simple estate tail was not intended (a).

It seems, however, to be a settled rule, that when the court has, in the case of a will, arrived at the conclusion that the trust is to be considered as directory only, there is no difference in regard to the construction as respects the issue, between the case of a directory trust created by will, and of such a trust created by articles or a settlement; in both the general intention will be followed, and the estate will be preserved to the issue, as being, equally with the parents, the objects of consideration (b).

Where lands are devised to a man and his issue, there is no doubt that it is an estate tail (c). But where lands are directed by will to be settled on the parent for life, and after his death on his issue, there the issue will take by purchase; and such a limitation will be modelled so as to give to the parent an estate for life (d), in the same manner as in marriage articles (e); and unless some words can be found in the instrument to confine the estates of the children to estates for life, limitations will be directed to be made, giving the eldest son, and so in succession to the next, and so on to the daughters, estates tail (f).

Lord Viscount Hampden (*inter alia*) devised his Bedfordshire estates to certain persons, upon trust, that they should settle and convey the

P. W. 145, reversing Lord Cowper's decree; or of jointuring, v. *ibid.* 143, *inf.* p. 137.

(a) *Bastard v. Proby*, *ubi sup.*, 1 Jac. & W. 573; and see Lewin on Trusts, 57, 58, and the cases there cited.

(b) See Sir E. Sugden's judgment, in *Rochfort v. Fitzmaurice*, 2 Dru. & W. 30; and Lord Eldon's judgment, in *Jervoise v. Duke of Northumberland*, 1 Jac. & W. 574, in which he refers to his previous expressions in *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 218, 227, which had been the subject of much comment, and had been supposed (v. *sup.* vol. i. p. 526) to amount to a denial that there was any distinction between articles and wills in ascertaining the intention, but which appear only to have meant what is stated in the text; *et v. Blackburne v. Stables*, 2 Ves. & B. 369, Sir W. Grant.

(c) Forrester, 11, though there be a proviso for jointuring, unless there be ingrafted words,

ibid. *et v. infra*.

(d) Per Sir Jos. Jekyll, M. R., *Meure v. Meure*, 2 Atk. 266; and see 5 Sim. 272, and 2 Dru. & W. 18, 23. "The expression 'issue male,' I can mould without difficulty to mean 'first and other sons,'" Lord-Chancellor Sugden, *ibid.*, *et v. infra*, as to the flexibility of "issue." But see *Marshall v. Bousfield*, 2 Mad. 166, and Mr. Jarman's remarks on that case, On Wills, ii. 261-2.

(e) *Hart v. Middlehurst*, 3 Atk. 373, and in the same manner as where heirs of the body are used as words of purchase; *Lord Glenorchy v. Bosville*, Forrester, 9; *Dod v. Dod*, Amb. 275; the younger children there insisted that the were entitled equally with the eldest son.

(f) *Dodson v. Hay*, 3 Bro. 408-9.; of the influence of the practice of conveyancing in these cases, see 1 Atk. 608; 2 Atk. 281, 4 Bro. 535.

same to the use of or in trust for George Rice for life, *sans waste*, with remainder to his issue in tail male, "in strict settlement," upon condition that all persons who should come into possession of the settled estates, should take the name and bear the arms of Trevor. The Vice-Chancellor of England observed "that the words, 'in strict settlement,' were to be referred to the mode in which the first taker was to take, and that they had no effect whatever on the limitations which were to be made to those who were to take after him; the settlement would be equally a strict settlement, whatever might be the form of limitation to the issue of the first taker. Those words," continued his Honour, "mean merely that the limitation of the estate to the first taker shall not be such as to enable him to disappoint the obvious intention of the settlor or devisor, that the children of the first taker should take after him" (a). And his Honour held the words "in tail male" were not descriptive of the persons who were to take, but of the interest which was to be taken; that the issue to take were not the issue male but the issue, and that the estates they were to take were in tail male (b); and his Honour declared that the persons who were to take in remainder after George Rice Trevor, as issue, were his children, both sons and daughters; the mode in which they were to take was to be the subject of further consideration (c).

In a gift of personal estate, and as it appears also of real estate, where, upon the construction of the will or other instrument, the individuals comprised under the description of issue are to take the property as *personæ designatæ*; then, as is more particularly noticed hereafter, each individual, whether child, grandchild, great grandchild, or more remote descendant, will take individually a share in the property (d).

As the object might be equally defeated by allowing the wife to take an estate tail in her own lands, as by allowing the husband to take an

(a) *Trevor v. Trevor*, 13 Sim. 138-9.

(b) *Ibid.* 139.

(c) By the order made (which was on exceptions to the Master's report approving a settlement) his Honour declared that immediately after the limitation to the first and other sons of G. R. Trevor, there ought to be inserted in the draught settlement a limitation to all the daughters as tenants in common in tail with cross remainders between them in tail, *ibid.* p. 150. This is also an important case, *ibid.* p. 137, on the subject of in what terms a power to jointure to the extent of a fractional

part of the ordinary annual rental is to be carried into effect, as to which see Sugd. on Powers, ii. p. 315-18, 6th ed., p. 296, 7th ed.; and as to the meaning to be given to the words in a *shifting clause*, that the estates shall go over to the person next entitled, on the person possessed for the time being succeeding to a barony (on this point the case is under appeal to the House of Lords), and see the references in Mr. Simons' note, p. 152; and as to how far and to whom a default in taking the name and arms is to be made to extend, p. 150.

(d) See 2 Jarman, 34-5, *et v. infra*.

estate tail, the articles in such case will, in the same manner, be controlled by the end and consideration of the settlement (*a*).

It was formerly held, that where the wife took an estate tail by the articles *ex provisione viri*, the court would not interpose to settle it otherwise, because, in such case, the wife by 11 Hen. VII. c. 20, was restrained from aliening after the death of her husband, and could not in his lifetime alien without his concurrence (*b*); and it has been determined that as the power of aliening the estate by the husband and wife jointly is not unreasonable, the Court of Chancery will not control a settlement made in pursuance of articles giving such a power where the articles warrant it (*c*). The statute of the 11 Hen. VII., as to estates *ex provisione viri*, has been repealed by the statute 4 & 5 Will. IV. c. 92, so that this exception has ceased to be part of the law (*d*).

In directory trusts in favour of issue generally—where there are no words which restrict the meaning of the term—the court, as is stated above, will take care of the interests, not only of the sons, by proper limitations, but likewise of the daughters (*e*); but this must be understood, where there is no other provision for the issue female; for if, by the articles, portions are to be raised for the daughters, the court, in ordinary cases, will consider such portions to be the whole extent of the benefit intended for them, and will not interfere to give them a further benefit (*f*). The court cannot interpolate a limitation to daughters, even in favour of an only child, if the articles only provide for the issue male (*g*).

If there be a provision in articles that the estate shall go to the issue, in such sort, manner and form, subject to such charges for younger children as the husband shall, by deed or will, direct or appoint; this gives to him the power to divide the estate amongst the children, giving some part amongst the sons, if he pleases, and another part by way of provision for the daughters; still the whole must be divided amongst them, though in what proportions is left to the husband (*h*).

(*a*) *Jones v. Laughton*, 1 Eq. Abr. 392.

(*b*) *Honor v. Honor*, 1 P. W. 123; *Green v. Ekins*, 2 Atk. 473, 477; *Whateley v. Kempt*, cited *Howel v. Howel*, 2 Ves. 358; 2 Fonb. 405.

(*c*) *Highway v. Banner*, 1 Bro. 587.

(*d*) See 2 Dru. & W. 19.

(*e*) Lord Hardwicke, *Hart v. Middlehurst*, 3 Atk. 373, *supra*, p. 137; and see *Oddie v. Woodford*, 3 My. & Cr. 600, 610.

(*f*) This, says Mr. Fonblanque, i. 406, seems to be the principal distinction between the case of *Honor v. Honor*, 1 P. W. 123, *West v. Erissey*, 2 P. W. 349, and *Powell v. Price*, 2 P. W. 535.

(*g*) Sir A. Hart, *McGuire v. Scully*, Beatty, 830.

(*h*) Lord Hardwicke, *Hart v. Middlehurst*, 3 Atk. 374.

The intention appearing upon the instrument, or the terms of the contract, may overcome the effect of the general rule in favour of the issue. Where, by articles, part of an estate was limited to the husband for life, remainder to the wife for life, with remainder to the first and other sons and daughters in tail; and another part was limited to the husband for life, and to the heirs male of his body by that wife; Lord Macclesfield said (*a*), if this had been the sole limitation, he should have decreed a strict settlement, according to the common rule; but, where the parties have shown they knew the distinction, when to put it out of the power of the father and when to leave it in his power, he would not vary the last limitation, and decreed to the father in tail as to the last, though not as to the first; and Lord Hardwicke approved, and acted on this decision (*b*). The court, generally speaking, will not, in favour of the issue, extend the provisions of the articles, if the articles make some provision for the issue, though such provision may not affect the whole of the settled estate; for it is not unreasonable for the parents to reserve some power to themselves (*c*).

If the lands be gavelkind, yet in a directory trust, the court will direct that the limitations shall be to the first and other sons, &c., according to the course of the common law (*d*).

In all cases where it was necessary, the court would have inserted a limitation to trustees to preserve contingent remainders, though not directed by the will (*e*); now, the necessity for such a limitation is superseded, as has already been mentioned.

If there be articles and a settlement, and both are executed before marriage, as a general rule, the settlement alone can be looked to: if it should differ from the articles, it must be taken as a new agreement; the trust is not executory but executed, excepting so far as the settlement itself may contain any directory or executory trust (*f*).

But if the settlement, though executed before marriage, purport to be executed in pursuance of the articles, and in all cases where there are articles before marriage and a settlement after marriage, the articles are in effect the binding instrument; and if the settlement

(*a*) The words in the articles are not precisely those in the text which are used by Lord Hardwicke; see 2 Ves. 358. The case is not well reported.

(*b*) See *Howell v. Howell*, 2 Ves. 359.

(*c*) *Chambers v. Chambers*, 2 Eq. Ab. 35, § 4; *Fitzgibbon*, 127; *Howell v. Howell*, 2 Ves. 358; 2 Fonbl. 406.

(*d*) *Roberts v. Dixwell*, 1 Atk. 610.

(*e*) *Humberstone v. Humberstone*, as cited 1 Atk. 593; *Gower v. Grosvenor*, Barnard. 63; Dict. of Lord Hardwicke.

(*f*) *Legg v. Goldwire*, Forrest. 20; *Partyn v. Roberts*, Ambl. 315; and see *Marquis of Breadalbane v. Chandos*, 2 My. & Cr. 735-6-8-9, 741-2, and *Page v. Horne*, 9 Beav. 570.

give estates or interests different from those which the court would give on the construction of the articles, the settlement will be reformed (a), not only in favour of sons but of daughters, unless they are provided for by portions or otherwise, independently of the limitations sought to be reformed (b). But this is between parties to the articles and settlement, and their representatives and mere volunteers, and has not, said Lord Hardwicke, "been carried into execution against a purchaser" (c).

It may be here observed, that the rule which was established in *Boraston's* case, and other subsequent cases,—that where an estate is devised to a person *when* he shall attain 21, with a gift over in the event of his not attaining that age, there being a gift of the profits during the interval for some purpose, the estate shall vest in the donee subject to the prior chattel interest (d),—is at least equally applicable where an estate is devised to trustees, upon trust to settle the estate in the same terms (e).

Where a testator has directed his trustees to convey an estate, upon trust for whole lines of issue, in such manner that, taken altogether, the trust would create a perpetuity; but the purpose is to a certain extent consistent with the rules of law, it will be so far complied with, that the estate will be settled so as to tie it up to the intended objects, so far as the rules of law will allow; the case of *Humberstone v. Humberstone*, before referred to (f), affords an instance (g): but, as will be seen on reference to the former volume, the estates directed to be given in the case of *Humberstone v. Humberstone* would have been modelled in the same way in case it had been an executed trust (h).

(a) *Honor v. Honor*, 1 P. W. 123, 125; S. C. 2 Vern. 658; *Trevor v. Trevor*, 1 Eq. Abr. 387; S. C. 5 Bro. P. C. 122; *West v. Erissey*, in the House of Lords, 2 P. Williams, 349, 355-6; S. C. 1 Bro. P. C. 225, and the notes in Mr. Cox's and in the last edition of P. W. p. 356; *Streatfield v. Streatfield*, Forrester, 181; *Roberts v. Kinsley*, 1 Ves. 239; *Cusack v. Cusack*, 5 Bro. P. C. 116, 120, 121; *Randall v. Willis*, 5 Ves. 262; and see *Barston v. Kelvington*, 5 Ves. 603, where a settlement was reformed on the footing of a letter of instructions.

(b) *Burton v. Hastings*, Gilbert's Eq. Rep. 113; *West v. Erissey*, *ubi sup.*; *Hart v. Middlehurst*, 3 Atk. 371. See the observations of the editors (2 P. W. 356) on *Powell v. Price*, 2 P. W. 535, and *Fearn's Conting. Rem.* 103, 6th ed., there referred to, v. *sup.* p. 139.

(c) *Warwick v. Warwick*, 3 Atk. 293.

(d) *Boraston's* case, 3 Co. 16, *sup.* chap. ii. p. 95; Jarman on Wills, i. pp. 734-740.

(e) *Stanley v. Stanley*, 16 Ves. 506-8. (It is to be observed that in this case Sir William Grant said (p. 506), "the event upon which an estate is given over cannot determine what is the event on which it is to vest;" *Phipps v. Williams*, 5 Sim. 47, 62; S. C., *Phipps v. Ackers*, in Dom. Proc. on appeal; as to the residue the decision was different, because there was a condition precedent to be performed. The Vice-Chancellor, 5 Sim. p. 63, does not appear to have approved of *Chambers v. Brailsford*, 18 Ves. 368.)

(f) *Humberstone v. Humberstone*, 2 Vern. 737, *sup.* vol. i. p. 531-4; *et supra*, chap. ii. p. 126.

(g) See *Mortimer v. West*, 2 Simons, 274, 282.

(h) And see Prior on Issue, p. 60, *et seq.*

SECTION III.—*Some other Matters relating to Executory Trusts,—
Usual Powers.*

*General Rule as to "Usual Powers" laid down by Vice-Chancellor of England, in
Hill v. Hill, 6 Sim.*

Power for Tenant for Life to appoint new Trustees.

Power to grant Leases.

*Precedents for carrying out a Directory Trust, for settling Estates to go along with a
Title.*

Lord Dorchester v. Lord Effingham.

Banks v. Lord Le Despenser.

Tenancy in Common more favoured in the Court of Chancery than Joint Tenancy.

AN important question frequently arises upon articles, which provide that "all usual and proper powers" shall be introduced (a). The general rule applicable to such cases has been laid down by the Vice-Chancellor of England (b). In the case before his Honour express powers were given, and then followed the direction that all usual and proper powers should be introduced. The question was whether these words authorized the introduction of a power of sale and exchange. "There is a palpable distinction," said his Honour, "between inserting in a settlement powers for the management and enjoyment of the settled estates, which are beneficial to all parties, and powers which confer personal privileges on particular parties, such as powers to jointure, to raise money for any particular purpose, &c. But powers of leasing, of sale and exchange, and where there is joint property, or there are any mines, or any land fit for building purposes, powers of partition, of leasing mines, and of granting building leases, are powers for the general management and better enjoyment of the estates; and such powers are beneficial to all parties:" and his Honour directed that a power of sale and exchange should be introduced (c).

(a) The cases on this subject are stated and examined by Sir E. Sugden on Powers, ii. 484, *et seq.*; Hill on Trustees, p. 483, *et seq.*; and Lewin on Trusts, p. 61, *et seq.*

(b) *Hill v. Hill*, 6 Simons, 144-5. It is to be remarked that in the case of *Trafford v. Trafford*, 3 Atk. 347, the question of remoteness, as Lord Eldon remarks, 12 Ves. 233, was overlooked, or at least not noticed, as to which, *v. supra*.

(c) And see *Williams v. Carter*, Sugd. on Powers, Append. No. 23, p. 635. In *Lindon v. Fleetwood*, 6 Sim. 152, a power to appoint new trustees was directed to be inserted under a distinct clause not connected with that by which the specific powers were given. The cases of *Wheate v. Hall*, 17 Ves. 80, *Brewster v. Angell*, 1 Jac. & W. 625, have rendered it doubtful whether a power of sale and exchange is to be introduced as a matter of

A power for a tenant for life to appoint *new trustees* is certainly an usual power (a). It has been held that where the articles expressly specify that there shall be a power to grant leases for twenty-one years, the general words will not authorize the insertion of a power to grant building leases, however beneficial it might be from the situation of the property in reference to circumstances which may have subsequently occurred (b).

The cases of *Lord Dorchester v. Lord Effingham* (c) and *Banks v. Lord Le Despencer* (d) afford precedents for the mode in which directory trusts for settling estates to go along with a title are to be executed; but this subject will be noticed hereafter. I shall conclude this branch of the subject by observing, that in a directory trust, words importing joint tenancy may be construed so as to give estates in common, the latter kind of estate being most favoured in the Court of Chancery (e): but it may now be considered as the settled general rule of the Court of Chancery, that in a direct gift, what would confer an estate in joint tenancy at common law will also, in the case of a legacy as well as in other cases, give an estate or interest in joint tenancy; this court in such cases having abandoned the rule of the civil law, which does not allow of survivorship in legacies (f), and the Ecclesiastical Courts would no doubt adopt the same construction.

course in every case where articles are to be carried into execution and the will is silent on the subject; Sir E. Sugden on Powers, ii. 484, considers that the effect of those cases is that such a power cannot be implied.

(a) Lord Eldon, *Brewster v. Angell*, 1 Jac. & W. 628.

(b) *Pearce v. Baron*, Jac. 158. Waterloo Bridge has since been built in the vicinity.

(c) 3 Beavan, 180, in note.

(d) 10 Simons, 576; 11 Simons, 508. On the latter hearing, a question was raised whether a protector of the settlement should be introduced in the settlement made according to the directions of the court: the Vice-Chancellor, after discussing the provisions of the act as to protectors, declared that in that case, the trustees not desiring it, a protector was neither necessary nor proper, 527; and see *Boydell v. Goltightly*, 14 Sim. 346.

(e) *Heathe v. Heathe*, 2 Atk. 122; *Synge v. Hales*, 2 Ball & B. 506-8; and see 9 Ves. 596-7; and *Marryatt v. Townley*, 1 Ves. 103.

(f) Sir Joseph Jekyll thought that there was nothing unreasonable in joint tenancy, as it might be severed (though not of course *by an infant*); and in the case before him, which has been uniformly followed, he refused to be

bound by the civil law doctrine, and he held the legatees to be joint tenants, as they would have been by the same words at law. *Cray v. Willis*, 2 P. W. 530-1; *et v. int. al.* 9 Ves. 598; 15 Ves. 371; and *Crooke v. De Vandes*, 9 Ves. 206; *Withy v. Mangles*, 4 Beav. 368, there the father, mother and child took under a limitation in a settlement to "next of kin," as joint tenants. Persons who take at different times cannot take as joint tenants, so that where the gift is to one for life, and after his decease to his children when they arrive at 21, the children take as tenants in common, *Woodgate v. Unwin*, 4 Sim. 129. In *Vaughan v. Marquis of Headfort*, the words of the bequest were 40,000*l.* in the Three per Cent. Reduced, to the Marquis of Headfort and his children, *to be secured for their use*; the Vice-Chancellor of England held, that under the first words the marquis and his children, of whom he had six (infants) at the death of the testatrix, would be joint tenants; but the latter words, as *securing* could not apply to the father, gave a life interest to the marquis, and that all his children, born and to be born, would take the corpus after his death, and according to the above rule they would take as tenants in common.

CHAPTER IV.

LIMITATIONS OF PERSONAL ESTATE IN RESPECT OF THE CLAIMS OF CHILDREN AND OTHER DESCENDANTS, AND THE INCIDENTAL DOCTRINES RELATING TO SUCH LIMITATIONS.

SECTION I.—*Limitations of Personal Estate to Parents and their Issue, which confer an Absolute Interest on the Parent, and those on which Issue take as Purchasers, and of Limitations over for default of Issue, and the like.*

General Rule—Words which would give Estate Tail in Real Estate give absolute Interest in Personal Estate.

Gift to a Person and his Issue, or with Remainder to his Issue, and other Instances.

Knight v. Ellis, Lord Thurlow.

Attorney-General v. Bright, Lord Langdale.

Any Gift over on Failure of Issue not limited to some Period within due Limits void.

Gift to Issue living at the Death of Tenant for Life.

Whether a Devise of a Term to a Man for Life, and afterwards to his Issue, forms an Exception to the General Rule.

General Rule may be controlled by Intention clearly and properly expressed in the Instrument.

Legal Acceptation of the word "Issue" (in note).

Conflicting Cases on the Subject of Limitations of Personal Estate in Remainder (in note).

Peacock v. Spooner, before Lord Chancellor Jefferies.

Webb v. Webb, before Lord Hardwicke.

Bartlett v. Green, before Vice-Chancellor of England.

Stat. 1 Victoria, c. 26, sect. 28 and 29, set out.

The Effect of these Clauses on Gifts over in default of Issue as regards Real Estate and Personal Estate.

Observations of Mr. Jarman on this subject ;

And of Mr. Hayes.

Who will take under a Gift of Personal Estate to Issue as Purchasers.

When Issue is a word of Purchase it is synonymous with Descendants.

General Rule that Children, Grandchildren, &c., when Purchasers, take per capita as Joint Tenants.

Where Issue will take as Tenants in Common.

IN connexion with the subject of the interests of children and other descendants, as regards the carrying out of executory trusts, it may be convenient here to introduce a little more at large the doctrines as to trusts of personal estate, so far as regards the rights of children and

other descendants, and the incidental doctrines in regard to limitations of personal estate, which have been occasionally adverted to in the preceding Chapters (a).

The general rule is, that where in a gift of personal estate the words would raise an estate tail in real estate expressly or by implication, they will, as no recovery can be suffered, give the absolute property in personalty, unless the donor expresses a clear intention to the contrary (b); if there be no distinct unequivocal expressions to restrain the received construction of the words the consequence must prevail, whatever may be the apparent intention (c).

Where there is a devise of real estate *simply* to a person and his issue (d), or to a person for life with remainder to his issue or issue male (e), it now seems to be pretty well settled by authority that such a gift will, in each case, confer an estate tail. The key to these decisions, and which must always be looked to in their application to any particular case, is, as has already been adverted to, because there is no other mode by which the testator's bounty can be made to flow to and embrace the whole range of the intended objects (f): a particular expressed intent that the first taker should take for life only, is therefore in these cases, where necessary, sacrificed to the general intent that all the issue should take (g). In like manner, according to the doctrine established in Wild's case, a devise to a man and his chil-

(a) For the particular doctrines on this subject and the cases illustrating them, I beg to refer to the learned works of Mr. Prior and Mr. Jarman, which will be repeatedly quoted. The cases on this subject are not always easily to be reconciled.

(b) *Fordyce v. Ford*, 2 Ves. J. 539; *Lyon v. Mitchell*, 1 Mad. 475; *Fearne, Ex. Dev.* 461, 463, 478, 480, 490, there cited; and see *Houston v. Hughes*, 5 Russ. 140.

(c) *Bigge v. Bensley*, 1 Bro. 190; *Chandless v. Price*, 3 Ves. 101, 102, Lord Rosslyn: *et v. int. alia*, *Richards v. Lady Bergavenny*, 2 Vern. 324; Lord Ellenborough, 12 Ves. 224, in Dom. Proc.; *Gower v. Grosvenor*, Barnardist. 56, 58, 59; *S. C.* 5 Mad. 338, 340; *Crooke v. De Vandes*, 9 Ves. 202; *Britton v. Twining*, 3 Meriv. 183: see as to the exceptions, Prior on Issue, pp. 174-5; and 2 Jarman on Wills, 362.

It is to be remembered that things which are consumed in their use, as wine, &c., belong to the first taker, however given, *sup.* vol. i. p. 196; *Andrew v. Andrew*, 1 Coll. 691; so that if the first taker dies in the life of the testator, the legacy lapses though the things are given over. See analogous case, *addit. note ii.*

(d) See Jarman on Wills, ii. 329; *Lampley v. Blower*, 3 Atk. 398, Lord Hardwicke.

(e) *King v. Melling*, 2 Lev. 58; *Shaw v. Weigh*, 1 Eq. Ab. 184, § 28; *Ward v. Bevil*, 1 Y. & J. 512; *Lees v. Mosley*, 1 Y. & Coll. 610; admitted *arg.*, 13 Simons, 134. See Prior on Issue, p. 95; and Smith's Original View, annexed to his edition of Fearne, p. 248, *et seq.*

(f) *Int. al.*, *Hodgeson v. Bussey*, 2 Atk. 91; "for the words cannot take effect in any other way," Lord Hardw., *Buffar v. Bradford*, 2 Atk. 222; *et v. Dunk v. Fenner*, 2 Russ. & M. 556, where Sir J. Leach says, following Lord Eldon in *Jesson v. Wright, ubi sup.*, that the direction that the heirs shall take *as tenants in common* does not manifest an intention to exclude any heirs of the body, *ib.* p. 566. It is to be borne in mind that the union under the rule in *Shelley's* case only takes place where the estate for life and the remainder to the heirs of the body or issue are both legal or both equitable, Fearne, Cont. R. 52, 58-9; and see *Roe v. Grew*, 2 Wils. 322; *S. C.* Wilm. R. 272; *Jarm. ii.* 336.

(g) See *Roe v. Grew, ubi sup.*, a leading authority; *Jarm. ii.* 337.

dren will, if he have none at the death of the testator (a circumstance that is immaterial where the gift is to him and his issue) (a), confer upon him an estate tail (b). Gifts in these terms, unless there be something to control them, will also, according to the preponderance of authority, (for, as will be seen, there are conflicting cases as regards some of these forms of expression,) confer the absolute interest in personal estate: indeed as regards personal estate (as Mr. Jarman has observed) the latter form of gift does not require the aid of the rule in Wild's case to give the property absolutely to the parent, he not having children (c). So where personal estate has been given by direct gift, or to trustees in trust for another, in such manner that it was to go to or be enjoyed by a person and the heirs of his body,—to him for life and after his decease to the heirs of his body or to the heirs male of his body, and with a gift over if he should have no such heirs not confined to the time of his death (d),—to the children of a person and their issue share and share alike, and with the addition to take *per stirpes*,—to the children of a person and their children after them,—to a person and his issue male or to his issue male and female,—to a person to be *secured* to her and the heirs of her body (e); each of these forms of expression in wills has been held in the particular cases to amount to a gift of the absolute interest in personal estate (f). "Heirs of the body," said Lord Cowper, "must not, as to land, be construed to be words of limitation and made an estate tail; and as to goods, be only words of designation of the persons entitled to take the goods" (g).

(a) 2 Jarm. *ubi sup.*; see however Prior on Issue, 36. Under special circumstances the gift to the issue may be *in substitution* for that to the ancestor, as to which see Prior, ii. p. 54, *et seq.*; *Hedges v. Harpur*, 9 Beav. 479.

(b) Wild's case, 6 Rep. 17; Forrest. 9; *Cook v. Cook*, 2 Vern. 545, (where all the previous authorities relating to devises to children are observed upon,) and the cases collected 1 Jac. & W. 91, note (a) to *Ex parte Williams*. If land be devised to *husband and wife*, remainder to their *children*, in that case, although they have no child at the time, every after-born child as it is born will take by way of remainder, for the intent is that their children should not take *immediately*, which distinguishes the case from a devise to a man *and his children*, &c. *Wild's case*, 17 b. v. 2 Jarm. 330. As to limitations to "Children," &c. generally, see 2 Jarm. 307, *et seq.*

(c) And see *Fearne*, 488, *supra*, 126; 1 P. W. 666; and *Read v. Willis*, 1 Coll. 86.

(d) *Crooke v. De Vandes*, 9 Ves. 202.

(e) *Crawford v. Trotter*, 4 Mad. 362.

(f) I have taken most of these latter instances from the last edition of Roper on Legacies, p. 1522, where the authorities down to *Dick v. Lacey*, 8 Beav. 214; *Hedges v. Harper*, x. Jur. 578, (also 9 Beav. 483), are collected; *et v. Samuel v. Samuel*, ix. Jur. 222, *supra*: *Butler v. Ommaney*, 4 Russ. 70, is a leading authority on the subject, see 2 Dow. & Cl. 340. It is to be observed, that in some of the instances the construction was given expressly upon the construction of the *whole will*: see *Snowball v. Proctor*, 2 Y. & Coll. C. C. 483: it is not to be taken that in every case, without reference to the context and circumstances, the effect above stated will be given to these expressions.

(g) *Richards v. Lady Bergavenny*, *ubi sup.*; and see *Webb v. Webb*, 1 P. Wms. 132; *Theobridge v. Kilburn*, 2 Ves. 236; and the note to *Hodgeson v. Bussey*, 2 Atk. 89, where the other cases are collected; and *Bartlett v. Green*, 13 Simons, 218, 226.

There are two cases on this subject which require particular notice. In *Jacobs v. Amyatt*, before Lord Rosslyn, (A. D. 1794,) where a testatrix gave the residue of her real and personal property (she having no real estate) to A., to be placed at interest until her age of 21 or day of marriage, and then the whole thereof with the accumulations, to be paid to her during her life, and after her death unto the heirs of her body, *equally to be divided* between them, share and share alike; and for default of such issue, or on the death of A. before her age of 21 or day of marriage, she gave such residue to her, the testatrix's, brother and his heirs for ever; Lord Rosslyn, in giving judgment (a), said, "It would be extravagant to extend the rule to cases where against the common import of the words an estate tail is raised in real estate, by an ingenious construction to effectuate the general intention," (*viz.* that the property should go in a course of descent to *all* the issue.) "That," said his lordship, "is not the intention here;" and he decided that A. took a life interest only. This case, which has been considered as overruled, can only perhaps be supported on the distinction taken by Lord Rosslyn as to the rejection of words of distribution as applied to real and to personal estate; "here," said his lordship, "the rejection would cross the intention, not support it": the distinction between an express and an implied estate tail, as Lord Rosslyn himself in another case admitted, had been exploded (b).

In *Knight v. Ellis*, the testator directed that his trustees should receive the rents of his estates till his grandnephew should attain 21, and place them out at interest, and should permit his grandnephew, when he attained 21, to receive *the interest of the moneys* to arise from such rents during his life, and after his death he gave such moneys to the issue male of his grandnephew, and in default of such issue (not if there should be no such issue) he gave the moneys to his three nieces, who, or their representatives, were the plaintiffs in the suit; the grandnephew had attained 21 and died without issue. Lord Thurlow said, if it is to go by limitation, then it vested in the ancestor, if by purchase

(a) *Jacobs v. Amyatt*, 4 Bro. 542. The judgment is more fully stated in the note to 13 Ves. 480, and the facts in 1 Mad. 376. Lord Alvanley had made the same decree at the Rolls; and see *Clare v. Clare*, *infra*.

(b) Mr. Jarman, presuming that it did not proceed on any such distinction, (which is not so pointedly noticed in Brown's report,) considers it to have been overruled, Powell on Dev. by Jarman, ii. 634, and Jarman on Dev. ii. 491-2; (as to the import of the words equally to be divided, &c., as regards real estate, see

Dunk v. Fenner, *supra*;) in many instances (*v. int. al. infra*, p. 148, 150) different rules are applied to personal estate; see, on this subject, Mr. Jarman's own statement, On Wills, ii. 497. Lord Rosslyn, in *Chandless v. Price*, 3 Ves. J. 102, (decided two years after, 1796,) considered the distinction between an express estate tail and an estate tail by implication as exploded; his decision in *Jacobs v. Amyatt* was not cited, but the decision in the latter case is not incompatible with the judgment in *Chandless v. Price*.

all the sons must take; he did not remember a case in which the first taker took for life only, and the subsequent takers took by limitation (a); his lordship held that the issue in this case would have taken as purchasers, and that in the event that had happened, namely, there being no issue to take, the plaintiffs were entitled under the gift over. Lord Langdale, in a late case, (without however expressing any opinion as to the authority of this or any other of the cases cited,) on the general principle adverted to in this section,—namely, that the words would have created an estate tail in land,—virtually overruled the case of *Knight v. Ellis*, so far as it decided that the first taker took only a life interest (b).

If the gift be to a person for life, with remainder to his issue *living at his death*, there all the individuals may be ascertained by reference to the particular period, and they may accordingly take by purchase, the parent therefore will take an estate for life, and the issue will take *per capita*, as *personæ designatæ* (c); and, according to Mr. Jarman, a gift of personal estate to a man *and* his issue living at his death, which as to real estate, according to the authorities, confers an estate tail, would now be construed to give an estate for life to the parent, and a contingent interest to his issue living at his death (d).

Mr. Fearne notices an exception to the general rule above stated, in regard to a term. If there be a devise of a term to a man for his *life*, and afterwards *to his issue*, “it seems,” says Mr. Fearne, “this does not enlarge the estate to A., but after his death the whole will vest in the issue” (e). In modern times, though there has been an

(a) 2 Bro. 575-7; *et v. supra*, *Jacobs v. Amyatt*, 4 Bro. 542.

(b) *Attorney-General v. Bright*, 2 Keen, 59. Mr. Jarman approves of this decision, ii. 496; probably it was his strictures on the case of *Knight v. Ellis*, in his edition of *Powell on Devises*, ii. p. 636, *et seq.* that produced it: Mr. Prior (p. 172, *et seq.*) has endeavoured to support *Knight v. Ellis*, on reason and authority; and, but for modern authority, his reasons perhaps would be unanswerable.

(c) As to *who* will take under the word *issue*, *v. infra*, in this chapter.

(d) Jarman on Wills, ii. 330, referring to *Lethuillier v. Tracy*, Ambl. 208; 3 Atk. 774, 784, 1 Hanmer's Cases, 56, S. C.; and see note (k).

(e) Fearn, Ex. Dev. 495, citing *Warman v. Seaman*, Finch, 280; *Clare v. Clare*, Forrest. p. 25. In that case the trust was for the testator's son, Thomas Clare, for his life, and

after his death in trust for the issue male of his son Thomas, lawfully begotten, for so many years as such issue male should live; and when the issue male of Thomas should be extinct then in trust for the testator's second son William, for his life, with remainder in like manner to his issue: it was held that Thomas the son took *for life* only, and though he never had any child, the limitation to the second son was void as too remote. Lord Talbot there says, as this is a leasehold which, without a particular provision, can never descend; as here is an *express estate for life*, it shall not be enlarged by any subsequent words; which is in effect Lord Rosslyn's and Lord Thurlow's doctrine in *Jacobs v. Amyatt* and *Knight v. Ellis*, *supra*; and see Lord Hardwicke's observations in his judgment in *Williams v. Jekyl*, 2 Ves. 684. But these observations do not seem to be peculiarly applicable to an estate for lives or to a term,

inclination, as regards all cases of bequests of personal estate, not to follow in all its rigour the construction which makes, in particular cases, 'issue' and more particularly 'children,' in devises of real estate, words of limitation (a), I do not find that this distinction has been recognized; indeed it may be doubted whether there is any solid foundation for such a distinction (b); the *reason* given for making the issue purchasers in the limitation of a term, seems to apply to every description of property not strictly capable of descent (c).

Nothing can be clearer than that where there is a remainder of personal estate limited to one, after what would be an estate tail in real estate vested in another, that remainder will be void, as it would tend to a perpetuity (d), and besides it is, in effect, a remainder after a gift of the entire property. However, there may be a gift over in event following such a gift, in the way of executory devise (e); but it must be confined to a dying without issue, at the death of the parent, (as to which the late Statute of Wills has introduced, as will presently be seen, a material alteration in the rules of construction,) or the happening of some event which must happen, if at all, within the prescribed limit, else it will be void (f). A gift by will of personal estate after

as distinguished from any other personal estate. *Clare v. Clare* has, as after mentioned, been impugned as regards the gift over.

(a) See 2 Jarman, 316, 308, n. (e), 498: *Gawler v. Cadby*, Jac. R. 346, and *Wilkinson v. South*, 7 T. R. 555, were decided on a liberal construction of the gifts over; *Heron v. Stokes*, 2 Dr. & W. 107. In *Stone v. Maule*, 2 Sim. 490, the gift over was supported on the plain intention; and see Lord Hardwicke's dict. in *Elliot v. Jekyl*, 2 Ves. 683, and 2 Atk. 222. In *Crawford v. Trotter*, 4 Mad. 361, but which does not appear to have been argued, Sir John Leach applied a different rule as to a gift of personal estate (stock) to a parent and her children, to what would have applied to the same devise of real estate; *Morse v. Morse*, 2 Sim. 485, was a special case.

(b) The case of *Warman v. Seaman*, *supra*, Finch, R. p. 280, and 2 Ch. Ca. 209, arose upon a voluntary deed with a directory trust, not a devise, though the same principle perhaps would apply to both, (*v. ib.* 210): the decision only established that a devise over after a *vested quasi* estate tail in personality could not take effect. The decision in the case of *Clare v. Clare*, *supra*, has been impugned by subsequent authorities, see *Phipps v. Lord Mulgrave*, 3 Ves. 616, *Lyon v. Mitchell*, 1 Mad. 486, and the authorities cited in

the note, Forrest. p. 27, *et v. supra*, note (e). Sir Thomas Plumer evidently did not consider that there was any such distinction as above adverted to, see 1 Mad. 475, and the additional note i. to this chapter; and see *Bartlett v. Green*, 13 Simons, *infra*, p. 152. Lord Hardwicke, in *Hodgeson v. Bussey*, *ubi sup.* said the reason the words "heirs of the body" vest an estate tail in the first taker, either on the limitation of a freehold or upon a term, is that they include "issue" in *infinitum*; the reason would of course also apply to the word "issue."

(c) See 1 P. W. 667, and *supra*, p. 148, note (e), *inf.* 150 (c).

(d) Lord Hardwicke, *Gower v. Grosvenor*, 5 Mad. 340; *Salkeld v. Vernon*, 1 Eden, 71; *Lepine v. Ferrard*, 2 R. & M. 387; *Tothill v. Pitt*, in Dom. Proc., 7 Bro. P. C. 453, affirming Sir T. Sewell's decision, reversing that of the Lords Commissioners, 1 Mad. 511.

(e) See *Stanley v. Leigh*, 2 P. W. 686, and see the additional notes to this chapter.

(f) *V. int. al. Donn v. Penny*, 1 Meriv. 20; *Attorney-Gen. v. Bright*, 2 Keen, 59; *Lepine v. Ferrard*, 2 R. & M. 388; *et v. Hodson v. Ball*, 14 Sim. 558; *Garratt v. Cockerell*, 2 Y. & Coll. C. C. 501, *et seq.* See *Elliot v. Jekyl*, *Fearn*, 499, 2 Ves. 681, a case of a limitation over of a lease for lives, in default of issue, in a purchase deed.

a *contingent* limitation in tail which *does not vest*, will be supported (a). And as regards personal estate, words denoting a failure of issue following a gift to children, have been generally construed to refer to the objects of that gift, so that the gift over on such a limitation was good before the late statute. But where the plain intention is that the real and personal estate should go together, the words must receive the same construction as to both estates (b).

The general rule that the words "heirs of the body" and "issue" are to be taken as words of limitation, may upon the circumstances and the intention of the parties, to be clearly collected from the instrument, be construed as words of purchase, even as regards real estate (c). Thus,

(a) *Phipps v. Lord Mulgrave*, 3 Ves. 613, 616; *Stanley v. Leigh*, 2 P. W. 686, (see this case in the additional note to this chapter, p. 162); *Salkeld v. Vernon*, 1 Eden, 70, 71. "It is like the limitation of two fees simple to start at the same time upon different events, as in the case of *Luddington v. Kime*, 1 Salk. 224, Lord Raymond, 203;" Lord Northington, *ibid.* Lord Hardwicke, in *Gower v. Grosvenor*, 5 Mad. p. 341, took the distinction between a vested gift to a person *in esse* in tail, in which case he admitted there could be no remainder, and a contingent gift on which there might be an effectual remainder, if in the event there should be no person to take under the first gift; and see *Target v. Gaunt*, 1 P. W. 432; *Atkinson v. Hutchinson*, 3 P. W. 261; *Pinbury v. Elkin*, 1 P. W. 563; and 13 Ves. 484, Lord Eldon; and *Fearne*, Cont. R. 7.

(b) 2 Jarm. 362; 2 Russ. & My. 567, Sir J. Leach.

(c) Although by all the cases, where the estate is so given in a will, that after the first taker it is to go to every person who can claim as heir to the first taker, the words "heirs of the body," must be construed to be words of limitation, (see Prior on Issue, 24, 25; *Mortimer v. West*, 2 Sim. 282; *Seaward v. Willcock*, 5 East, 205-7; and *Jesson v. Wright*, 2 Bli. 1;) in many cases the courts of law and of equity, upon the construction of wills, have construed the words "heirs of the body" to mean children, so as to preclude the operation of the rule in *Shelly's* case, where that construction has appeared upon the whole will to be the meaning attached to those words by the testator. *Doe v. Laming*, 2 Burr. 1100; *Doe v. Ironmonger*, 3 East, 533; *Grattan v. Howard*, 6 Taunt. 94; *Doe v. Jesson*, 5 Maule & S. 95; and *Lees v. Mosley*, 1 Yo. & Col. 606.

In *Jesson v. Wright*, 2 Bli. 1, (where the decision in *Doe v. Goff*, 11 East, 668, was overruled, and *Doe v. Jesson*, 5 Maule & S. 95, was reversed, on the ground that the

general or paramount intention must prevail over the particular intent, 2 Bli. p. 51, "thus enabling the first taker to destroy both the general and the particular intent," *ibid.* p. 55;) it was admitted by Lord Eldon that the words *heirs of the body*, which must generally be construed according to their legal meaning, will yield to a clear particular intent that the estate should only be for life, and that may be from the effect of *superadded words* or any expression shewing a *particular intent* of the testator; but that expression must be clearly intelligible and unequivocal, *ib.* p. 53; Lord Redesdale, p. 57, to same effect; *Jones v. Morgan*, 1 Bro. 21, *et v.* 91; *Right v. Creber*, 5 Barn. & C. 866, 872; *Dodson v. Hay*, 3 Bro. 408; *Blackburn v. Stables*, 2 Ves. & B. 371; *North v. Martin*, 6 Sim. 266; *Dunk v. Fenner*, 2 R. & M. 566.

The word "issue," one of the most vexed words in the books, (Clive, J., *Roe v. Grew*, 2 Wils. 324,) which in a deed is a word of purchase, and gives an estate for life only, though generally used in a will as a word of limitation, Sir T. Plumer, 1 Mad. 473, *Tate v. Clarke*, 1 Beav. 105, is not so fully a word of limitation as heirs of the body (but see *Hockley v. Mawbey*, 1 Ves. J., 149; Lord Thurlow, *Roe v. Grew*, *ubi sup.* Gould, J., and 2 Jarm. 329); it may be a word of limitation or of purchase in a will, according to the context; (see Prior on Issue, pp. 26, 36, *et seq.* 1 Mad. 473; *Ryan v. Cowley*, Lloyd & G. temp. Sugd. 7; and see Smith's Orig. View, 249, *et seq.*, *et v. supra*, vol. i. p. 543.) "There is no technical word in a will," said Lord Northington, "if the testator's intention be plain the court will modify and effectuate his expressions," *King v. Burchell*, 1 Ed. 431. As to where "their lawful heirs" may mean heirs of the body or issue, see *Harris v. Davis*, 1 Col. 423. "Issue" is more strongly a word of limitation than "child," Prior, *ubi sup.* The word "issue" may have a different construction in distinct

in the case of *North v. Martin*, by the settlement an estate was settled to the use of the heirs of the body of the husband by his wife, and to their heirs, and "if more children than one equally to be divided amongst them." The Vice-Chancellor of England said, there were all the elements of a case which would call upon the court to decide that the first taker took an estate in tail special, notwithstanding the super-added words (a); but then the words "and if more children than one" must be taken as interpretative of the words "heirs of the body," and confine them to children, so that they would take in remainder in fee as tenants in common, and a gift over in default of such issue would have been effectual. The children were declared to be absolutely entitled in remainder to the leaseholds which were settled in the like manner (b). Lord Hardwicke remarked, "that as words of limitation are not properly used in terms for years, or other personal estate, it was not to be wondered at that such construction should have been found in so many cases as regards personal estate" (c).

clauses in the same will, according to the context; *Hedgcs v. Harpur*, 9 Bear. 479; *Head v. Randall*, vii. Jur. 299; though the general rule is to give the same words the same meaning, *Ridgeway v. Munkettrick*, 1 Dru. & W. 84.

(a) And see on this point, *Franklyn v. Lay*, 2 Bli. 59, note; *King v. Burchell*, Ambl. 379; *S. C.* 1 Ed. 432. Lord Northington there says, there is not a case in the books where "issue" or "heirs" has been used in the plural number, and words of limitation added that they have been taken as words of purchase; (but see the observations on this case, 13 Ves. 481, note;) *Kinch v. Ward*, 2 Sim. & S. 409, 418; *Doe v. Harvey*, 4 Barn. & Cr. 610.

(b) *North v. Martin*, 6 Sim. 270.

(c) Lord Hardwicke, *Hodgson v. Bussey*, 2 Atk. 89. That was a case of a voluntary settlement; the case was decided upon the words "their executors," &c. being added to the words heirs of the body, which turned them into words of purchase; and see *Jeffery v. Honeywood*, 4 Mad. 398, a devise of real estate (see Prior, pp. 42-3); *North v. Martin*, 6 Simons, 270, settlement of real and personal estate; *Ryan v. Cowley*, Lloyd & G. Temp. Sugd. 7, case of a will of personal estate, where the effect of the word issue was controlled from the context; and see *Fearne, Ex. Dev.* 490 n., 492 *et seq.* *Peacock v. Spooner*, 2 Vern. 43, 195; 2 Freem. 114, was the leading case on this subject; by marriage settlement a term of 900 years was assigned to trustees, in trust to permit and suffer the husband and wife, and the survivor of them, to receive the profits for so many

years of the term as they or the survivor should happen to live, and after their decease to the use of the heirs of the body of the wife by the husband to be begotten. It was decided by Lord Chancellor Jefferies that the words heirs of the body were words of limitation; the Lords Commissioners, in 1690, held, apparently on the ground that it was a case of a marriage settlement which would let in the presumed intention in favour of the children, that they were words of purchase; and their decree was affirmed by the House of Lords, see 2 Vernon, 196. This case was followed in *Dafforne v. Dafforne*, *ibid.* p. 362, 2 Freem. 231, where, as reported in *Freeman*, the words were the same; but those cases have since been departed from in so many instances, see *Butterfield v. Butterfield*, 1 Ves. 135; *Garth v. Baldwin*, 2 Ves. 660; *Theobridge v. Kilburne*, 2 Ves. 233; *Webb v. Webb*, 1 P. W. 132, 135, that they can hardly be considered as governing any but precisely similar cases; see *Lyon v. Mitchell*, 1 Mad. 484, in the additional note to this chapter, where Sir Thomas Plumer has minutely examined the cases; and see *Fearne, Cont. Rem.* 493.

In *Webb v. Webb*, now the leading authority as to the general rule in cases of this kind (1 Mad. 485), by a marriage settlement the father of the husband assigned a term of 1000 years to trustees, upon trust to permit the son to enjoy it so long as he should live; on his death to permit the heirs of the bodies of the husband and the intended wife to hold the premises for the remainder of the term; and for want of such issue to be enjoyed by the right heirs of the husband. Lord K. Har-

By the law as it stood before the late Statute of Wills, where real estate was given to a man for life, and if he should die without heirs of his body or without issue general or special then over to some other person, and there were no words from which, "upon fair demonstration," an intention could be collected to limit the generality of the expressions (a), the donee would have taken an estate tail *by implication* (b), and under the same limitations of personal estate, as before observed, the donee was held to be entitled to an absolute interest in the property (c); and though it has been held that no estate could be raised by implication on these words, so as to destroy an express estate given (d), yet that even has been done to effectuate the *general intention* (e).

court, reversing the decree of the Master of the Rolls, held, taking various not very material distinctions between that case and *Peacock v. Spooner*, that the term vested absolutely in the husband.

The authority of *Webb v. Webb* has been supported, and indeed extended, in a very late case before the Vice-Chancellor of England; *Bartlett v. Green*, 13 Simons, 218; there a settlement was executed, which was recited to be in pursuance of an agreement that the remainder of a lease of 1000 years should be settled on John Cossens for life, and after his decease on his intended wife for her jointure, and after their several deceases on the issue of the marriage, and in default of such issue on William Cossens and his heirs, &c. during the remainder of the term. By the settlement the term was limited in trust to permit John Cossens to receive the rents, issues, and profits of the premises for so many years of the term as should expire in his lifetime, then in trust for Margaret Crofts the intended wife, in like manner, and after their several deceases to permit the heirs of the body of John Cossens on the body of said Margaret, for so many years of the term as should expire in the life or lives of him, her, or them respectively, to receive the rents, &c. for so many years of the term as should expire in the life or lives of him, her, or them respectively; and in default of issue of John Cossens and Margaret, his intended wife as before limited, in trust for John Cossens, his heirs, executors, and administrators. There were three children of the marriage. It was contended that, this being a settlement, the words heirs of the body were words of purchase; but the Vice-Chancellor considering that there was no difference between this case and *Webb v. Webb*, he held that the term vested in the husband absolutely.

In Roper on Legacies, 1523-6, last ed., most of the cases are collected in which the decisions have turned upon *superadded words*

and particular expressions, as against the ordinary construction of "heirs of the body," and the like; and as to what superadded words will not vary the construction of a devise, see Prior on Issue, pp. 34, 127, 130, 131; Smith's Orig. View, 252, and the references; and see Prior, 53, 192-5; 2 Jarman, 331, *et seq.* 338, 345; *Tate v. Clarke*, 1 Beav. 100: as to what words will have that effect, see 2 Jarman, 351; and *int. al. Backhouse v. Wells*, 1 Eq. Ab. 184 (Fearn, 152); *Britton v. Twining*, 3 Meriv. 182; the cases cited in *Jeffery v. Honeywood*, 4 Mad. 399, and *ib.* 402, (Prior, p. 43); *Merest v. James*, 1 Brod. & B. 484, (Jarm. ii. 347); *Lees v. Mosley*, 1 Y. & Coll. 589, (Jarm. 350); *Dick v. Lacy*, 8 Beav. 220. As to the distinction between the effect of superadded words on the mode of devolution to "heirs of the body" and to "issue," see 2 Jarm. 331 *et seq.*; and Prior on Issue, p. 26 *et seq.*, 42, 192.

(a) *V. int. al. Jesson v. Wright*, 2 Bli. 56, 57; and Lord Thurlow, 1 Bro. 190; Sir W. Grant, 19 Ves. 548.

(b) *V. supra*, vol. i. p. 530.

(c) *V. int. al. Bigge v. Bensley*, 1 Bro. 190; and see *Knight v. Ellis*, 2 Bro. 578, where the reason on which the rule was founded is given; by Lord Thurlow; (the decision was against the general rule in the particular case, but, as noticed elsewhere, that decision is considered as overruled by *Attorney-Gen. v. Bright*, *supra*, 2 Jarm. 496; *Barlow v. Salter*, 17 Ves. 482; *Elton v. Eason*, 19 Ves. 78, &c.)

(d) *Bamfield v. Popham*, 1 P. W. 54.

(e) See 2 Fonbl. pp. 57-8, and cases there cited; *Robinson v. Robinson*, 3 Atk. 736-9. The gift was to Lancelot Hicks for the term of his life and no longer, remainder to *such son* as he should have taking the name of Robinson, with a gift over in default of *such issue*; it was decided, against Lord Hardwicke's opinion, on the certificate of the judges of the King's Bench; *University of Oxford v. Clifton*, 1 Eden, 473.

As regards limitations of this description of personal estate that would give an estate tail by implication, considerable license had been taken by the courts, to give effect to the intention where the property was given over: dying "without leaving issue," as regards personal estate, was construed to mean dying without leaving issue *at the death*; and the court went to the extent even of adopting different readings of the words "dying without leaving issue," when applied indiscriminately to real and personal estate blended in the same gift (*a*). This state of the law was not considered to be satisfactory, and an important provision on the subject was introduced (*b*) into the new Statute of Wills (*c*), which has made a very material alteration in the law, as regards those limitations which, under the old law, gave estates tail by implication in real estate and the absolute interest in personal estate. The clause is so material, and it may so often be necessary to refer to it in practice, that it is better to set it out at length, together with the clause which dispenses with words of inheritance, which also has an important influence as regards the subject now under consideration: they are as follow:

§ 28. "And be it further enacted, That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will."

§ 29. "And be it further enacted, That in any devise or bequest of real or personal estate the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue or otherwise: Provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue." The 32nd and 33rd as to lapse are also material.

(*a*) *Forth v. Chapman*, 1 P. W. 663; Lord Eldon, *Crooke v. De Vandes*, 9 Ves. 203; and the other cases cited in the note to *Atkinson v. Hutchinson*, 3 P. W. 261, last ed.; and

See Hayes, *Introduct. to Conv.* i. 399.

(*b*) *V. supra*, vol. i. p. 475.

(*c*) 1 Vict. c. 26 (1837), *supra*, vol. i. p. 473.

“Under the 29th section,” says Mr. Jarman, “coupled with the preceding section, which makes a devise confer an estate in fee without words of inheritance, it will generally happen, in cases in which according to the old law the prior devisee would have been tenant in tail by the effect of words devising over the property on the failure of his issue, that he will, under the new rule of construction, take an estate in fee simple, subject to an executory devise in the event of his dying without leaving issue at his death; and this no doubt was the effect contemplated and designed by the legislature” (a).

Where the gift is expressly to the parent *for life*, and if he shall die without issue, or without children (which must now be construed living at his death,) then over, this will not it seems give to the children, if any living at the death, an estate by implication, inasmuch as such a gift in express terms, as to the dying without issue, before the passing of the act, would not have raised such a gift to the issue as purchasers by implication (b); nor can the gift over take effect as there are issue living; so that the property, after the life estate, is undisposed of, contrary perhaps to the intention of the legislature, as well as of the testator: but the court will, no doubt, endeavour to raise an implied gift to the children upon any circumstances showing such an intention (c).

As to personal estate, the new rule will change a bequest to A. and if he shall die without issue over to B., from an absolute interest in A. into a bequest to A. of the whole interest, defeasible by an executory bequest over to B., to take effect in the event of A.'s death without issue then living (d).

As regards the exceptions in the 29th section, I beg to refer the reader to the third book of Mr. Prior's able Treatise, which has been so often quoted (e).

When issue is used as a word of purchase in a bequest of personal estate directly or in trust, it has always been considered as synonymous to, and the same as descendants, and whoever can make himself out a descendant of the person to whose issue the bequest is made at the period of distribution, has a right to be considered as a *persona designata* in that bequest; and if the words “equally to be divided” or

(a) Jarman on Wills, i. 496-7; and see pp. 498-9, as to the advantages and disadvantages of the new enactments.

(b) *Greene v. Ward*, 1 Russ. 264-5; *Bodens v. Lord Galway*, 2 Ed. 298; and see *Carter v. Bentall*, 2 Beav. 558.

(c) *Ex parte Rogers*, 2 Mad. 449, 454-5-6; *Ferard v. Griffin*, 2 Keen, 621; and see

Hayes, *Introd. to Convey.* 401; though it is said “every implied intent must be free from doubt,” 1 Bro. 284.

(d) Hayes, *Introduction to Convey.* i. 401; the student should carefully read this chapter; *sup.* vol. i. p. 475.

(e) P. 190 *et seq.*, and see 2 Jarm. 414.

some equivalent expressions be not added, all will take *per capita* as joint tenants (a): intention is required for limiting the sense of the word "issue" to children (b). Where there is a gift to a person amounting to a gift for life only, and after his death to the issue of his body *begotten or to be begotten*, these words will include all descendants, and they will take vested interests on their birth, and all will take *per capita* (c); it may be however that on the words of the will, children, or issue substituted for them, must be living at a particular time in order to take (d).

In a devise of real estate to the issue of a person in the same terms as those which have been held to constitute them purchasers subject to the prior life estate in gifts of personal estate, the word "issue" would probably receive the same construction as in the case of a like bequest of personal estate, that is, the issue would take *per capita*; if there are words constituting the issue purchasers, as tenants in common, they will clearly take as such, though following a limitation for life in the parent (e). It is true, as Mr. Jarman observes, that the word "issue," when preceded by an estate for life in the ancestor, is frequently, as we have seen in this chapter, construed as synonymous with "heirs of the body," and as such conferring an estate tail, on the ground that this is the only mode in which the testator's bounty can be made to reach the whole class of descendants, born and unborn; and the same reasoning applies, to a certain extent, in the case now under consideration; but the case of *Cook v. Cook* (f)—where it was held that, under a devise to the issue of J. S., who had a daughter then living and afterwards a son, the children and grandchildren, if any, would take concurrently an estate for life—is a direct adjudication in favour of the same construction being applied in gifts of real as well as personal estate (g).

(a) Lord Alvanley, *Davenport v. Hanbury*, 3 Ves. 258-9; *Butler v. Stratton*, 3 Bro. 367; and see *Dalzell v. Welch*, 2 Sim. 319, case of a power coupled with a trust; and *Lyon v. Coward*, *ubi infra*.

(b) *Leigh v. Norbury*, 13 Ves. 340; *Cook v. Cook*, 2 Vern. 545; see *Garratt v. Cockerell*, 1 Y. & Coll. C. C. 500; *Pruen v. Osborne*, 11 Sim. 137; *Lyon v. Coward*, 15 Sim. 287; and 2 Jarman, 36-7.

(c) *Evans v. Jones*, 2 Coll. 524; *Head v. Randall*, vii. Jur. 299.

As to where children take together with their parents, *per capita*, and where in a gift to a person and his children, he having children, the children have been held to take

in remainder, see *inter al.* 8 Beavan, 218: where he has no children, see *Read v. Willis*, 1 Coll. 87.

(d) See *Macgregor v. Macgregor*, 2 Coll. 199.

(e) *Mogg v. Mogg*, 1 Mer. 658, 689. The words "without survivorship" were there added; and see *Ashley v. Ashley*, 6 Sim. 358, case of a devise to children; the words "for want of such issue" were held to create cross remainders by implication, *ib.* 363.

(f) 2 Vern. 545. Under the law as it then stood they took for life only; now, under the 28th sect. of the New Wills Act (*v. supra*), they would take in fee.

(g) Jarman on Wills, ii. 34-5.

SECTION II.—*As to the common Direction in Wills and Marriage Articles, that Personal Chattels shall go according to the Limitations of Real Estate.*

Strict Construction of such a Direction in general Terms will generally defeat the Intention.

Gower v. Grosvenor, before Lord Hardwicke.

Vaughan v. Burslem, before Lord Thurlow.

Lord Eldon's Observations on Gower v. Grosvenor, in Duke of Newcastle v. Countess of Lincoln.

Carr v. Lord Eirrol, before Sir W. Grant.

Present State of the Law upon the Authorities.

It often happens that personal chattels are directed by wills and articles to go in the same manner as the real estate, or as "heir looms" (the meaning of which is that they are to go with the family estate), so far as the rules of law and equity will permit.

In accurately penned wills and settlements clauses are introduced to keep the property in trustees for such a period as shall not infringe the rule against perpetuities (a), so that no tenant in tail shall be entitled to it until he shall have attained 21; but many devises still continue to be made, through ignorance or haste, in general terms. A strict construction of a clause so penned will, in most cases, defeat the intention, by giving an absolute interest in the personalty before an absolute interest in the realty or the right to acquire such absolute interest is obtained; and accordingly attempts have been made to induce the court to treat such directions as executory, and to mould them according to the supposed intention, keeping the real and personal estate together as long as the rules of law will allow and the different natures of the two kinds of property will permit, and controlling what would be the effect of the legal operation of the words (b), as regards the right which the tenant in tail would, without such control, acquire at his birth (c).

(a) As to which see *Ware v. Polhill*, 11 Ves. 257; *Lord Southampton v. Marquis of Hertford*, 2 Ves. & B. 54, 63-64; *Ibbetson v. Ibbetson*, 10 Sim. 495, 4 My. & Cr. *infra*, and see Butler's note (1), x. Co. Litt. 290 b.

(b) *Gower v. Grosvenor*, 5 Mad. 338: *Trafford v. Trafford*, 3 Atk. 347, was decided on the testator's express directions, (see 12 Ves. 235).

(c) *Foley v. Burnell*, 1 Bro. 279; *Taylor v. Biddall*, 2 Mod. 289, and *Trafford v. Trafford*, *ubi sup.*, are considered not to be authorities in regard to the rule of perpetuities as affecting such limitations, as the point was overlooked, or not noticed in either of those cases. See, as to the last, Lord Eldon's Observations, 12 Ves. 233.

In *Gower v. Grosvenor*, the testator devised his real estates in strict settlement, and then stated his will to be that his books, plate, &c. "should go as heir-looms as far as they could by law," to the heirs male of his family successively, as his real estate was before settled. Lord Hardwicke, though, according to Lord Eldon, it was not a decision (a), expressed a strong opinion that these words were directory only (b), and that, by the known forms of conveyancing, the personal property might have been given to the parent for life, then to the first son and the heirs of his body, and if he should die without issue before 21, (thus avoiding an infringement of the rule against perpetuities,) with remainder over. "There are," said his lordship, "no express words of devise; it was only said 'my mind and will is that my library,' &c. 'shall go,' &c. 'as far as,' &c.; it is the most reasonable, natural and satisfactory course, to understand this clause, where no express gift is made, as a directory clause to the executors: when a man makes use of words of this kind, he does not make the limitation himself, but leaves it to the law to do it for him" (c).

In the case of *Vaughan v. Burslem* (d), Lord Thurlow evidently did not agree in thinking that such words were directory, so as to constitute a directory trust; and it would, he said, "be 'pedantic' to say that *Gower v. Grosvenor* turned on the words 'as far as the law allows' (e); for they are explained by the different natures of real and personal estate" (f); and his lordship decided, in that case, where the devise was that the plate, &c. "should go as heir-looms with his real estate, and be held and enjoyed by the person or persons who should for the time being, by virtue of his will, be entitled to his real estate, as far as the rules of law and equity would permit;" that the plate, &c. so given vested in the first tenant in tail at his birth: however, he did not expressly decide against Lord Hardwicke's opinion in *Gower v. Grosvenor*, for he relied upon the particular words "to go to the person entitled," &c. as constituting a direct gift to the tenant in tail when his title accrued (g).

(a) See 12 Ves. 231.

(b) 5 Mad. 349; and see *Duke of Bridgewater v. Egerton*, 2 Ves. 121; 12 Ves. 231.

(c) *Gower v. Grosvenor*, 5 Mad. 347-9, 350; *S. C.* Barnardist. 54; and see 12 Ves. 225; and his lordship referred to Serjeant Maynard's case, where he wrote in the margin *valeat quantum valere potest*, and the Lord Chancellor inserted trustees to preserve contingent remainders. Lord Hardwicke said in such sort of cases the court must take notice of the known and common course of conveyancing, as *part of the law*, Barnardist. 63;

Sir Jos. Jekyll, (*Stanley v. Leigh*, 2 P. W. 689,) and subsequent judges have used expressions to the same effect.

(d) 3 Bro. 101; and see 3 Ves. 396.

(e) These words, as the Vice-Chancellor of England remarked in *Ibbetson v. Ibbetson*, 10 Simons, 514, are very important as regards the application of the doctrine of perpetuities to such a bequest, *v. infra*.

(f) 3 Bro. 106.

(g) *Ibid.* p. 106. Lord Cowper decided *Richards v. Lady Bergavenny*, 2 Vernon, 324, and Sir W. Grant the case of *Brownker*

The case of *Gower v. Grosvenor* was afterwards pointedly relied upon in the case of the *Duke of Newcastle v. Countess of Lincoln* (a), after mentioned. Lord Eldon appears to have approved of and adopted Lord Hardwicke's construction, that these words were directory only, and he approved of the principle laid down by Lord Hardwicke (b), but he intimated, referring to the cases before Lord Thurlow, above adverted to, that it had not been abided by (c); and he added, "that though the case before the House arose upon articles and not a will, he should have decided the case upon the authority of *Vaughan v. Burslem*" (d); treating that case therefore as one of a directory trust.

In *Carr v. Lord Errol*, Sir W. Carr, by will, directed that all his plate, &c. at his mansion-house at Edal should remain there as heir-looms, and devised the same to trustees, in trust, to *permit* the same to go, together with the mansion-house, to such person or persons as should from time to time, under his will, become entitled to it, "for so long time as the rules of law and equity would permit;" and he desired that an inventory should be taken by his executors. Sir Wm. Grant considered that this case was governed by *Foley v. Burnell* and *Vaughan v. Burslem* (e); the only difference was the interposition of trustees, which he thought made no difference; and being of opinion, contrary to the opinion of Lord Hardwicke in *Gower v. Grosvenor*, that even in the case before him there was nothing executory, he held that the first tenant in tail took the property at his birth (f). It is remarkable that

v. Bagot, 19 Ves. 581, partly on a similar ground. In the case of *Foley v. Burnell*, 1 Bro. 274, originally decided by Lord Thurlow, which was re-heard before Lord Rosslyn and the other Lords Commissioners, *ib.* p. 283, and was affirmed in the House of Lords, the bequest was held not to be directory *merely*, (*ib.* 285, but see 12 Ves. 225, 234); the special words relied upon by Lord Hardwicke were not introduced, which, however, Lord Thurlow, in *Vaughan v. Burslem*, considered to be immaterial; it was held in that case that the personal estate vested in the first tenant in tail at his birth.

(a) 12 Ves. 223, *v. infra*, p. 159.

(b) *Ibid.* 230-1.

(c) *Ibid.* 231.

(d) *Ibid.* p. 236. From this it would appear that his lordship considered that case equally as the one before the House as a case of directory trust; and holding as he did, and as it is presumed it must now be held (*v. supra*, p. 137) that there ought to be no difference in the execution of a directory trust created by will and of a covenant in marriage articles in such a case (*v.* 12 Ves. 227-30 *et*

v. 1 Jac. & W. 574), and professing to proceed upon *authority only*, it was so far *consistent* that his lordship should have held that the case before the House should be decided in the same manner as *Vaughan v. Burslem*, (that being treated also as a case of *directory* trust,) and consequently that the decree should have been in favour of the appellants; but if this is a correct view of Lord Eldon's judgment, it is difficult to understand why he should have followed Lord Thurlow's decision, which proceeded on the absence of any thing directory, rather than Lord Hardwicke's and Lord Rosslyn's.

It is to be observed that the question here does not arise between the parents and the issue, in respect of which in articles the distinction between the construction of wills and articles is settled (*v. supra*, pp. 136-7), but virtually between the issue themselves, where the distinction would not apply, unless indirectly; see 3 Ves. 394.

(e) Lord Manners also followed these cases in *Stratford v. Powell*, 1 Ball & B. 26.

(f) 14 Ves. 486-7; and in *Brownker v. Bagot*, 19 Ves. 580, Sir W. Grant said it

although Lord Hardwicke's observations in *Gower v. Grosvenor* must have been present to the minds of the counsel and the judge, being so pointedly referred to in *Vaughan v. Burslem*, they were not in any way adverted to in that case in the argument or judgment.

A similar provision in *marriage articles* afterwards came for decision before Lord Rosslyn. In that case the first tenant in tail had died in his infancy; his personal representatives claimed the property. Lord Rosslyn had decided *Foley v. Burnell* (mentioned above), on the rehearing, and he would evidently have decided the case before him in conformity with Lord Thurlow's decision in *Vaughan v. Burslem*, had it been the case of a will (a); but as it was a case which arose upon articles, which therefore let in the rule of construction applied to directory trusts, but which he thought would not have been let in on the same words in a will, he decided that the first tenant in tail, who had died in his infancy, had not become entitled to the property; and he declared that the settlement should be so framed as that no tenant in tail should become entitled to the absolute property unless he should attain 21, or die under that age leaving issue (b). An appeal from this decree was presented by the personal representatives of the first tenant in tail, to the House of Lords, and the subject was much discussed, as has already been mentioned: Lord Eldon, in a subsequent case, intimated that the decision of the House did not affect the general question; but as the Lords declared that the second tenant in tail, who was then living and had attained 21, was entitled to the property, Lord Rosslyn's decree seems to have been affirmed in effect (c).

In this state of the authorities it may perhaps be considered as settled that a provision in the words of *Gower v. Grosvenor* will, in the case of a will, be considered, contrary to Lord Hardwicke's opinion countenanced by Lord Eldon, as an executed trust; and consequently that the first tenant in tail will become absolutely entitled to the personal estate on his birth, so that it will pass on his death, even the hour of his birth, to his personal representatives, away from the estate: but that in the case of a gift by will with a clear direction to settle the property so that it may go with the real estate so far as the rules of law will permit; and in the case of *articles* containing similar provisions; the absolute interest will be construed to vest in the first tenant in tail who attains 21, or who dies under 21, leaving issue inhe-

made no difference as to the right of the tenant in tail, whether he was so constituted by express words or by implication.

(a) 3 Ves. 394.

(b) *Duke of Newcastle v. Countess of Lincoln*, 3 Ves. 394. 397-8.

(c) 15 Ves. 553. *et v.* 2 Jarm. 508, *sed qu.*

ritable to the entail; in which latter case also of course the two descriptions of property will be severed: the court is not, it has been said, to do for a testator all that can be done by law, but no more than what he has intended to be done, and according to the common acceptance of the words (a).

(a) Lord Rosslyn, *Duke of Newcastle v. Countess of Lincoln*, 3 Ves. 394, recognized 5 My. & Cr. 28. Lord Thurlow said (1 Bro. 105) he knew no case where the conveyance had been carried to the utmost extent of what the law *might* do; however, in *Ware v.*

Polhill, 11 Ves. 280, Lord Eldon said, "Where any thing is left to the court to do, the court have said they will do *more* than the testator has *directed*." See in addition, *Fordyce v. Ford*, 2 Ves. J. 539. Of settling estates to go with a title, see the cases *sup.* p. 143.

ADDITIONAL NOTE, I.—*Supra*, pp. 145, 149, 150, 151.

The judgment of Sir Thomas Plumer, in the case of *Lyon v. Mitchell* (1 Mad. 467), is so important in reference to the subject of this Chapter, that I have set it out at some length. The case arose on a gift of residuary personal estate, mixed with proceeds of real estate, "to be divided equally amongst his sons, John, Edmund, Benjamin and George, and such son or sons as his wife should or might be *enciente* of at the time of his (the testator's) death, or at any time during his life (if born alive), share and share alike, as *tenants in common*, and to the *issue* of their several and *respective* bodies; but in case of the death of any or either of them without issue lawfully begotten, *living at the time of his or their respective deaths*, then the part or share of him or them so dying should go to the survivors and survivor equally, share and share alike, and to the issue of their several and *respective* bodies."

The testator left the four sons and two daughters surviving.

George died intestate and unmarried and without issue (the remainder over on his death, the Vice-Chancellor held to be good, pp. 470-2); the plaintiff, Benjamin, was his administrator.

John died, leaving a son, who died under age; E. P. Lynn was their representative.

Benjamin died intestate, leaving two sons, John and George—both dead; the plaintiff was their administratrix.

Edmund, the only one living, was a defendant.

The plaintiff (administratrix of George and Benjamin and their children) claimed one-third of the property, insisting the issue took as purchasers.

Two considerations, said his Honour, are to be adverted to:—

1. The effect of the will in favour of the four sons.
2. The effect of the gift over;

the duration and extent of the prior estate, supposing the contingency on which it is to go over does not take place, is a perfectly distinct question.

The words "share and share alike," &c., immediately follow the persons named to take, before the words relating to issue; the four sons are therefore to take as tenant in common, and all that follows is only to express by words of limitation the quantum of interest they are to take.

The four sons, when the will was made, had no issue; if therefore the bequest to the issue of the sons is by *words of purchase*, it is in favour of persons not existing;

if they were words of limitation, it is, in the natural order of things to give it in the manner stated, to regulate the quantum of interest intended to be given to the four sons.

The word "issue" is generally used in a will as a word of limitation; it may be used as a word of purchase if such appears to be the intention.

The Vice-Chancellor then points out the inconveniences that would result (owing to the comprehensive nature of the word "issue," usually including all descendants) from the issue taking in common with their parents, or by way of remainder by purchase, p. 474; (and see *Gibbs v. Tait*, 8 Sim. 134.)

The Vice-Chancellor then states the general rule, that what words will give an estate tail in realty, will give the absolute interest in personalty. The words in this will would, if applied to real property, have given an estate tail to the four sons. "Is there," he said, "any apparent intention in this testator that the words should not have the effect of passing absolute interests?"

This is not the case of a chattel real, if any distinction in that respect could arise; it is the case of mere personalty. It is not the case of giving the property to four persons *for life*: there are no words that import an intent that they should take it only for life: it is not an implied estate tail—it is an express estate tail. P. 475. It is not given by a settlement but by a will, and at a time when no issue of the sons was living.

The Vice-Chancellor then referred for the general doctrines to *Fearne*, Con. R. 463, and to *Seale v. Seale*, Prec. Chan. 421; *Butterfield v. Butterfield*, 1 Ves. 133, 154; *Daw or Tothill v. Pitt*, 1 Mad. 488, (where the dividends of personal estate were given to the testator's daughter *for life*, and after her death to the heirs male of her body, and for want of such issue over; and it was held that the whole vested absolutely in the daughter, confirmed by the House of Lords; a leading decision, p. 477); *Chandless v. Price*, 3 Ves. 99, more fully 13 Ves. 479; *Brouncker v. Bagot*, 1 Meriv. 271: the cases establish, said his Honour, that even in so unfavourable a case as an implied estate tail the rule will prevail.

It had been argued that because the executory bequest over was on death without issue living at the death, the bequest over was good, and had the effect of showing that "issue" was meant as a word of purchase; but his Honour did not concur in that, or see how it necessarily followed that, because the estate was to go over in the event of the party dying without children, supposing "issue" were to be so construed, if he had children he was not to have the absolute interest in it; the two propositions were separate and distinct: it is competent to a testator to say, If my sons leave children they shall have the absolute property; if any one of them has not, I give his share over: you must look at the words as applied to each event. Pp. 479-80.

It is material, continued the learned Judge, (p. 480,) to advert to the vital principle on which an executory devise depends; it is not to take effect like a remainder, expectant on the regular determination of the prior estate; if it were so, then certainly the remainder taking effect would regulate the quantum of the first estate; but the very principle of executory bequests is, that a contingency, if properly limited, is to arise, the effect of which is to defeat the prior estate—to raise a new use: the prior estate being absolute in one event, does not at all prevent its going over in another event. The validity and extent of the first estate is to be governed by the words that give it, and not by the words of limitation over, unless where they bear upon and unite with and tend to affect the construction of the prior words, and which in many cases may enable us to come to a conclusion respecting it, (as in *Lampley v. Blower*,

3 Atk. 393.) If the bequest had been to the son absolutely and for ever, it would not have signified if it were cut down by a contingency, (pp. 481-2.) It certainly has the effect of suspending the power of the parent to dispose of the property in his lifetime, (*i. e.* otherwise than subject to the contingency); but that is the effect of all executory devises, notwithstanding the estate is of a nature that would otherwise give the power of alienation.

The Vice-Chancellor then (p. 483, *et seq.*) examined the several cases relied upon by the plaintiff, particularly *Peacock v. Spooner*, and *Dafforne v. Goodman*, (*vide supra*, p. 151, note (c),) founded upon it;—he distinguished *Lyde v. Lyde*, 1 T. R. 593. *Clare v. Clare*, Forrest. 21, said his Honour, had been much shaken by later authorities, besides it went on the peculiar wording of the will; it was difficult to reconcile it with *Stanley v. Leigh*, 2 P. W. 686 (1), (see 12 Ves. 228); the Vice-Chancellor also distinguished *Knight v. Ellis*, 2 Bro. C. C. 570, (*supra*, p. 147,) but seemed to doubt its authority; *Read v. Snell*, 2 Atk. 642, was overruled by *Garth v. Balwin*, 2 Ves. 646; as to *Jacobs v. Amyatt*, 4 Bro. 542, and 1 Mad. 376, note, (*supra*, p. 147,) it was determined on the peculiar language of the will, and in *Doe v. Applin*, 4 T. R. 82, Lord Kenyon, on similar words, determined the direct contrary; *Warman v. Seaman*, Finch, 280, 2 Ch. Ca. 209, was not applicable. His Honour decided that the four sons took an absolute interest in the property.

ADDITIONAL NOTE, II.—*Supra*, p. 149.

In *Harris v. Davis*, 1 Coll. 424, the Vice-Chancellor, K. Bruce, said he always thought that if a testator possessed of a specific personal chattel, such as plate or a chattel real liable to the same considerations, bequeath it to A. and the heirs of his body, and in default of such issue to B., the death of A. in the testator's lifetime without issue does not enable B., though surviving the testator, to take under the will, but causes a lapse; nor, said his Honour, am I the only Judge of the Court of Chancery by whom that opinion is entertained; if *Mackinnon v. Peach*, 2 Keen, 555, is to be understood as showing the Master of the Rolls not to be of that opinion, I must with great deference respectfully differ from him. The bequest, said his Honour, in his view, excluded the notion that the testator meant that B. or his representatives should take only if A. should die without leaving issue, or that they should take in any other way than after the failure of A.'s issue whenever happening. The whole bequest supposed, is in truth merely a gift to A. absolutely, a gift therefore wholly failing by A.'s death without issue in the testator's lifetime, or by A.'s death in the testator's lifetime, and his Honour did not see that the absence of issue made any difference. The gift, it will be observed, is not upon the happening of one of two alternative events, but on the happening of one event only, the extinction of the heirs of the donee.—*See Lewis on Perpet.* 371-2.

(1) See the dict. p. 692: the point decided in that case was, that where there is a gift of a term to one for life, remainder to his first, &c. son (*i. e.* in contingency) in tail, with a limitation over in default of such issue to the daughters, and in default of daughters to a third person absolutely for the remainder of the term, the limitation over, in the event of the tenant for life never having a son or daughter, so that the estate never becomes

vested, is good; *Higgins v. Dowler*, 1 P. W. 98, 2 Vern. 600, 2 P. W. 694; and *Wood v. Sanders*, ib. 698; and *Sabbarton v. Sabbarton*, Forrest. 245, are to the same effect; both were cited in *Clare v. Clare*; *et v. Murray v. Addenbrook*, 4 Russ. 419; and as to the point in *Clare v. Clare*, see *Sir W. Backhurst's* case and *Burgess's* case, cited 2 P. W. 692, ib. 694; but see 5 Mad. 343, as to these cases.

CHAPTER V.

OF TRUSTS FOR ACCUMULATION.—THE THELLUSSON ACT, ITS CONSTRUCTION AND OPERATION.—OF MAINTENANCE OUT OF RENTS OR INTEREST DIRECTED TO BE ACCUMULATED, AND INCIDENTALLY OF MAINTENANCE OUT OF DEFERRED AND CONTINGENT LEGACIES.—LIABILITIES OF TRUSTEES UNDER TRUST TO ACCUMULATE.

First Appearance of Trusts for Accumulation commensurate with Executory Devise.

Thellusson v. Woodford—Extent and Limits of Accumulation, as established by that Case—Limited by Thellusson Act, 39 & 40 Geo. III. c. 98.

Mr. Hargrave's Observations on 3rd and 4th Clauses of 1st Section.

Testator only entitled to take one of the several Periods of Accumulation.

Some Uncertainty as to the 4th Description of Accumulation.

Haley v. Bannister, before Sir J. Leach.

Ellis v. Maxwell—Lord Langdale.

Observations on 4th Period of Accumulation.

Question whether the Operation of the Act is confined to Cases of express Direction to Accumulate.

General Rules of Court of Chancery in regard to the Devolution of Interest and Rents accruing on Deferred and Contingent Gifts.

As to Personal Estate.

Reasoning of Lord Talbot and Lord Hardwicke, in Strudholme v. Hodgson, in note.

As to Real Estate.

"When" Devisee shall attain 21, or the like, does not prevent Vesting.

Real and Personal Estate mixed up in same Clause.

Question whether Accumulation of Interest and Rents, directed by the Court rather than the Settlor, are within the Scope of the Act.

Shaw v. Rhodes—Case of Charge.

M'Donald v. Bryce, before Lord Langdale.

Authority of this Case disputed in Elborne v. Goode, before Vice-Chancellor of England.

Eyre v. Marsden, before Lord Langdale.

Corporation of Bridgenorth v. Collins, before Vice-Chancellor of England.

Observations on these Cases.

Of the Operation of the Statute to accelerate Possession.

Provision which transgresses or may transgress Boundary of Remoteness void altogether.

Lord Southampton v. Marquis of Hertford—Example where Minorities are taken. Trust for Accumulation only void for Excess.

Trusts void in Creation.

The Operation of the Act has been confined to its Purpose.

Difference in the Provisions of Mortmain Act and Thellusson Act.

*Thellusson Act gives Statutable Title to Heir at Law or Residuary Devisees, &c.
Direction for Maintenance and Advancement good.*

Where Donee takes the Property discharged of the Trust.

General Rule as between Tenant for Life and Remainder-man,—where there is a Direction to invest in Land, the intermediate Interest to be accumulated.

Legacy vested at 21, to accumulate till 24.

Doctrine of the Court of Chancery as to giving Maintenance out of the Fund directed to be accumulated, and out of Contingent Legacies generally.

Rule as to giving Maintenance out of a Legacy, though Contingent, given by a Parent or Person in loco parentis.

Presumption on which the Rule is founded,

Maintenance allowed when Legacy vested.

Leading Cases as to Maintenance out of Contingent Legacies, stated.

Fairman v. Green, before Sir W. Grant,

Errat v. Barlow, before Lord Eldon.

Greenwell v. Greenwell.

*Where each of several Legatees has an equal Chance of taking by Survivorship, &c.
et contra.*

Ex parte Kebble, before Lord Eldon.

Marshall v. Holloway.

Haley v. Bannister, Sir J. Leach.

Kime v. Welfitt, Vice-Chancellor of England.

Turner v. Turner, ibid.

Canning v. Flower, ibid.

Liabilities of Trustee where there is an Express Trust to accumulate.

It was shortly before the end of the eighteenth century that avowed and express trusts for accumulation commensurate with executory devise made their appearance, though before Mr. Thellusson's experiment, no attempt appears to have been made to take more than one life, or at most two lives and a minority (a). That experiment was successful, and in the suit which it gave rise to (*Thellusson v. Woodford*) it was decided that accumulation might lawfully endure, by force of the testator's direction alone, during the life of the survivor out of nine (b) specified persons *in esse* at the death of the testator; and that the beneficial ownership of the accumulations, and of the estates out of which they had issued, might be postponed for the full period of a valid executory devise, *viz.* (c) so long as any one person, or the survivor out of any number of specified persons *in esse* at the execution of the deed, (if the trust was created by an instrument *inter*

(a) Hargrave on Accumulation, p. 57; Jarman on Wills, i. 265.

(b) Lord Thurlow, as Lord Eldon observed on the hearing of this cause in the House of Lords (11 Ves. 145), said, "A man may appoint one hundred or a thousand trustees, and

that the survivor of them shall appoint a life estate; that would be within the line of a perpetuity." *Robinson v. Hardcastle*, 2 Bro. 30; and see *Low v. Burron*; Lord Talbot, 3 P. W. 264.

(c) *V. supra*, vol. i. p. 487.

vivos), or at the death of the testator (if created by will,) should continue alive, and for a further contingent period of gestation, in reference to the infancy of some person in *ventre sa mere*, followed by a term of twenty-one years (*a*): if the parent be, as he may be, in *ventre sa mere* at the death of the testator, a double period of gestation may be gained—one at the commencement, the other at the end; in fact, for the purposes of the rule, a child in *ventre sa mere* is considered as a living person (*b*).

Shortly after the original decree in *Thellusson v. Woodford* had been pronounced, namely, 28th July, 1800, the act of the 39 & 40 Geo. III. c. 98, was passed, commonly called the “Thellusson Act.” That act, after reciting that it is expedient that all dispositions of real or personal estates, whereby the profits or produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, shall be made subject to the restrictions thereafter contained, enacts, by Section I.; that no person or persons shall, after the passing of that act, by any deed, surrender, will, codicil, or otherwise howsoever, *settle or dispose* of any real or personal property *so and in such manner* that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer term than

1. The life or lives of any such grantor or grantors, settlor or settlors; or

2. The term of twenty-one years from the death of any such grantor, settlor, deviser or testator; or

3. During the minority or respective minorities of any person or persons who shall be living or in *ventre sa mere* at the time of the death of such grantor, &c.; or

4. During the minority or respective minorities *only*, of any person or persons who under the uses or trusts of the deed, surrender, will or other assurance directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce so directed to be accumulated (*c*): and in every case where any accumulation shall be *directed* otherwise than as aforesaid, such *directions* shall be null and void; and the rents, &c., and produce of such property so *directed* to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to and be

(*a*) Lord Eldon, *Thellusson v. Woodford*, 11 Ves. 150; Jarm. i. 223.

(*b*) See the case (*A. D.* 1799), 4 Ves. 313; Lawrence, J. 319; Buller, J. 331; Lord Alvanley; Lord Loughborough, 341. *S. C.* in

the House of Lords (1805), 11 Ves. 133, 144, where the unanimous opinion of the judges is set out, p. 146, 150, Lord Eldon.

(*c*) See Jarman on Wills, i. 267-9, as to this clause.

received by such person or persons as would have been entitled thereto, if such accumulation had not been directed.

By Sect. II. it is provided that nothing in that act contained shall extend, 1st, to any provision for payment of debts (*a*) of any grantor, settlor or devisor, or other person or persons; or, 2nd, to any provision for raising (*b*) portions for any child or children of any grantor, settlor or devisor, or any child or children of any person taking any interest (*c*) under such conveyance, settlement or devise; or, 3rd, to any direction touching the produce of timber or wood (*d*) upon any lands or tenements; but that all such provisions and directions shall and may be made and given as if the act had not been passed. By Sect. III. it is provided that the act shall not extend to any disposition respecting heritable property in Scotland; and by Sect. IV. that the act shall not affect wills made before the passing of the act, unless the testator shall have been living and of sound mind for twelve months after the passing of the act (*e*); the recitals will be adverted to in a subsequent page of this chapter.

The fourth clause of the first section, as Mr. Hargrave has observed (*f*), differs from the third in this, that it does not require that the minor selected should be in existence at the death of the settlor or donor, while a minor to be selected under the third clause must, at the death of the settlor, be either born or *in ventre sa mere*: and the addition of the word "only" in this clause, as Mr. Smith (*g*) observes, would seem to indicate that it was intended to prevent an accumulation during a life or lives in being in addition to the period of the minority of an unborn person, for which time it was allowable to accumulate before the statute, and to restrict it to the minority of an unborn person; but, as will be presently mentioned, the decisions appear to have introduced a further restriction on the operation of this clause. The fourth clause also differs from the third in this, that the minor selected under the fourth clause must be a person who, if of full age, would be entitled, under the limitations in the same settle-

(*a*) See *Bateman v. Hotchkin*, xi. Jurist, 809.

(*b*) Not adding to; see Hargrave on Accum. p. 199, 200; *Eyre v. Marsden*, 2 Keen, p. 564.

(*c*) As to what amount of interest is sufficient to satisfy this provision of the act, see the judgment in *Shaw v. Rhodes*, 5 Cl. & Finell. 121; Lord Lyndhurst and Lord Brougham seem to have thought, contrary to Mr. Justice Bosanquet's opinion, that the smallest interest was sufficient: all the autho-

rities on the subject of these exceptions, are collected by Mr. Hargrave, 183-208.

(*d*) See *Lord Dorchester v. Effingham*, 3 Beav. 180, in note.

(*e*) I have had frequent recourse to the very clear and well arranged Treatise of Mr. Hargrave on this act; and to Jarman on Wills, vol. i. 264, *et seq.*; and Lewis on Perpetuities, chap. xxviii. p. 592.

(*f*) P. 119.

(*g*) View of Executory Interests, § 738 h.

ment contained, to the income so directed to be accumulated ; while a minor under the third clause is not required to have any beneficial interest whatever.

It is considered that the true construction of the act is, that the testator or settlor is only at liberty to take one of the several periods of accumulation (a). A direction simply to set apart the dividends, with a view to postponed enjoyment, is equally an accumulation as a direction that they shall be laid out so as to make compound interest ; and if it be in the form of a charge it will be equally within the act, if on the true construction it requires accumulation (b). If the direction to accumulate begins to take effect at a period subsequent to the testator's death, in ordinary cases the twenty-one years begins to run not from that period, but from the testator's death (c).

As to the construction of the fourth clause the decisions do not appear to be very satisfactory. In the case of *Haley v. Bannister* (d) the testator, by a codicil, had directed that two sums of stock should be purchased in the names of his executors, and that they should receive and invest the dividends, so as to accumulate until one of the children, born and to be born, of his daughter Amelia Haley, should attain 21 ; and upon that event the trustees were to transfer the stock and the accumulations to the grandchildren then living, and if but one to that one ; there was a residuary gift of the testator's personal estate. It was contended, on the authority of *Griffiths v. Vere*, and *Longdon v. Simson*, that the accumulations, directed by the will, were contrary to the statute, so far as it gave the accumulations to a child unborn at 21, in case of the deaths of all the elder children before attaining that age : what, if anything, was said to the contrary is not stated, so that whether the fourth clause was brought to the attention of the court does not appear. Sir John Leach laid down, broadly, " The statute prevents an accumulation during the minority of an unborn child, but as to the principal the law remains as before the statute. The excess of accumulation prohibited by the statute will form part of the residue " (e).

(a) See Jarman on Wills, i. 266-7 ; but see Hargr. 139-141.

(b) *Longdon v. Simson*, 12 Ves. 295, stated *infra*, in note ; *Shaw v. Rhodes*, 1 My. & Cr. 155-6-7, 160-1-2 ; *S. C.* nom. *Evans v. Hillier*, 5 Cl. & Fin. 128 ; and see Lewin, 113, as to the principles to be deduced from this case.

(c) *Webb v. Webb*, 2 Beav. 495-6 ; there the

question was whether the case was within the 2nd clause of sect. 2 of the act, as to which see *Bacon v. Proctor*, T. & Russ. 31 ; *Shaw v. Rhodes*, 1 M. & Cr. 159.

(d) 4 Mad. 275 ; see Mr. Jarman's strictures on this case, i. p. 268.

(e) Sir J. Leach, *Haley v. Bannister*, 4 Mad. 278.

It will be observed that under the words of the will the grandchildren would have been *entitled* to the interest so directed to be accumulated, if the eldest had been of *full age*; so that, *primâ facie*, the case appears to have been within the fourth clause stated above. As to the cases cited, *Griffiths v. Vere* (a) was clearly not within the fourth clause; and though in *Longdon v. Simson* (b) the terms of the direction for accumulation and the gift of the *corpus* were in substance similar to those in *Haley v. Bannister*, the fourth clause was not adverted to in the argument or judgment; and all that was decided was, that the accumulation was good for twenty-one years from the testator's death.

This case was followed by *Ellis v. Maxwell* (c), before Lord Langdale. In that case there was a direction for accumulation of the surplus interest of a trust fund, until the youngest of all the children of the testator's son and daughter should attain 21; and the corpus and accumulations were given to such grandchildren, exclusive of an eldest son, to be vested at 21, or marriage, but *payable* and *transmissible* only on the death of the survivor of his two children, though maintenance was allowed for all the grandchildren out of their presumptive shares; the testator's widow was appointed residuary legatee. Neither of the testator's children in that case had any child at the testator's death, but the daughter was *enciente* of a son, afterwards born, who, as an eldest son, was not within the trust, except for maintenance; and the daughter had afterwards other children.

It was contended, on the part of the residuary legatee, that this was in effect a trust for accumulation during the lives of the son and daughter and the survivor, and not an accumulation within the fourth clause of the first section, and therefore the excess beyond 21 years, or the minority of the eldest son in *ventre sa mere* of the daughter, was void by the statute. It was contended, on the part of the grandchildren, that it was in effect a trust for accumulation, within the fourth clause. It was held by Lord Langdale that all the grandchildren took vested interests *at* 21, notwithstanding the deferred payment; so that in this case each grandchild on coming of *full age*, viz., at 21, would have been *entitled* to an equal share of the interest,

(a) 9 Ves. 127.

(b) 12 Ves. 295, 298. In this case legacies were given to unborn children (strangers) with a direction for investment till 21, the interest to be applied for the education of the children; on their attaining 21 the whole to

be divided between them equally.

(c) Reported, Lewin on Trusts, p. 714, and 3 Beavan, 587; see p. 596 (the reports do not materially vary) stated by Mr. Hargrave, § 103.

liable to be diminished in amount by the birth of after-born children. On the question, as to the validity of the trust for accumulation, Lord Langdale held, that the accumulation from the time the eldest grandson attained 21 was void, and went to the residuary legatee. In regard to the construction of the fourth clause of the first section, his lordship (after observing upon the acknowledged difficulty of attributing a distinct and efficient meaning to all the words of the act,) said, "If the accumulation is permitted only during the minority of a person entitled under the uses of the will, and *no time is to be allowed*, either *before* the minority commences, or *after* it has ceased, it does not seem that anything is added to the permission to accumulate during the minority of a person living at the death of the testator; but taking the words as they are, they do not appear to permit accumulation during a minority, and any time to elapse between the death of the testator and the commencement of the minority, or in favour of any person who would not, for the time being, if of full age, be entitled to the annual produce of the fund; and accordingly in the case of *Longdon v. Simson* (a), where an accumulation was intended to be made until unborn children attained 21, Sir W. Grant decreed an accumulation for twenty-one years only; and in *Haley v. Bannister*, Sir J. Leach expressed his opinion to be, that the statute prevents an accumulation during the minority of an unborn child." Those cases, said his lordship, prevented him from considering, on the construction of the act, whether the accumulation would be lawful during the minority of any grand-children born after the death of the testator: so that this case seems to have been decided on the supposition that Sir J. Leach had conclusively put a construction on the fourth clause. These cases, as they have not yet been disturbed, must be considered as having settled the construction in cases where the direction is to accumulate during the minority of one or more of *a class* of unborn children, though that circumstance is not adverted to in any one of the cases; the dry simple case of a gift to an unborn child of a person *in esse*, with a direction for accumulation of the interest of the property so given, to commence from the birth of such child, and to continue during his minority, and then a gift of such accumulations to the legatee or to some one else, has, it seems, yet to be decided upon. Mr. Jarman, I would observe, considers (b) that the effect of Sir John Leach's decision, above

(a) *Supra*, p. 168, n. (b). In *Marshall v. Holloway*, 2 Swanst. 432, and the other similar cases, the fourth clause could not be adverted to.

(b) See this subject discussed, Hargrave, pp. 124-134. In *Eyre v. Marsden*, as Mr. Hargrave observes, the accumulation was

referred to, is to make the clause of the act allowing the fourth period for accumulation to amount only to a mere saving of the rule of law, which accumulates the income of minors, or rather of the surplus income, after providing for maintenance.

Possibly a question may arise as to the power of the donor to dispose of the accumulations which are permitted by the fourth clause, away from the person during whose minority the accumulation is ostensibly (for that is all that can be said, looking to the decisions above referred to) permitted. According to the language of the act, the accumulation may be made during the *minority* of any person who would for the time being, if of full age, be entitled to the rents or interest; the meaning probably was, that the rents or interest should be accumulated for the benefit of such individual, or, at least, that they should not be given away from him, but there is no direction to that effect; so that, as I presume, such accumulations may be given away: if so, that impresses upon them a very different character to the accumulations which are made by the rules of the court, which will presently be mentioned. As to the accumulations from timber, made under the proviso which exempts such provisions from the restrictions of the act (*a*), the donor may clearly, as I presume, dispose of them as he pleases.

Another question of construction has lately arisen, namely, as to whether the operation of the act is confined to cases where there is an *express direction* for accumulation; or whether it extends to those cases also where the accumulation arises, by construction of law, only from the nature of the gift.

In order to have a clear understanding of this point of construction, the general rules of the Court of Chancery, in regard to the devolution of the interest and rents and profits accruing upon deferred and contingent gifts, must be referred to.

And first, as to bequests of personal estate.

The general rule is, that where a legacy is given on happening of a future contingent event (*b*), or where a legacy is given payable at a future day, and nothing is said as to interest (*c*), if the legatee is a

expressly directed to continue until the death of the survivor of the testator's three children, so that after the youngest grandchild attained 21 it was no longer an accumulation during minority.

(*a*) Sect. 2, 3rd clause, *sup.* p. 6.

(*b*) *Pett v. Fellows*, *ubi inf.* *Ellis v. Ellis*, 1 Schol. & Lef. 6; *Harris v. Lloyd*, Turn. &

R. 314. "Where," says Lord Eldon, "there is an interval in which the interest is not disposed of expressly by the will before the persons come into existence who are to take the capital, the interest falls into the residue;" and see *Roper*, c. xx. § 9.

(*c*) There may in such a case, as in every other, be a gift of the intermediate interest

stranger, it does not carry interest, in the one case till the happening of the contingency, in the other till the day of payment arrives, though the capital of the legacy, in the latter case, is vested from the testator's death; for interest can only be due in default of payment; no interest can commence where payment is not delayed (a): in such cases no accumulation takes place; the intermediate interest passes to the residuary legatee, or if none, as the law now stands, to the next of kin at the death of the testator.

There is an exception to the rule above stated where the subject of the gift is a *Residue payable at a future day*; in that case, the residue being vested, subject to be divested, the legatee will be entitled to the intermediate interest down to the time of his death, though he die before the day (b), for otherwise there would be a partial intestacy, which it is presumed the testator, he having disposed of the residue of his estate, could not have intended (c): so where a specific fund or a residue is given by immediate bequest, with a condition subsequent, which is to divest it in a certain event, and to pass it to some one else, unless the intermediate interest is given over, expressly or by implication, it belongs to the legatee, and it will pass to his representatives (d), so that here also no accumulation takes place.

Where a residue is given upon a contingency (not exceeding the legal limits), so that it is uncertain in whom it may vest; the intermediate dividends and interest must be accumulated; differing in this respect from an executory devise of land, which descends to the heir in the mean time, and he is therefore entitled to receive the inter-

by implication; thus, in *Boddy v. Dawes*, 1 Keen, 368, where in the event of all the children (legatees) dying under 21, the interest "arising," not which had arisen, was given to a particular person for his life; this, with other circumstances, was held to entitle the legatees to the intermediate interest; and see *Acherley v. Wheeler*, 1 P. W. 788; and the cases cited by the V. C. 5 Hare, 577.

(a) *Haughton v. Harrison*, 2 Atk. 330; *Crickel v. Dolby*, 3 Ves. J. 13, 16; *Tyrrell v. Tyrrell*, 4 Ves. 1, 5, 6. I do not here notice the exceptions, as where the legacy is given by a parent to a child, *Crickel v. Dolby*, 3 Ves. 10, &c., or by a person in *loco parentis* (Roper, 1246, &c.), or where an intention to give interest can be collected, *Pett v. Fellows*, 1 Swanst. 561; *Tyrrell v. Tyrrell*, *ubi sup.*; 2 P. W. 22, last ed. note (y). If the words of the bequest are sufficient to pass a present interest, though there be a gift over, not including the interest, upon a contingency, that does not prevent the vesting in the mean time so as to entitle the legatee

to the interest, especially in the case of a residue, *Skey v. Barnes*, 3 Meriv. 340-1.

(b) It is different if the gift does not confer a vested interest, *Murray v. Tancred*, *infra*.

(c) *Atkinson v. Turner*, Barnardist. 76; *Nicholls v. Osborn*, 2 P. W. 419; *Crickel v. Dolby*; and *Tyrrell v. Tyrrell*, *ubi sup.*; *Wadley v. North*, 3 Ves. 367; *Booth v. Booth*, 4 Ves. 405, 407. "Every intendment is to be made against holding a man to die intestate who sits down to dispose of the residue of his property," *ibid.*; *Bolger v. Mackell*, 5 Ves. 513; *Skey v. Barnes*, 3 Meriv. 346-7; and see *Bird v. Hunsdon*, 2 Swanst. 345-6, where a gift of interest on a residue for an intermediate space not provided for was implied; and see *Barber v. Barber*, 3 My. & Cr. 695: if the interest is given over of course it will go as directed, *ibid.*

(d) *Tissen v. Tissen*, 1 P. W. 500, 503; *Taylor v. Johnson*, 2 P. W. 504, and the cases in the note, p. 506: as to residue, see *Nicholls v. Osborn*, 2 P. W. 419; and see *Shepherd v. Ingram*, Amb. 448.

mediate rents; and (a) where the intermediate interest of a legacy or residue given, or such part as may not be applied for maintenance and the like (if there be a provision for that purpose) is directed, expressly or by necessary implication, to go over with the capital on the happening or non-happening of some given event (b); in such cases, also, according to the rules of the Court of Chancery, the interest and dividends must be laid out and accumulated until the residue or legacy becomes definitively vested (c); and a bill by the person who has an interest in contingency will be sustained, in respect of his possibility, to enforce such an accumulation being made (d).

(a) *Studholme v. Hodgson*, 3 P. W. 305-6; *Green v. Ekins*, 2 Atk. 476; *Butler v. Butler*, 3 Atk. 59; *Trevanion v. Vivian*, 2 Ves. 430; *Bullock v. Stones*, 2 Ves. 522; *Glanvill v. Glanvill*, 2 Meriv. 39, 40; *Murray v. Tancred*, 10 Sim. 469. See *Fearne*, Cont. Rem. 545, and Hargr. 44 and 51, where the case of *Rogers v. Gibson*, 1 Ves. 485, is stated, in which the rents and profits of the realty as well as the interest of the personalty were directed to be accumulated; and see Ambl. 96.

(b) *Mackell v. Winter*, 3 Ves. 536; 3 Mer. 345-6; *Sisson v. Shaw*, 9 Ves. 291; *Harvey v. Cooke*, 4 Russ. 34, 37, 51.

(c) *Ibid.*

(d) *Studholme v. Hodgson*, 3 P. W. 304. It was at one time contended, that in case of a contingent bequest of a residue of personal estate, the corpus of the residue was all that the contingent legatee was entitled to, and that the intermediate interest should go to the next of kin, in like manner as where a real estate is given upon a contingency the intermediate rents, if not devised to some one else, belong to the heir at law, *Green v. Ekins*, 2 Atk. 474: by the same analogy, in *Studholme v. Hodgson*, 3 P. W. 305, the mother of the infant claimed the intermediate interest, insisting that there was an implied gift to her for life; but Lord Talbot, and after him Lord Hardwicke, were clearly of opinion that the interest must follow the corpus of the residue. Their reasoning affords some useful general principles. "A man," said Lord Hardwicke, "may die partly testate and partly intestate in this court, though not at law; but there is a great difference between a particular distinct part of the personal estate (of which, as above observed, a man may die intestate) and the whole residue of it; for when the whole is given it is a contradiction in terms to say that any part of the estate is undisposed of; the residue is nothing fixed, but a fluctuating interest, and if the personal estate is increased

by any event after the death of the testator, it is part of the residue and will pass as such, why then not the interest of that residue, for that interest is assets and part of the estate, and in all distributions the time of death vests the interests?" (*Green v. Ekins*, 2 Atk. 475.) The only plausible argument to the contrary, said Lord Hardwicke, is that drawn from real estates; but, said his lordship, there are many material differences between real and personal estate; (and see Cro. Jac. 75;) for in the case of real estate the thing itself is not disposed of, but descends in the mean time, and the heir has the interest till the contingency happens, and that carries the profits with it; (and see *Atkinson v. Turner*, Barnardist. 76; *Studholme v. Hodgson*, *ubi sup.*;) but personal estate does not descend or go to the next of kin, but is vested in the executor; and, said Lord Hardwicke, this is a question as to a trust of it, where the intent of the testator must prevail: another difference between them is, that in the one case the rents could never become part of the personal estate, but the profits of personal estate are part of the estate itself; *Green v. Ekins*, 2 Atk. 476. Each of these learned judges therefore held that the intermediate profits formed part of the residue, and must be accumulated till the contingency happened; of course this is without reference to the provisions of the Thellusson Act.

In *Gordon v. Rutherford*, Turn. & R. 373, 376, a moiety of a sum of stock was given to trustees, and they were to hold it in trust for Donald Gordon until he should have attained 25, and the trustees were directed to transfer the stock to him when and as they in their discretion should think proper. If Donald Gordon should die before the stock was transferred to him, the stock was to sink into the residue, which was given to William Forbes. Sir William Grant held that there was no gift to Donald Gordon but through the medium of the discretionary

As regards real estate.—If there be an executory devise to take effect only on a future contingent event, as to the first-born child of a person living who shall attain 21, and no direction is given as to the intermediate rents: if it be a devise of a specific estate, the intermediate rents belong either to the residuary devisee, if there be one, or to the heir at law if there be no residuary devise (a): so that, generally speaking, no accumulation will take place on such a devise. But if the subject of the executory devise be the residue of the testator's real estate, then the heir at law will be excluded, and the rents and profits will be liable to be accumulated until the period arrives to which the vesting under such devise is suspended, equally as the interest and dividends in the case of a contingent executory bequest of personal estate (b).

Where a testator mixes up real and personal estate in an executory gift, the intermediate rents will follow the interest. In *Genery v. Fitzgerald* the property was partly real, partly personal, and partly such that the testator did not seem to have known whether it was real or personal: the testator made a legal devise and bequest of the whole together, to the eldest of his three natural children who should attain 21, charged with 10,000*l.* to each of his brothers, if they or either of them should attain 21; Lord Eldon held, on the apparent intention, affirming Sir W. Grant's decree, that the intermediate rents of the real estate should go together with the intermediate interest of the personal estate to the legatees, not to the heir (c).

It had been considered, and with great show of reason, that the cases had fully established that trusts for accumulation of interest or

power of the trustees, even of the interest, and the trustees not having exercised their power to transfer, the interest was directed to accumulate to go with the capital.

(a) See *Stephens v. Stephens*, Forrest, 228, 233, Amb. 96; in that case the intermediate rents went to the residuary devisee; so in *Rogers v. Gibson*, and *Gibson v. Rogers*, Ambl. 93; S. C. 1 Ves. 485, 490; Hargr. § 32, 33. In *Hopkins v. Hopkins*, Forrest, 44, 50; S. C. 1 Atk. 581, 597, 1 Ves. 268, there being no residuary devisee, they went to the heir at law; and see *Elborne v. Goode*, 14 Sim. 172; *Duffield v. Duffield*, 3 Bli. N. S. 260, 330; 1 Dow & Clark, N. S. 268, 295, 316, which Lord Eldon hoped would be "a leading case," *ibid.*

(b) *Rogers v. Gibson* and *Gibson v. Rogers*, *ubi sup.*, and Lord Brougham's judgment in *Ackers v. Phipps*, 3 Cl. & Finell,

691-3 and 699-700; and *Elbourne v. Goode*, *ubi sup.*

It has already been observed that "when a person shall attain 21, or the like," does not import contingency, or prevent the vesting in a devise of real estate, where a prior interest, for whatever purpose, is given, extending over the whole interval during which the devise in question is postponed, *supra*, p. 95; *Doe dem. Cadogan v. Ewart*, 7 Adol. & E. 663 *et seq.* and the case itself, p. 665; and that the ordinary conditional effect of "when" and "if" may be controlled by the context, even in a gift of a legacy, *sup.* p. 97.

(c) *Genery v. Fitzgerald*, Jacob, 470. Lord Brougham considered the residuary nature of the gift in that case as the strongest reason for adopting the conclusion, 3 Cl. & Finell. 697; the ordinary rule would have given the rents to the heir.

rents of property given by way of executory devise or bequest, although directed by the court rather than by the settlor or testator, were equally within the scope of the act, as where there was an express direction for accumulation (*a*); however, this construction of the act was brought into doubt by an opinion expressed by the Vice Chancellor, in the case of *Shaw v. Rhodes*, which opinion may perhaps receive some support if the statutory accumulations are, as above suggested, at the testator's disposal. Lord Brougham, in delivering his opinion in the House of Lords, on the Appeal from the Vice Chancellor's decision on that case (*b*), stated that his mind was still very much inclined to favour the construction originally put upon the clause in the will on which alone the question arose (*c*), by the Vice Chancellor of England, namely, that the third clause of the will merely created a *deferred charge beyond the scope of the Thellusson Act*.

The decision in *Shaw v. Rhodes* has settled the question as regards a charge made by a testator, but the effect of the act in reference to the accumulation, which is made by the rules of the court only in the case of a deferred gift, has lately been the subject of discussion, and the authority of *M'Donald v. Bryce* (*d*), one of the cases above referred to, in which the operation of the act was assumed to be such as is above stated, has been disputed.

In that case a residue, wholly consisting of personalty, was given by will to Robert Shawe, eldest son of Peter Shawe, upon Robert Shawe coming of age,—and failing him, to the next male child of Peter

(*a*) See Hargr. pp. 76, 85, 86, 90; and *Shaw v. Rhodes*, 1 My. & Cr. 135, an abstract of which is set forth, p. 77, § 69; and the same case in the House of Lords, by the name of *Evans v. Hillier*, 5 Clark & Finelly, p. 114 (1837); *M'Donald v. Bryce* (1838); and *Ellis v. Maxwell*, 1841, *infra*,

(*b*) *Evans v. Hellier*, 5 Cl. & Finell. p. 128; 1 My. & Cr. 139.

(*c*) By the clause in question the testator directed that after the decease of the survivor of his sons and daughter, the whole of his freehold and copyhold estates should stand charged for 20 years with the payment of two third parts of the produce of those estates in equal shares of so much money as would in 15 years make in the whole 30,000*l.* which sum, with the interest and produce thereof, he directed should be equally divided between and among all his grandchildren who should live to attain 21, their executors, &c.; or if but one, then to such one, 5 Clark & Finell. p. 117. The word "accumulate," it will be observed, is not to be found in this

clause, though it was in the preceding clauses of the will; in the event the trust for accumulation (treating it as such) would have gone on for 39 years after the testator's death, 19 years longer than is permitted by the statute.

(*d*) 2 Keen, 276. In *Shaw v. Rhodes*, 1 My. & Cr. 147 (1835), it appears to have been admitted that where the testator has by necessary inference directed an accumulation, or the clause, by a sound construction of it, requires that such accumulation should take place, it will fall within the act, though there be no express direction for accumulation; Mr. Justice Bosanquet said that was the true exposition of the act, pp. 153, 155; and Lord Cottenham was of the same opinion, pp. 160, 161; and they founded their judgments, which were affirmed in the House of Lords, on that construction; but in that case there was a charge which is stronger than a mere executory bequest, which is the subject of the Vice-Chancellor's observations in *Elborne v. Goode*; *Shaw v. Rhodes* was cited in that case.

Shawe, in the same manner—failing male children of Peter Shawe, to the daughters (naming them) of Lewis M'Pherson: there was no express direction for accumulation. Robert Shawe died an infant, and Peter Shawe had no other son, but he and his wife were living. It was assumed by all parties that the accumulation of the income became unlawful under the statute, on the 11th April, 1833, at which time twenty-one years from the death of the testator expired. The question argued was whether the income of the residuary estate, and of the accumulations, from the period to which accumulation was assumed to be limited by the statute, until the contingency should be determined by the death of Peter Shawe, belonged to the daughters of M'Pherson, or to the next of kin of the testator. It was admitted that the contingent gift to the daughters of M'Pherson vested in interest, so as to be transmissible, but Lord Langdale thought that as nothing in the present state of things was given for immediate enjoyment, the next of kin, and not the daughters, were entitled to the intermediate income, thus assuming that the act applied to the case.

The case on which the authority of the case last stated was disputed was *Elborne v. Goode*, before the Vice-Chancellor of England (1844) (a). The case itself did not in fact raise the question now under consideration; there was an *express* direction to accumulate during the lives of several annuitants, that is, until the period when the persons to take as executory legatees should arrive, and then there was a gift of the residue; it was held, according to *Longdon v. Simpson*, and *Griffith v. Vere*, that all the accumulations beyond the twenty-one years were void, and that they should go to the next of kin. But the case had been argued as if it had been an executory bequest of a residue, and that the only accumulation to be considered was such as would be made by the course of the court; and it was contended that, in such a case, where the accumulation was only incidental to the devise, the *Thellusson Act* did not apply, and that, being a bequest of a residue, the intermediate rents, before and after the end of twenty-one years, as well as the capital itself, would pass to the residuary legatees on the residue becoming vested, just as it would if the act had not passed; and it was contended that the decision in *M'Donald v. Bryce* could not be supported, as there was, in that case, no express trust for accumulation: as the question had been argued, the Vice-Chancellor of England delivered his opinion on the point.

The Vice-Chancellor first stated the recital in the act:—"Whereas

(a) *Elborne v. Goode*, 14 Sim. 175-6, after Mr. Hargrave's treatise.

it is expedient that all dispositions of real or personal estate, whereby the profits and produce thereof are *directed* to be accumulated, and the beneficial enjoyment thereof postponed, should be made subject to the restrictions hereinafter contained;” his Honour then stated the enactments in the first section of the act (a). “It is observable,” said his Honour, “that there is in this section a most copious use of the words ‘direction’ and ‘direct;’ and it seems to me that the language of the act expressly applies to *those cases only* where there is a *direction* to accumulate, and that upon the face of the statute it does not apply to the case of a mere naked executory devise, for without any direction from the testator, this court would direct the profits to be accumulated.” His Honour then cited and adverted to the following observations of Lord Eldon, in *Griffiths v. Vere* (b). “It had been contended,” said his lordship, “that by analogy to the law applicable to devises and bequests, which are postponed in enjoyment to a period beyond that to which executory devises and bequests may by law extend, the gift should be wholly void.” In answer to this, Lord Eldon observed, that the sort of case then before him was not, he believed, much in the contemplation of the legislature; he further added (c), “As to the analogy between executory devise and the law to be considered laid down by this act, if the act itself does not prescribe what is to be the effect of the direction, the analogy may be resorted to, in order to determine the effect; but if the act has itself said what is to be the effect, you cannot upon analogy go further than to apply it as far as the directing words of the act will allow:” this passage appears to relate to the question then before Lord Eldon, namely, whether the direction was to be considered as wholly void. In a subsequent passage (d), his lordship, still adverting to the same question, says, “I doubt whether the present case was thought of, for by this will the estate is given, *not by executory devise*, but by creating a trust to pay the annual profits, and then follows the trust for accumulation;” and having decided the main point, his lordship added (e), “The difficulty was put strongly, that supposing the life of the husband should happen to endure for more than twenty-one years, what is to

(a) *V. supra*, p. 168.

(b) The question before Lord Eldon, it is to be remembered, was this, namely, whether the decision of Sir William Grant, that a trust for accumulation during the life of a person (in that case the husband of a married woman, to whom on the death of her husband the accumulated fund was given) was good for 21 years, if the life should exceed that period,

and not void altogether, was right: Lord Eldon, as before mentioned, affirmed that decision.

(c) 9 Ves. 134. These observations are quoted by the Vice-Chancellor, p. 174.

(d) P. 135.

(e) P. 136, partly quoted by the Vice-Chancellor of England.

become of the profits accumulated at [*qu. from*] the end of the twenty-one years. It is clear now accumulation may be directed for twenty-one years, where an executory devise is created as large as heretofore, and when therefore there may be a very long interval. The very same difficulty might occur upon a will precisely in the terms of the act as upon this will: for instance, suppose the testator had an infant son a year old, and a brother; and that he expressly directed accumulation for twenty-one years, and subject to that gave the estate to his eldest son; and after the decease of his eldest son, to the eldest son of his brother: suppose the will contained a direction that the property so accumulated under a direction admitted to be legal, should go to the person who, under those limitations, was to take the estate; it is clear, though the direction to accumulate is only for twenty-one years, yet under the combined effect of the direction and the law, there *might* be an accumulation for forty years; for if the son lived till just about the end of the first twenty years, and then died, and the brother had a son a week old, and by his will he had provided a maintenance for his own son, under the *direction of the law*, that accumulation, 4,000*l.* for instance, must, during the minority of that son, accumulate in this court. It is clear then he would take the accumulation of forty years, *though the legislature did not mean that*, and there would be no difficulty, consistently with the principle which is to result from this decision, in deciding that whenever it arises. I could put many cases in which the same difficulty would occur if the direction for accumulation was in the very terms of this will" (a).

"It is observable," continued his Honour, "that Lord Eldon is putting a case totally distinct from the present, because he is putting the case of a devise to one party, with a direction to accumulate, and then a simple devise to another; and Lord Eldon then supposes, that being the case, that the statute *did not at all intend to interfere with the accumulation*, which would only be directed by *operation of law*."

"It struck me," continued his Honour, "on reading the different cases that have followed on the subject, that notwithstanding Lord Langdale's decision in the case of *M. Donald v. Bryce*, he has himself given a very plain rule in the language which is ascribed to him in the case of *Eyre v. Marsden*, where his lordship says, 'The statute, as it appears to me, was not intended to operate, and does not operate to alter any disposition made by the testator, except his direction to accumulate; striking that out, every thing else is left as before, and all the

(a) Lord Eldon, *Griffiths v. Vere*, 9 Ves. 136.

other directions of the will as to the time of payment, substitution, or any contingencies, are to take effect according to the true construction of the will, unaltered by the effect of the statute;’ he added, ‘I think therefore that the income which the statute forbids to be accumulated must go as in case of intestacy’” (a). “If you apply that language to a case in which no direction for accumulation is given, but there is an executory devise; by the operation of law, the rents and profits intermediately accruing would be preserved by way of accumulation for the person ultimately taking under the executory devise. Where there is nothing to strike out in the way of direction, you cannot strike out the direction unless you strike out the devise, and the direction therefore must be considered as *a separate* thing from the devise: and my opinion is, that if ever a case should again arise, such as actually did arise in *M'Donald v. Bryce*, it would deserve very serious consideration whether, considering the language of Lord Langdale himself, in the case of *Eyre v. Marsden*, and the hypothetical case put by Lord Eldon in *Griffiths v. Vere*, the decision in *M'Donald v. Bryce* could be sustained” (b).

Shortly afterwards (12 March, 1847), the following case came before his Honour. William Guest, by will, gave 3,300*l.* to the corporation of Bridgenorth, upon trust, that they should receive the dividends, and should pay various annuities, and after the death of the survivors of the annuitants sell the 3,300*l.*, and pay the money arising therefrom, and also the proceeds arising therefrom in manner aforesaid, and the surplus of the dividends, after payment of the annuities, whilst they respectively continued payable, and also the proceeds *which should have accumulated* in respect thereof, unto and amongst all and every his second cousins as should be living at the death of the survivor of the annuitants; and if there should be any difficulty in the making out of the claims or otherwise, the trust moneys and the interest which should have accumulated in respect thereof, were to be divided at the end of two years from the death of the surviving annuitants, amongst those who had made out their claims; the testator gave the residue of his estate to James Baker. The testator died in 1812; the surviving

(a) 2 Keen, 574. That was a case of an express direction to accumulate, the accumulations to be added to the capital of the testator's property for the benefit of his grandchildren living at his decease, to be paid to them on the decease of his youngest surviving child; and the testator had provided that during the life of the youngest child the vested interest previously given might be divested. There was in fact a child still living. His lordship

said that to direct that payments should be made to grandchildren at the end of 21 years, before the death of the testator's surviving child, as had been contended, would be to direct that which the testator had not directed, and to give and defeat interests directly contrary to his meaning and intention: then follows the passage above cited.

(b) *Elborne v. Goode*, 14 Sim. 174-6.

annuitant in 1835; there were two years of dividends, possibly four, which, according to *McDonald v. Bryce*, would have belonged to the residuary legatee, and he claimed them accordingly. The Vice-Chancellor, adhering to his former opinion, held, as there was no *specific* direction to accumulate, but only a sort of passing incidental observation made as to the possibility of there being an accumulation, that the words of the statute did not apply; "the testator has not so devised it," said his Honour, "as that there shall be accumulations; 'any accumulations' that may happen to be made are the result of a *mere contingency*, and not a devise of the testator's, though there is a direction by the testator to dispose of what *may* be accumulated;" that there was an accumulation was a mere accidental circumstance, the testator had not directed it (a).

Looking to the prohibitory part of the first section alone (b), it certainly does appear to apply only to cases where the accumulation is made by reason of some direction given by the testator, and not to a case where the court makes the accumulation without any direction on the part of the testator, and not as a matter of construction upon the will but for the sake of the parties interested; yet the latter description of accumulation in the case of a postponed gift seems to be equally within the spirit of the act, for thereby "the beneficial ownership is postponed" (c).

With regard to the supposed case put by Lord Eldon, it can hardly be compared to the case of an executory bequest; it is true there may be an accumulation for forty years, but the accumulation for the first

(a) *Corporation of Bridgenorth v. Collins*, xi. Jurist, 213. In this case, *Shaw v. Rhodes*, and the same case on appeal, nom. *Evans v. Hillier*, was not cited; in *Elborne v. Goode* it was.

In a late case, *Lombe v. Stoughton*, (1941,) 12 Sim. 304, the testator gave 20,000*l.* and 1000*l.* a year out of the rents of his estates which were settled, for ten years to his trustees, in order that out of that fund and its accumulations they might build a house, according to a plan to be approved by them, with the consent of whoever should be tenant for life, and they were to accumulate the interest; in the mean time they were to hold the surplus, if any, on the trusts which he had declared as to his personal estate. It happened that owing to various circumstances the fund had been accumulated for more than 21 years; the Vice-Chancellor held that the Thellusson Act did not apply to the case; he thought that if from disputes, negligence, or inadvertence, the fund had been paid into court, and had gone on accumulating for a century, the matter would have remained just

exactly as it was before; namely, that out of the accumulated fund the house would be directed to be built according to the declared trust, and the court would have dealt with the surplus of the fund according to the trust declared of that surplus, and consequently that neither the heir at law or next of kin had any interest whatever in the subject. His Honour, by his observations in the course of the argument, *ibid.* p. 312, seems at first to have thought that the Thellusson Act might apply. In adjusting the rights of the parties in such a case, it would seem that the interests of the parties who would have enjoyed the house, if it had been built, would have to be taken into consideration, as well as the interests of those entitled to the surplus; the right of the latter would probably be regulated as between those successively entitled by analogy to the principle established in the case of *Sitwell v. Bernard*, 6 Ves. 520.

(b) *V. sup.* p. 165.

(c) Mr. Jarman appears to have entertained no doubt on the subject, i. 274-6.

twenty years is of a quite different character from that for the second twenty years; the accumulations arising during the first interval are, if I am right in the opinion as to the construction of the act hazarded in a former page, entirely in the testator's or settlor's power to dispose of as he pleases; those which are made during the second interval are accumulations arising merely from the careful management of the infant's own property and for his own benefit; and if the interest should be required for maintenance, there will be no accumulation at all. It seems to be no more than what is constantly introduced into schemes for the regulation of charities, that the surplus income shall be accumulated for repairs or other incidental purposes (a); besides, if the accumulation for the second term should be treated as an accumulation within the act, as the interest and profits during the prohibited interval are directed to go to the person who would have been entitled if such accumulation had not been directed, it would seem that the infant would still be entitled to them (b), and then they must be taken care of for him just in the same way; and in either case, on his death, they would pass as part of his personal estate. With regard to Lord Langdale's observation in *Eyre v. Marsden*, it appears to be equally applicable to an executory devise as to an express direction for accumulation, the implied direction for accumulation for the interval which takes place after the end of twenty-one years may be struck out, and the executory bequest will still have its entire effect as regards the corpus and the amount of the preceding accumulations. It being necessary therefore to choose between such high authorities, principle and reason appear to turn the scales in favour of the received opinion that executory bequests, which necessarily lead to accumulation, are within the statute (c).

As regards the Operation of the Statute.—The act, it is to be observed, is a restraining statute; it does not give validity to any trust for accumulation, which would have been invalid as the law stood prior to the statute.

Before the Accumulation Act, a testamentary or other trust or direction to accumulate, so worded as to last, or to be capable of lasting, beyond the compass of all lives in being at the testator's death,

(a) So accumulations are continually made of funds in court, where there is a doubt as to the existence of the person beneficially entitled, *Cuthbert v. Purrier*, vi. Jur. 447; and for other similar purposes to which the statute has never been considered to have any

application.

(b) See *Trickey v. Trickey*, 3 My. & K. 561, 565.

(c) See, as to the cases last adverted to, Roper on Leg. 1560-2.

and twenty-one years after the death of the survivor of those lives, the title being put in suspense till the end of that time, would have been illegal and void for the whole; and such a trust is not less illegal and void since the Accumulation Act (*a*). But if the accumulations are so given as to vest at the testator's death (*b*), subject to a postponement of the enjoyment (*c*), such a gift is not obnoxious to the provisions of the act, so far as to be made void; the act, in such a case, like the rule against remoteness, only applies so as to accelerate the possession (*d*). A trust for accumulation, as has been remarked by Mr. Lewis, may verge on the very outside of the allowed limits of perpetuity, and yet be void only for the actual excess beyond the absolute period authorized by the act; while if it in any degree, however insignificant, transgress the boundary of remoteness, or, if it be so framed as that it may possibly transgress such boundary, it will wholly fail, without regard to the actual course of events. There are numerous cases from which the latter proposition may be exemplified (*e*).

The case of *Lord Southampton v. Marquis of Hertford* (*f*), before adverted to, may be given as an example where minorities are taken, but so that the accumulation may possibly go on beyond the limits allowed by law. By indentures, certain estates were conveyed in strict settlement, subject to a term of one thousand years, upon the following trusts:—that during the minorities of any person who, for the time being, should, by virtue of the limitations thereinbefore contained, be immediate tenant for life, in tail male, or in tail, in possession, the trustees should receive the rents, and apply them in discharge of incumbrances, and after the discharge of the same, should, during such minorities as above-mentioned, invest the yearly rents in real or government securities, so that the same might accumulate during such minorities; and that the trustees should stand possessed of such accumulations, in trust for such person as should immediately, upon the expiration of such minority or minorities, or the death of such minor

(*a*) *Boughton v. James*, 1 Col. 45.

(*b*) See *Blease v. Burgh*, 2 Beav. 221-226.

(*c*) See *Boughton v. James*, *ubi sup.* and p. 42.

(*d*) Jarman on Wills, i. 252.

(*e*) *Lord Southampton v. Marquis of Hertford*, 2 Ves. & B. 54, and *Marshall v. Holloway*, 2 Swanst. 432, which are cases where income was directed to be accumulated during the minorities of the persons who should become beneficially interested in settled property, and which might exceed the limit fixed by law, *Palmer v. Hoiford*, 4 Russ.

403; *Vaudrey v. Geddes*, 1 Russ. & M. 203; *Griffith v. Blunt*, 4 Beavan, 248, 252, where income was directed to be accumulated and divided among the children, born and to be born, of a person living, at a period which might postpone the vesting of the interests of some of them at least, till more than 21 years after a life in being. Abstracts of these cases may be seen in Mr. Hargrave's Treatise, and Lewis on Perpetuities, 594-6.

(*f*) *Lord Southampton v. Marquis of Hertford*, 2 Ves. & B. 54; and see *Broune v. Stoughton*, 14 Sim. 369, 378.

or minors, be tenant in possession, and be of the age of 21. "This is an attempt," said Sir W. Grant, "wholly to sever the surplus rents and profits from the legal ownership of the estate, for a term that *may* extend beyond the period allowed for executory devises or trusts of accumulation, and to give them to a person who may not come into existence until after that period, and he did not see how any part of such a trust could be executed; and he held the trust to be wholly void" (a). In the case of *Marshall v. Holloway* (b), Lord Eldon, on the same principle, held the trust for accumulation to be wholly void.

However, it was very early established that where a trust for accumulation, which would be good according to the general law, is so constructed as to aim at either a certain or a contingent duration beyond twenty-one years from the death of the settlor or testator; the effect of the statute is not to nullify the trust altogether, but only for the interval during which in the event it shall be found to exceed that duration (c). But where the limitations of an estate which are valid, have annexed to them trusts for accumulation which are *in their creation* invalid, by reason of remoteness, the Court of Chancery, when dealing with the instrument, will not support the trusts for accumulation so far as the testator might have carried them, but will reject them altogether: "if it is bad to the extent in which it is given, you cannot model it to make it good" (d); Lord Eldon (e), though at first inclined to support such trusts, so far as not to break in upon any rule of law, yet ultimately came to the same conclusion as Sir Wm. Grant (f).

Care has been taken that the operation of the act should be confined to its purpose, and that the other provisions in the will, not necessarily annulled by the act, should not be interfered with; thus, in *Eyre v. Marsden*, before cited (g), Lord Langdale held that the title of the legatees to the accumulations directed to be made remained untouched, so that they could not be admitted to have any interest in the accumulations declared to be void, as their title under the gift to such accumulations, had they been good, would not then have been

(a) *Lord Southampton v. Marquis of Hertford*, 2 Ves. & B. 64; Harg. pp. 91-2.

(b) 2 Swanst. 432.

(c) *Griffiths v. Vere*, 9 Ves. 127; *Longdon v. Simson*, 12 Ves. 295; *Haley v. Banister*, *supra*; and see the other cases, Harg. 151-3.

(d) *Ware v. Polhill*, 11 Ves. 257; *Lord Southampton v. Marquis of Hertford*, 2 Ves. & B. 54, 64.

(e) *Marshall v. Holloway*, 2 Swanst. 432, 450.

(f) Sir E. Sugden, *Ker v. Lord Dungannon*, 1 Dru. & War. 532.

(g) *Eyre v. Marsden*, 2 Keen, 574.

complete: on the other hand, in *Pride v. Fooks* (a), the same learned judge considered that the directions for maintenance and advancement out of the income of the fund directed to be accumulated, were effectual after as well as before the period from which the direction for accumulation had been declared to be void (a).

As regards the void accumulations or the void excess.—By the provisions of the Thellusson Act, not only are directions for prohibited accumulations declared to be null and void, (which is the only provision which is contained in the 9 Geo. II. c. 36, the Mortmain Act, in respect of provisions inconsistent with its provisions,) but it is enacted that the rents, issues and profits and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of the act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed: the title of the heir at law and next of kin under the Mortmain Act therefore rests altogether upon the right to property undisposed of; but the act against accumulations gives a statutable title (b). Under the provisions of this act if the accumulations are to be made upon a Specific Portion of the property, the rents or interest during the prohibited interval will go to the devisee or legatee of the property (c), if he would have been entitled to the rents or interest in case such accumulation had not been directed: the same analogy holds in such case as in the case of a perfect gift charged with a trust which is imperfectly declared or which fails of effect: the property is absolutely given, and a trust for accumulation is by a distinct direction imposed upon the property, which being illegal fails of effect; the donee therefore by analogy, as well as by the words of the statute, takes the property discharged of the trust (d). If the title of the legatee or devisee to the enjoyment has not arrived, then the prohibited accumulations will go to the residuary legatees or devisees if any, as part of the capital of the residue (e); if there should be no

(a) 2 Beavan, 430.

(b) Lord Cottenham, *Eyre v. Marsden*, 4 My. & Cr. 246. It was on this ground that Lord Cottenham reversed the decree of the Master of the Rolls, so far as it charged the costs upon the illicit accumulations treating them as residue undisposed of, and directed that the general costs of the suit should be paid out of the general estate of the testator, including the fund accumulated within the permitted period, p. 248.

(c) *Trickey v. Trickey*, 3 My. & K. 565.

(d) *Lord Southampton v. Marquis of Hertford*, 2 Ves. & B. 54, 64; *Shaw v. Rhodes*, 1 My. & Cr. 135 (see Hargrave, 171, Jarman, i. 170); and see *Carver v. Bowles*, 2 Russ. & M. 308; *Kampf v. Jones*, 2 Keen, 761; *Ring v. Hardwicke*, iv. Jur. 242, 2 Beav. 352; *Winkworth v. Winkworth*, 8 Beavan, 576, and *Marshall v. Holloway*, 2 Swanst. 450, dict. Lord Eldon.

(e) *Crawley v. Crawley*, 7 Sim. 429,

residuary gift, then to the heir at law or next of kin, just as they would have done if there had been no direction for accumulation during that interval; the statute annulling the accumulation, and any gift of the accumulations forming an integral part of the direction to accumulate, but not further. If it be the Residue itself which is directed to be accumulated for the purpose of future gift, the next of kin or heir at law, according to the nature of the property, will be entitled to the accumulations for the prohibited interval; to give them to the residuary devisee or legatee, where the enjoyment has been suspended by the testator, and made to depend on a contingency, would, as it has been observed, be to make a new disposition for the testator (a): if there be a direction for maintenance and advancement out of such accumulations, such maintenance, as before observed, is well given; the act which prevents accumulation only applies to such part as intended to be accumulated (b).

It is to be observed, that where a legacy is given which becomes *vested* in the legatee at 21, and there is a direction for accumulation until the legatee attain 24 or some other age; such a clause is considered as merely directory as to the future management, and the legatee may put an end to it at pleasure: it is void, not by the effect of the Thellusson Act, but by the general law, as being repugnant to the estate which is given to the legatee (c).

Where property is given to trustees, with a direction that the same be converted into money if not already such, and that the fund be invested in the purchase of real estate to be settled, and there is a direction that in the mean time the rents, interest and profits of the property so devoted to the purchase shall be accumulated and be laid out together with the corpus in the intended purchase, and that no

there the legacy did not vest in the legatee till 25. *O'Neill v. Lucas*, 2 Keen, 313, there the legacy was not to vest till the death of a particular person.

(a) *Eyre v. Marsden*, 2 Keen, 573-4. In that case, there was an express direction to accumulate the residue for the benefit of the testator's grandchildren; the rents and dividends from the legal period of accumulation were held to go as in case of intestacy, and not to the residuary legatees; and see *S. C.* on appeal, 4 My. & Cr. 246, where this part of the judgment was affirmed. *Pride v. Fooks*, 2 Beav. 437; *M'Donald v. Bryce*, 2 Keen, 284; see *Hargrave*, 174; *Jarman*, i.

170, 271.

(b) Lord Langdale, *Pride v. Fooks*, 2 Beav. 441.

(c) *Josselyn v. Josselyn*, 9 Sim. 63; *Jackson v. Majoribanks*, 12 Sim. 93; *Curtis v. Lukin*, 5 Beav. 155; *Saunders v. Vautier*, 4 Beav. 115; 1 Phill. 240: that case is important, as having established that where a legacy is given to trustees and set apart from the bulk of the estate (see 1 Ves. 311), and the trustees are directed to accumulate it till the legatee attain 25, or any other age, and then to pay the legacy and accumulated interest to him, the legatee has a vested interest in the legacy; and see *Rocke v. Rocke*, 9 Beavan, 66.

person is to take any interest till the trusts with respect to the purchase are completed (a); the court, looking to the inconveniencies which would result from a literal adherence to the directions given, has held as a general rule, in regard to the respective interests of the tenant for life and remainder-men of the estate to be purchased, that the direction for accumulation shall operate for one year only, and that though the personalty remains as personalty (necessarily perhaps), it shall at the end of the year be considered as converted, and that the beneficial enjoyment shall be the same as if the conversion had been made (b).

It may be well here to consider the doctrine of the Court of Chancery, in regard to giving maintenance out of the funds directed to be accumulated, and to advert to the doctrines as to maintenance out of contingent legacies generally.

Where a legacy is given to a legitimate child by its parent (c), or by a person who has placed himself *in loco parentis* (d), or who gives the legacy expressly as a "portion" (e), at least where it is to a natural child, a grandchild, or a nephew or niece (f), the court will allow maintenance for the child from the death of the testator (g), though none be given by the will, notwithstanding that the legacy be contingent, for instance, to such of the testator's children as shall attain 21 (h); and, according to one case, though there be a direction for accumulation, and if the legatee die before 21, then the whole be given over (i).

(a) As in *Sitwell v. Bernard*, 6 Ves. 520; *Entwistle v. Markland*, *ib.* 528, n.; *Stuart v. Bruere*, *ib.* 529, n.

(b) Lord Eldon, *Angerstein v. Martin*, Turn. & R. 239-40. The same principle applies where a residuary personal estate is directed to be got in and invested, and life estates and remainders in the funds are given, *Hevit v. Morris*, *ibid.* 241-5, v. *supra*, p. 43.

(c) *Beckford v. Tobin*, 1 Ves. 310.

(d) As to the circumstances which will be sufficient to place a person in this character, see *Ellis v. Ellis*, 1 Scho. & Lef. 5; *Hill v. Hill*, 3 Ves. & B. 187; *Rogers v. Soutten*, 2 Keen, 602; *Wilson v. Maddison*, 2 Y. & Coll. C. C. 372; *Powys v. Mansfield*, on appeal, 3 My. & Cr. 374, *sup.* vol. i. p. 560; and see *Heath v. Perry*, 3 Atk. 101; *Crickett v. Dolby*, 3 Ves. J. 11a; *Acherly v. Wheeler*, 1 P. W. 782, and *Boddy v. Dawes*, 1 Keen, 368; on that point and the use of the word "Portion" by the testator.

(e) The subject of Portions will be separately considered in a future chapter.

(f) *Acherley v. Wheeler*, 1 P. W. 782, provision for a niece; but which case Lord Hardwicke does not appear to have approved; *Heath v. Perry*, 3 Atk. 102; the reasons given for this decision are special; *Hill v. Hill*, 3 Ves. & B. 183, provision for grandchildren. As to a natural child see *Perry v. Whitehead*, 6 Ves. 547; *Beckford v. Tobin*, 1 Ves. 308, 1 Swanst. 558; *Dowling v. Tyrell*, 2 Russ. & M. 343.

(g) The rule is not extended to a legacy to a natural child simply as such, *ibid.*; and *Perry v. Whitehead*, 6 Ves. 546; or to a grandchild, see *Errington v. Chapman*, 12 Ves. 24; but there the legacy was not given absolutely.

(h) Dict. Lord Hardwicke, *Inledon v. Northcote*, 3 Atk. 430, 438; *Brown v. Timperley*, 3 Russel, 263; in this case there was no gift over.

(i) *Mole v. Mole*, 1 Dick, 310; and see the other cases, *Roper on Leg.* 1259; but the Vice-Chancellor of England, 4 Sim. 436, seems to doubt this case.

The basis of this rule, which does not extend to adults, is, that the father being bound to provide maintenance for his child, whilst an infant (*a*), and having made a provision by a legacy, payable at a future day, and that a person who has placed himself in the character of parent, must be presumed to intend that the child, having no other provision, should be supported in the mean time; but this implication is ousted if he provides any maintenance for the child, however small the maintenance and however large the legacy (*b*). However, where a legacy is given, payable at 21, so as to be vested at the testator's death, and a provision is made for maintenance, and the remainder is directed to be accumulated; this provision and direction will not prevent the vesting of the legacy, nor will the direction for accumulation prevent the court from ordering a further portion of the interest to be applied for maintenance if required (*c*): where the property, of whatever nature, is vested, though liable to be divested, maintenance may be obtained (*d*): if there be an intention to be collected, that maintenance or interest should be allowed from the death or any other time, of course it will be followed, whosoever may be the legatee (*e*).

Where the legacy is amongst a class with survivorship between them but is not given over, and the grandchildren, or indeed any class of children (strangers to the testator), compose a class of legatees, all or some of whom must absolutely take the fund, all having a common interest in it—an equal chance of taking or being the survivor, there the court will allow interest in the shape of maintenance if the father of the legatees be not of ability to maintain them (*f*). The case of *Fairman v. Green*, before Sir W. Grant, though, as after mentioned, it has been disapproved, will, together with the other cases after stated, illustrate this rule. The grandfather, who survived the father, and on whose will the question arose, by his will devised his real estates to his eldest grandson, Joseph, directing that the rents should be accumulated and paid to him at 21; and if he should die under that age leaving issue then to his issue; if he died before that age without issue, the testator gave such accumulated rents to his three other grandchildren, equally, at 21, the interest to be applied for their respective uses in the mean time; the testator also gave to each of his four grandchildren

(*a*) See *Raven v. Waite*, 1 Swanst. 553, 558-9.

(*b*) Lord Redesdale, *Ellis v. Ellis*, 1 Scho. & Lefroy, 5. Lord Alvanley, in *Tyrrell v. Tyrrell*, 4 Ves. 5; and see *Chambers v. Goldwin*, 11 Ves. 1.

(*c*) *Fairman v. Green*, 10 Ves. 48; *Stretch v. Watkins*, 1 Mad. 253, 256-8.

(*d*) *Snow v. Poulsen*, 1 Keen, 186.

(*e*) See *Leslie v. Leslie*, Lloyd & G., temp. Sugd. 4, and *Pell v. Fellows*, 1 Swanst. 561, there cited.

(*f*) See *Ex parte Kebble*, Lord Eldon, 11 Ves. 606; *Errat v. Barlow*, 14 Ves. 202, stated *infra*; and see Roper on Legacies, ii. p. 1283.

before mentioned 500*l.* each, to be paid at their respective ages of 21 ; and he gave the residue of his personal estate to his grandson, Joseph, to be paid at 21 ; there was a direction to accumulate the interest of the several legacies till they should become payable, to be transferred to the legatees with their original legacies ; and in case of the death of either of the children under age without leaving issue, the legacy and the accumulations were to go to the *survivors* equally, to be paid at the same time as their original shares. A bill having been filed, the eldest and three younger grandchildren applied to confirm the report made by the Master, approving of 250*l.* a year out of the income of 600*l.* a year belonging to the eldest, and 54*l.* a year for the other children, being the amount of the interest of the legacies from their father and grandfather, with the accumulations. The disputed cases of *Greenwell v. Greenwell*, *Cavendish v. Mercer*, and *Fendal v. Nash*, (after noticed,) were cited, to show that in the case of a father and grandfather the rents and interest might be applied for the maintenance of a child otherwise unprovided for, though the devise or bequest were contingent. No one opposed the application. Sir Wm. Grant said, "The court has not done this, except where all parties who were to have maintenance were equally interested. If there are three children, and the property is given to one, and if he dies under 21, then to the others, there is an equal chance of all attaining the age of 21. But if there is any legatee over," (there was none in this case,) "the court has always taken the consent of that legatee"(a). "If," Sir Wm. Grant afterwards said, "the eldest son were to die, the younger children would have maintenance under the grandfather's will ; therefore they are not all equal here as in the cases cited. My doubt was," (he said, referring to his having refused to make the order on petition,) "whether it was ever done upon a *petition* if the infant had not the absolute interest. It could only be on the equitable ground that if the court would not interfere *the other children would be just in as bad a situation.*" His Honour made the order (b).

In *Errat v. Barlow* (1807), (c), Lord Eldon examined all the cases on the subject ; he first observed upon *Greenwell v. Greenwell* (d) ; "That was a case where the testator devised his real estates to trustees in trust for his grandson till he should attain 21 ; they were expressly directed to *accumulate* the rents during the minority

(a) Sir William Grant decided *Errington v. Chapman*, 12 Ves. 24, on this principle.

(b) *Fairman v. Green*, 10 Ves. 49 ; Lord Eldon, 11 Ves. 605, said this case was not within the former cases, and he disapproved

of it, by reason of the limitation to *the issue*: it is to be observed the grandfather stood in *loco parentis*.

(c) 14 Ves. 202.

(d) 5 Ves. 194.

of the grandson, for his benefit; and when he attained 21, the trustees were to pay to him such accumulations, but if he should die before 21, the same were to be held in trust for the testator's three grand-daughters, to be paid at 21, or marriage; and in the same event the real estates were given in trust for the three grand-daughters at 21, as tenants in common. The bill was filed by the infant grandson, praying to have maintenance allowed; it is presumed the grand-daughters were parties. Lord Rosslyn at first said he feared if he should make a decree it would be his will and not the testator's; ultimately he granted the maintenance, on the authority of *Cavendish v. Mercer* and *Fendal v. Nash*; though Lord Rosslyn stated each of them as being cases in which the consent of those who would be ultimately entitled was obtained, no consent was required in the case before Lord Rosslyn" (a). Lord Eldon next adverted to *Cavendish v. Mercer* (b), where there was also an express direction for accumulation, but in which all had an equal chance as amongst themselves, and the persons entitled under the limitation over consented. "That case therefore," said Lord Eldon, "is an authority only that where the court sees that it is for the benefit of the infants, the chance of surviving being equal, and *can procure the consent* of all persons interested, the court will take the chance of controverting the direction of the will." Lord Eldon next observed "that he could not bring himself to think that the case of *Fendall v. Nash* (c) was properly decided, as upon certain contingencies both the principal and interest would have gone to individuals not then in existence; and how the court," said his lordship, "could give to the infants that property which in that event would belong to others, he could not conceive." "The result is," continued his lordship, "that if the chance of surviving is equal amongst all, and *no other interest* that upon any contingency would take effect will be defeated, maintenance shall be allowed out of the interest; but it is impossible to give it where in any event under the operation and construction of the will, that interest may *possibly* belong to other persons." (d). This case therefore over-ruled the case before Lord Rosslyn, and the case of *Greenwell v. Greenwell*, and the other cases, and is now acted upon as the law. In a previous case, *Ex parte Kebble*, (1805.)

(a) Sir William Grant does not appear to have disapproved of, on the contrary he acted upon this case, see 12 Ves. 25, and *Collis v. Blackburn*, (1804,) 9 Ves. 470: there was a clause of survivorship in that case, but no gift over.

(b) 5 Ves. 195, n.

(c) 5 Ves. 197, n.

(d) *Errat v. Barlow*, 14 Ves. 203-4; but it seems no order was made on that petition, and by a subsequent order (the circumstances are not stated) 50*l.* a year was allowed by the M. R. for maintenance of the infants, to be paid to the father; *Haley v. Bannister*, 4 Mad. 279.

Lord Eldon had said, "the principle could not be applied where the legacy is not given absolutely to the children and the survivors, but in case of the death of the child there is a limitation to the issue, who for that purpose are strangers," and he there refused to make the order (a).

In a subsequent case Lord Eldon said: "The court has never gone further than this, that though the words of the will do not authorise the application of interest to the maintenance of infants, yet if it can collect before it *all* the individuals who *may* be entitled to the fund, so as to make to each *a compensation* for taking from him part, it will grant an allowance for maintenance; but if the will contains *successive* limitations, under which *persons not in being* may become entitled (to the exclusion of the parties presumptively entitled), it is not sufficient that all the parties then living, presumptively entitled, are before the court, for none of the living may be the parties eventually entitled to the enjoyment of the property: in such a case the order would be in effect to give for the maintenance of one person the property of another (b).

In the case of *Haley v. Bannister* (1819), before referred to, two sums of stock were directed to be purchased by the executors, and they were to receive and accumulate the dividends until one of the children of the testator's daughter should attain 21, and on his attaining that age, if there should be only one, the executors were to transfer the whole to such one; if more than one, they were to transfer one half to such children in proportion to the number of such children then living; there was no specific gift over on failure of children, but there was a residuary gift; some of the children applied for maintenance: *Errat v. Barlow*, before noticed, was cited. Sir J. Leach, M. R., said, "I take the principle to be that wherever the children have a common interest in the fund, the increase of the fund, if necessary, may be applied to their maintenance: in this case children born *and to be born* have a common interest, and therefore the interest of the fund is in this case applicable to maintenance" (c). In *Kime v. Welfitt*, where an accumulation was directed for the benefit of such of the testator's children as should attain 21, and the *issue* of such as should die before that age *leaving issue*, and the whole was given over in the event of no one attaining 21, or leaving issue; the Vice-

(a) *Ex parte Kebble*, 11 Ves. 604. Lord Eldon said there were some older cases than those that were produced in *Greenwell v. Greenwell*, but his lordship said he did not know the principle on which those cases could

be maintained.

(b) Lord Eldon, *Marshall v. Holloway* (1818), 2 Swanst. 436.

(c) Sir J. Leach, *Haley v. Bannister*, 4 Mad. 280.

Chancellor of England refused to allow maintenance, even though the legatees over consented, saying, there might by possibility be other claimants; some issue might come into existence who would be entitled to the fund, and he could not affect their rights (a). In *Turner v Turner*, before the same learned judge, the disposition of the property, which was by the grandfather, was not such as that it could be said "that the grandchildren would of necessity take the whole fund" (b); he therefore, referring to Lord Eldon's decisions before cited, refused to give any maintenance (c). In the case of *Cannings v. Flower* (d), the testator directed that his trustees should stand possessed of one-sixth part of the moneys to arise from the sale of his residuary real and personal estate, after the decease of two persons named, in trust for the children of one Eleanor Goddard by her late husband, as tenants in common, but the shares of sons were only to be vested on their attaining 24, or dying before that age leaving issue, and the shares of daughters were to vest at 24, or marriage; the shares of such of the children as should not become vested in them as aforesaid were to accrue to the others; there was no gift over: there were three children, none of whom attained 24, and they applied for maintenance. The Vice-Chancellor of England refused the application: he said he considered that the rule was established in the manner stated in his judgment in *Turner v. Turner*; that the chances of obtaining a vested interest in the fund appeared not to be equal as amongst the children themselves; at all events he would not make the order without the consent of the next of kin. These cases appear to have settled the principle upon this point, the only doubt will be as to its application.

With regard to the Liabilities of Trustees charged with an effectual trust for accumulation, Lord Eldon, after much consideration, laid it down as a principle that where a trustee is directed to lay out a fund intrusted to him to accumulate for the benefit of the *cestuis que trust*, if he neglect to do so, taking no step for years and keeping the whole in his hands, he acts against his duty, and that upon the nature of his duty compound interest is to be charged against him as much as upon contract or the usage of dealing (e): and again, after further considera-

(a) *Kime v. Welfitt*, 3 Sim. 535; following Lord Eldon, 11 Ves. 605, *supra*, p. 187. The decree in the case of *Body v. Dawes*, 1 Keen, 367, proceeded on the ground of a gift by implication of the intermediate interest.

(b) *V. supra*, p. 189.

(c) *Turner v. Turner*, 4 Sim. 437. The Vice-Chancellor there said, he considered *Fendall v. Nash*, and the older cases, as overruled.

(d) 7 Sim. 523.

(e) *Raphael v. Boehm*, 11 Ves. 104; 13

tion, his lordship said (*h*), "Where there is an express trust to make improvement of the money, if the trustee will not honestly endeavour to improve it, there is nothing wrong in considering him, as the Principal, to have lent the money to himself, upon the same terms upon which he would have lent it to others; and as often as he ought to have lent it if it be principal, and as often as he ought to have received it and lent it to others, if the demand be interest and interest upon interest:"—"this is a species of case in which the court would shamefully neglect its duty to infants by adopting a rule that an executor might keep money in his hands without being answerable as if he had accumulated; and if the court cannot find out from the actual circumstances proved that he has attempted accumulation, and the charge falls more heavily upon him on that account the *fault is his own* in not showing what endeavours to improve it he has made" (*i*). But this

Ves. 591. Lord Loughborough's original decree, which is not reported, gave *double* compound interest, which Lord Eldon disapproved (11 Ves. 111; 1 Mad. 300). Even Lord Eldon's order in this case, charging the trustee with compound interest, which proceeded upon the principle stated in the text, has often been observed upon as having been a harsh decision (2 My. & K. 663). Sir Thomas Plumer supposes that it may have proceeded upon the fact that the trustee had laid out the money in his trade, but which does not appear from the case (1 Mad. 300), and he seems to have thought that it was necessary to make out a case of *misfeasance*, in order to substantiate a charge for compound interest, even where there is an express direction to accumulate, *Tebbs v. Carpenter*, 1 Mad. 307. The Vice-Chancellor of England, in the *Attorney-General v. Solly*, 2 Sim. 519, which however was a charity case without any trust for accumulation, describes it as "an excepted case;" but neither Sir A. Hart, (1 Molloy, 85,) who was counsel in the cause, on the re-hearing, nor Lord Erskine, (13 Ves. 412,) appear to have objected to the principle laid down: the present Lord Chancellor, in *Heighington v. Grant*, 1 Phill. 604, cites it without any expression of dissent, though the question was not before him; Sir William Grant, as is stated in the next note, expressed his approval of this principle. If, as it is constantly declared, he who accepts a trust assumes all the duties imposed by the trust, and is liable to make compensation for all the consequences if he neglect to perform them (see Sir William Grant's judgment, *Dornford v. Dornford*, 12 Ves. 129) it seems difficult to find any solid ground for exempting a trustee from the full extent of his liability

in a case of this description, however much one would desire that trustees should not be so hardly dealt with: his duty is clearly marked out in this case; in the case of an executor omitting to get in debts on personal security, and in other cases, where executors and trustees are held liable for neglect and constructive breaches of trust without any hesitation, they have frequently first to find out what is their duty; or, as in *Urch v. Walker*, 3 My. & Cr. 702, they may have been misled into an erroneous conception as to their duty: in cases of gross neglect of duty, and of fraud, trustees have been charged with compound interest in cases where there was no direction to accumulate, and that by the highest authority, *Stacpoole v. Stacpoole*, 4 Dow. 209, 230. If there be any reason for relaxing the rules of the court in the case now under consideration, it is perhaps that such cases are not of so frequent occurrence, and therefore not so necessary to be provided against, as those where it has been considered that the rules of the court must be strictly adhered to. However, in the absence of fraud or gross misconduct, the trustee, if he duly account, will, as it seems, have his *Costs*, though charged with compound interest; see 1 Phillips, 603-4.

(*h*) 11 Ves. 107-8, *et v. rel.*

(*i*) And see *Dornford v. Dornford*, 12 Ves. 129, where Sir William Grant, in his judgment, fully adopts Lord Eldon's principle; but the decree charged the estate of a bankrupt trustee with simple interest only, (1 Mad. 302-3,) the direction not being so explicit as in *Raphael v. Boehm*, (1 Mad. 301-2). In *Brown v. Sansom*, 1 McClelland & Yo. 427, in which case one of the executors was a banker and had kept the funds in his hands with the

rule is to be applied only where there is a positive direction to accumulate, a mere direction to lay out the money is clearly not sufficient; and where there is a positive direction to accumulate, only where the trustee has been guilty of culpable negligence, or, according to Sir Thomas Plumer, actual misfeasance (*a*). "If," says Lord Eldon, "the trustee comes desiring the court not to weigh his conduct in golden scales, but to measure, by his general conduct, an honest endeavour to execute the trust, the court would not deal out harsh measure to him" (*b*).

permission of the trustees; an inquiry was directed as to what would have been the amount of the accumulations, so as to charge the trustees with that amount (p. 430), and the defendants were charged by C. B. Alexander, on further directions, with interest at five per cent. on the balance from the time the direction for accumulation ceased.

(*a*) Sir Thomas Plumer, in *Tebbs v. Carpenter*, *ubi supra*; citing *Dornford v. Dornford*, *ubi sup.*; *Ashburnham v. Thomson*, 13 Ves. 402; and *Rocke v. Hart*, 11 Ves. 58 (1 Mad. 303).

(*b*) Lord Eldon, 11 Ves. 107; see Hill on Trustees, 371.

CHAPTER VI.

TRUSTS BY IMPLICATION, PRESUMPTION, AND CONSTRUCTION OF LAW, WHERE FRAUD OR PUBLIC POLICY DO NOT FORM THE MAIN INGREDIENT IN THE DECISION.

SECTION I.—*Introduction.—General Doctrines.*

The Trusts here to be considered are those where Fraud and Improper Conduct do not form an Ingredient.

Implied or Presumptive Trusts, Resulting Trusts, and Constructive Trusts not depending on Fraud, will be treated of together.

Whether Vendor's Lien is to be considered an Express Trust within the Statute of Limitations, note.

Trusts by Operation of Law within the Words of the Statute of Frauds, Lord Hardwicke's Definition.

Lloyd v. Spillett.

Trust fixed upon Trust Property in the hands of the Possessor.

Rule applied as regards Persons taking from Executors and Administrators.

Exception as regards Disseisors, &c., and those who come in in the Post.

Effect of Fine levied, prior to their Abolition, in reference to this Subject.

Whether on a Conveyance without Consideration a Trust may result.

Duke of Norfolk v. Brown.

Lord Hardwicke's Opinion, that no Trust will result.

No Presumption of Trust as against a Complete Transfer or Conveyance according to Modern Cases.

Evidence may in some Cases be given to prove a Trust.

No Resulting Trust as regards a Transfer of an Equitable or Trust Estate by Analogy to the Doctrine as to Uses.

BEFORE entering upon a particular consideration of the express trusts usually introduced into wills, settlements and trust deeds, it will be proper to notice the general doctrines of the Court of Chancery on the subject of trusts by Operation of Law, that is, by implication, presumption, and construction of law, so far as relates to such trusts as arise from the voluntary act of the party having the dominion over property,—from contract, expressed or implied,—and such constructive trusts as arise from the application of the doctrines of the Court of Chancery, independently of any particular act or contract; confining ourselves for the present, as regards constructive trusts, to such as arise from the relative situation of the parties; leaving those

cases which are based on actual fraud for the next Division (a). These several kinds of trusts will be treated of together in this chapter, there being no definite meaning attached to any one of the expressions by which they are designated, which has been adhered to by the judicial authorities (b).

Lord Hardwicke, as is noticed in the former volume, in the case of *Lloyd v. Spillet* (c), speaking of trusts of the description we are now to consider, observes that he was bound by the Statute of Frauds (d) to construe nothing a Resulting Trust but what are there called Trusts by Operation of Law, "which," said his lordship, "are: first, when an estate is purchased in the name of one person, but the money or consideration is given by another (e); or, secondly, where a trust is declared only as to *part*, and nothing is said as to the rest, what remains undisposed of results to the heir-at-law (f); and they (sic) cannot be said to be trustees for the residue." "I do not know," adds his lordship, "in any other instance, besides these two, where this court has declared resulting trusts by operation of law, unless in cases of fraud, and where transactions have been carried on *mâlâ fide*" (g). But this description, as will be seen by what follows, does not embrace every case of trust by operation of law, within the meaning of the statute, which is raised by the application of the doctrines of the Court of Chancery (h).

Some of the most familiar instances of trusts by operation of law, have been noticed in the former volume (i); but they require a more particular consideration.

One instance of trusts by operation of law arises from the possession of property bound by a trust (k). Trusts are enforced not only against

(a) V. *supra*, vol. i. pp. 509, 510, vol. ii. p. 4. Constructive trusts depending on fraud and public policy will be considered under the general jurisdiction in regard to fraud, under the next division, namely, that which treats of Equitable Rights; and that description of implied or constructive trust which arises on a contract for sale (*vide supra* vol. i. p. 509,) will, as before noticed, be treated of under the head "Specific Performance," also in the second division.

(b) V. *supra*, vol. i. p. 511. Indeed, as we have seen, Lord Nottingham includes Presumptive, or as they are now generally called Implied, sometimes Constructive trusts, under his definition of Express trusts, *supra* vol. i. 496; *Cook v. Fountain*. A definition of express trusts is only perhaps material in respect of what is meant by express trusts as distinguished from trusts by implication or construction or operation of law as regards the

Statute of Frauds, *supra* vol. i. p. 497, and the Statute of Limitations, 3 & 4 Will. IV. c. 27, § 25, v. *supra*, vol. i. p. 503, vol. ii. p. 48.

(c) 2 Atk. 150; S. C. Barnardist. 384.

(d) 29 Car. II. c. 3, § 7.

(e) *Supra*, vol. i. p. 511.

(f) V. *supra*, vol. i. p. 510; it will be seen that a trust may result as to the whole.

(g) *Lloyd v. Spillet*, 2 Atk. 150.

(h) And see 2 Fonbl. 117; where Mr. Fonblanque has observed upon the inaccuracy and insufficiency of this definition; and see Lewin, 181.

(i) Pp. 509-512.

(k) The holder of trust property becomes a trustee of it as soon as he has notice that it is trust property, Lord C. Sugden, *Sheridan v. Joyce*, 2 Jo. & Lat. 410; that is of course if its character has not been changed; Fonbl. p. 4, n. (b): the trust is as it were continued.

those persons who are possessed of the trust property rightfully as trustees; but also against all persons who come into possession of the property bound by the trust with notice (a) of the trust; and against those who take by voluntary conveyance or title, though without notice (b): and whosoever so comes into possession is considered as bound with respect to that special property to the execution of the trust; and this, as Lord Redesdale observes, applies to the administration of assets of a testator or intestate equally as to other trusts (c): and the rule applies to purchasers, with notice of any equitable incumbrance or lien, as of a covenant or agreement affecting the estate (d).

It is not clear how far a purchaser may be affected by notice of a constructive trust: notice of an equitable title, it is to be observed, is very different from notice of a legal title; the result of the authorities appears to be, that where the construction to be put on the words of the instrument on which the equitable title arises may admit of serious doubt, the purchaser will not be bound, though the Court may consider that the words do give an equitable title (e): on a similar principle the Court will not, at least in a doubtful case, rectify a settlement as against a purchaser though the case might be clear as against a volunteer (f).

(a) As to notice, express and constructive, *v. infra*, chapter on Mortgages, *et v. supra*, vol. i. pp. 424, 425, 445; *Jones v. Smith*, 1 Hare, 55; and Sugd. V. and P. 1040, *et seq.*, which indeed might supersede any other reference; *et v. infra*, p. 200, add. note.

(b) *Diet. Mansell v. Mansell*, 2 P. W. 681-2, Gilb. For. Rom. 62.

(c) Lord Redesdale, *Adair v. Shaw*, 1 Scho. & Lef. 262, affirmed on re-hearing; *Kennedy v. Daly*, 1 Scho. & Lef. 379; affirmed on re-hearing, 2 Scho. & Lef. 740; *Nelson, C. C. 378; Parker v. Brooke*, 9 Ves. 583; *supra*, vol. i. 445.

(d) *Int. al. Ravenshaw v. Hollier*, 7 Sim. 15; *Leigh v. Macaulay*, 1 You. 260; *Small v. Atwood*, *ibid.*; and see *Lewin*, p. 609.

(e) See 1 Sanders on Uses, 256; Sugden, V. and P. 1060, s. 79; *Warrick v. Warrick*, 3 Atk. 293, there Lord Hardwicke would not hold a purchaser bound by notice, as it was by construction of law that the title (an estate tail under articles) of which he had notice arose. *Senhouse v. Earle*, Amb. 285, there also Lord Hardwicke held that notice of an old settlement, which according to the modern mode of carrying them into execution would be construed into giving an estate tail, would not bind the purchaser, a mortgagee—it was a stale demand and the mortgage *bond fide*: notice of modern articles, since the rules of construction have been settled, Lord Hardwicke held would bind the purchaser, *ib.* 288; and see on this distinction *Powell v. Price*, 2 P.

W. 540; and Sug. V. and P. 1060. In *Cordwell v. Mackrill*, Amb. 515; *S. C. 2 Eden*, 344, Lord Northington held as a general rule that a purchaser, though bound by notice of a deed on which an equity supported by undoubted precedents is founded, is not bound when the equity depends on the mere construction of words which are uncertain and where the meaning often depends on the locality; that is, as Sir W. Grant in *Parkes v. Brooke*, 9 Ves. 588, interprets this case, there may be such a doubtful equity that a purchaser is not to be taken to know what will be the decision: but Sir E. Sugden, V. and P. 1060, s. 79, disapproves of Lord Northington's doctrine; one ground of the decision was that the articles were not produced. *Hardy v. Reeves*, 5 Ves. 426, is to the same effect as the dictum of Sir W. Grant, (*sup.* 9 Ves. 588), that a purchaser is not bound by notice of a doubtful equity, see pp. 428, 431; "notice of an equitable title is quite different from notice of a legal title," *ib.* 428; the fact of notice being doubtful an inquiry was refused. In *Ferrars v. Cherry*, 2 Vern. 385, it was held that a purchaser having notice of a settlement made after marriage was bound to inquire whether it was made in pursuance of articles before, but this is different from fixing him on the construction of the instruments.

(f) *Goring v. Nash*, 3 Atk. 188; *Vernon v. Vernon*, 2 P. W. 600; Sanders's note, 3 Atk. 188; *Warrick v. Warrick*, 3 Atk. 293; and *Cordwell v. Mackrill*, 2 Eden, 346.

To the general rule above stated, there is an exception as regards those whose claims are paramount to or inconsistent with the trust. A *disseisor*, *abator*, or *intruder*, as has been noticed before, would not have been seised to an use, although he had notice, for no one of them was *in* in privity of the estate to which the use was annexed, but in the *post* (a). This doctrine applies to modern trusts; in such case the *cestui que trust* may, as the *cestui que use* might have done, by bill compel the trustee to enter upon the disseisor, or to recover the land against him at common law, and then this court will compel the trustee to execute the estate according to the trust (b).

A fine (c) levied in favour of one who had notice of a trust (d), or who, not having notice, was a holder without consideration (e), would not bar the *cestui que trust*; nor would a fine levied by a person who had purchased with notice strengthen his title as against the *cestui que trust* (f). A mortgagee could not by fine and nonclaim bar the equity of redemption (g). But wherever a person came in by a title opposite to the title to the trust estate, or came in under the title to the trust for a valuable consideration, without fraud, or notice, actual or constructive, of fraud or of the trust, a fine and nonclaim might be set up as a bar to any claim under the trust (h); but fines and nonclaim having been abolished, these doctrines are now only useful for illustration.

If a trustee conveys to a person with notice, and takes a re-conveyance, it is inoperative; and if even the person to whom he conveyed had no notice, yet on the re-conveyance the trust will again attach; though it did not attach on the person to whom he conveyed, nor would have attached if that person had conveyed to another even with notice (i). This doctrine is analogous to that of the common law,

(a) 1 Rep. 122; For. Rom. 62; *sup.* vol. i. p. 445.

(b) 1 Rep. 139, 4 Inst. 85; Gilbert on Uses, by Sugden, 429, note; Lewin, p. 29; and see *Reynold v. Jones*, 2 Sim. & St. 211; but as fines are abolished there cannot now be a disseisin by fine. Where the right to the inheritance was lost by fine and non-claim, he who had lost the inheritance was not entitled in equity to claim the term which was to attend it, *ibid.* 213; these terms, as already stated, are extinguished, *sup.* vol. p. 516.

(c) Of fines before their abolition, v. *sup.* vol. i. pp. 142, 164-5.

(d) See *Kennedy v. Daly*, 1 Sch. & Lef. 379, 380, affirmed on re-hearing, 2 Sch. & Lef. 740; *Bovey v. Smith*, 1 Vern. 149; *S. C.* 2 Ch. Ca. 124; reversed in Dom. Proc. See

Martin v. Martin, Vin. Abr. title Fraud, A. (pl. 12) noticed by Lord Redesdale in *Kennedy v. Daly*, *ubi supra*.

(e) Gilb. For. Rom. 62, 11 Ves. 230.

(f) 1 Sch. & Lef. 379.

(g) 1 Sch. & Lef. 380; *Story v. Windsor*, 2 Atk. 631, *contra*, 2 Freem. 21, 69.

(h) Gilb. For. Rom. 63; *Bell v. Bell*, Rep. temp. Plunkett, 59; and see Sugd. V. and P. 1036, § 16.

(i) 1 Sch. & Lef. 379; *Lowther v. Carlton*, 2 Atk. 242, and the cases cited in the note by Mr. Sanders; *Ferrars v. Cherry*, 2 Vernon, 384. But as regards stock sold out, Lord Eldon, in *Vulliamy v. Noble*, said that, "If a man has sold out stock in breach of trust, and afterwards buys stock of a like description, it would be a novelty to say that any

for if a disseisor aliens, and the alienee dies seised, the entry of the disseisee is barred; but if the land come again to the disseisor, the entry of the disseisee is revived. So in regard to goods, if a person who has obtained goods as a *trespasser* sell them in market *overt*, the owner's title is barred, but he may seize them if they come to the trespasser again (a).

It may be a question whether a purchaser of trust property with *express* notice of a trust (b) holds the premises upon an express trust within the meaning of the 25th section of the late Statute of Limitations, so as to be liable to be deprived of the estate at the suit of the *cestui que trust* after twenty years have elapsed (c). The case of the *Attorney-General v. Christ's Hospital* (d) would seem to imply that he does: but that was a case of a Charity, where the rules are much more stringent against the holders of trust property; besides, in cases of charity there cannot be any *cestui que trust* who is competent by acquiescence to affect the rights of the objects of the charity (e), though no distinction was taken on this ground in the argument or the judgment. If a *bonâ fide* purchaser is to be considered only as a trustee by implication or construction of law, and such it is conceived he actually is, it is presumed that he may insist on the benefit of the statute after twenty years: indeed it is a well established rule that when a person is a trustee by implication only, and as such affected by an equity, that equity independently of any statute must be pursued within a reasonable time. It is conceived, that the statutory bar would clearly apply to such a case as a purchaser fixed with constructive notice only, or where he had purchased under circumstances which, in a recent transaction, might have made him liable for want of having exercised due caution: and persons taking the estate without notice, but without consideration, (from which it is sometimes said notice will be presumed,) are clearly, it is conceived, entitled to the benefit of the statute (f): poverty, ignorance, or mistake

part of the stock so purchased can be considered as specifically the property of the *cestui que trust*, 3 Meriv. 616.

(a) *Bovy v. Smith*, 2 Ch. Ca. 126.

(b) As, for instance, such notice as in the case of *Parker v. Brooke*, 9 Ves. 587.

(c) As to the operation of the statute in regard to express trusts, v. *supra*, vol. i. p. 503, ii. p. 48—62; *Ward v. Arch*, 12 Sim. 472; *Man v. Ricketts*, 13 Law. J., N. S.; and *Hill on Trustees*, 249—254, where the most important authorities are collected.

(d) Before Sir J. Leach, 3 Myl. & K. 344. There is an important case, *Toft v. Stephenson*, heard 4th April, 1848, as I am informed by my friend Mr. Lee, now under appeal, in which the question will be decided whether the

vendor is such a trustee for the vendee, (v. *supra*, vol. i. p. 509, and 9 Ves. 510, *et infra*.) as that he or his representatives cannot plead the statute; the Vice-Chancellor Wigram has decided that he is not.

(e) As between private persons acquiescence may have important effects and raise every kind of presumption: see Lord Eldon's observations in *Parke v. White*, 11 Ves. 226; *Lewin*, 619, and *sup.* p. 60, 61.

(f) See *int. al.* *Townsend v. Townsend*; *Andrew v. Wrigley*, and the other cases cited, *supra*, p. 63, note (a); *Beckford v. Wade*, 17 Ves. 97; and see *Lewin*, 613. As regards express trusts, v. *sup.* p. 62; and see *Attorney-General v. Fishmonger's Company*, *Preston's Will*, 5 My. & Cr. 16.

cannot be taken into consideration where the statutory bar has attached, though it may weaken the effect of length of time considered only as affording a presumption (a). Even if the transaction be affected with fraud the statutory bar will apply if a sufficient time has elapsed since the discovery of the fraud; the general rule of equity is that *every* new right of suit must be acted upon at least within twenty years after it accrues (b). It may be observed that it has been held by the Vice-Chancellor Wigram, that where an annuity is given by will and the real estate is charged with the payment of it, and then the estate is simply devised charged with the payment of the annuity, that is not a case of express trust; it is a bequest or devise which creates a liability, but does not impose any fiduciary character on the devisee (c).

It has been stated by Mr. Cruise (d), and it may be inferred from a passage in Mr. Justice Story's Commentaries (e) that he entertained the same opinion, that on a conveyance of property to a stranger in blood, where no use or trust is declared, a trust will result to the grantor by analogy to the doctrine as to resulting uses; but if the case be such that an use will not result at law, it is by no means clear that a trust will result in equity. The authority on which Mr. Cruise relies, is the *Duke of Norfolk v. Browne*, before Lord Keeper Somers (f). The then late duke had executed a grant of the next presentation to a church to the defendant's father, who was a clergyman, and had been much entrusted and employed by the duke, and so far there were grounds for presuming that it was intended as a gift; but the duke had kept the deed in his possession, and never had any communication with the donee on the subject: The Lord Keeper said, "This is a resulting trust for the grantor, there being no other trust declared," thereby rather confirming Mr. Cruise's conclusion; but it will be observed that this was a very special case, and the decision may perhaps have been influenced by the grantor having apparently reserved for himself a *locus pœnitentiæ* by keeping the deed and making no com-

(a) See Lewin, pp. 617 and 621, and the cases there cited.

(b) Lord Redesdale, *Hovenden v. Lord Annesley*, 2 Scho. & Lef. 636; *sup.* p. 61, Lewin, 619. I would refer the reader to this treatise for a very clear exposition of the doctrine as to presumptions and bars from length of time.

(c) V. C. Wigram, *Francis v. Grover*, 5 Hare, 51, referring to *Hughes v. Kelly*, 3 Dru. & W. 482; *Harrison v. Duignan*, 2 D. & W. 295. As to the case of there being no person to give a discharge or release under the 40th

section of the statute, see *Burrell v. Lord Egremont*, 7 Beav. 235—8.

(d) Cruise, Dig. Tit. xii. ch. 1, § 51, 52; and see Hill on Trustees, 72, and Lewin, p. 130.

(e) Vol. ii. § 1197; the authorities there cited apply to the common-law doctrine of resulting uses; see *Lloyd v. Spillet*, 2 Atk. 150, *et supra*, vol. i. 451, *infra*, p. 227, n. (h), and 2 Bla. Comm. 330, in respect of which no question as to any trust can arise.

(f) Prec. Ch. 80. This, it may be observed, was after the Statute of Frauds.

munication to the donee (a). Lord Hardwicke, in the case of *Young v. Peachy* (b), in conformity with his doctrine in *Lloyd v. Spillet* (c), mentioned above, expressed an opinion that no trust could result in such a case, for it would be to contradict the Statute of Frauds. "The rule as to trusts by implication or operation of law, is by no means," said his lordship, "so large as to extend to every voluntary conveyance" (d). It seems to be clear, according to the modern authorities, as will be more fully noticed hereafter (e), that if a complete conveyance or transfer of property is effected, whether legal or equitable, and the grantor has not reserved any control over the deed, or *locus pœnitentiæ*, the legal title in the one case, and the equitable title in the other, and the presumption, will go together; the donee needs no proofs to keep the estate, but the claimant must bring proofs to take it from him (f). If upon the deed there are any circumstances tending to show that a trust was intended (g), then the onus of proof is on the donee; if there are circumstances from which it can be made out in proof that it would be a fraud in the grantee to retain the property as his own, parol evidence may be given of such circumstances, to prove that the transaction was subject to a trust (h). If stock be transferred to another, though he should be a stranger, no resulting trust will have place, it will, *primâ facie* at least, be considered as a gift (i). As regards the transfer of a trust or equitable estate in writing, which is *perfected* by the grantor, where no consideration, or a merely nominal consideration,—which in the Court of Chancery is

(a) See *Disher v. Disher*, 1 P. W. 204, *et infra*.

(b) 2 Atk. 150.

(c) *Lloyd v. Spillet*, 2 Atk. 150; and see *Cottington v. Fletcher*, 2 Atk. 156, where Lord Hardwicke holds the same doctrine; "if the plea of the statute had stood by itself it might have been a sufficient plea."

(d) *Young v. Peachy*, 2 Atk. 256. The decision however is not an authority on the point; the Lord Chancellor turned the grantee into a trustee on the ground of fraud; the conveyance was proved to have been obtained for one purpose and intended to be used for another; and see Lord Nottingham's dict. *Cook v. Fountain*, 3 Swanst. 590, 592; but see his observations on *Wyndham's* case, there cited; and Lord Thurlow's, *Fordyce v. Willis*, 3 Bro. 577, 585: this case related to a grant of a pension from the Crown, not from the party, and does not apply to resulting trusts, but to the point whether a person may aver and prove by parol evidence (if it is admitted it is different) that an absolute conveyance or assignment to a third

person was made in trust for him; Lord Thurlow considered that there was no presumption of a trust in such a case, and would not admit parol evidence.

(e) See chapter on *Voluntary Conveyances and Assignments*, *infra*.

(f) *Jefferys v. Jefferys*, 1 Cr. & Phillips, 138; *Curran v. Jago*, 1 Coll. 261; and see *Cook v. Fountain*, 3 Swanst. 590; *et v. infra*, chap. *Voluntary Conveyances*.

(g) See *supra*, vol. i. pp. 568-9, as to whether parol evidence should be admitted in the first instance to support a presumption.

(h) *Hutchins v. Lee*, 1 Atk. 447, the evidence was declarations of the donee at the time and afterwards; Lord Hardwicke admitted it in that case as consistent with the deed, and in avoidance of fraud: and as to evidence of conduct and the acts of the parties, as showing whether the transaction is gift or trust, see 10 Ves. 367, 368, Lord Eldon; *Cook v. Fountain*, 3 Swanst. p. 593, Lord Nottingham; *et v. Cripps v. Jee*, 4 Bro. 472.

(i) C. B. Richards, *George v. Bank of England*, 7 Price, 651.

treated as no consideration (a),—is stated, there is no analogy on which a resulting trust can be supported in such case as against the Statute of Frauds; for no use could result on the transfer of an use (b): the question always is, as will be more fully noticed hereafter, whether in the particular instance the trust estate or interest has actually been transferred.

(a) See *Young v. Peachy*, 2 Atk. 256.

(b) *Supra*, vol. i. p. 454.

ADDITIONAL NOTE.

P. 195. "I shall always hold," said Lord C. Sugden, "those who with notice deal with a person entitled to a partial interest in an estate, responsible for any dealing with the property, which professes to encumber or embarrass the estate of the other persons claiming under the same instrument with the grantor. They are not at liberty to deal with it so as to embarrass the persons claiming under the same instrument;" *Nixon v. Robinson*, 2 Jones & Lat. 15.

ADDITIONAL NOTE TO CHAPTER V., p. 181.

It should have been stated, in the page above referred to, that the propriety of the decision in the case of *Browne v. Stoughton*, 14 Sim. 369, S. C. x. Jur. 747, cited p. 181, *supra*, is discussed in four several articles in the Jurist, Vol. X. Nos. 510, 511, and 512, to which the reader will do well to refer.

SECTION II.—*Resulting Trusts arising on Purchases made with the Money of another Person, and Trusts of a similar Character.*

Resulting Trusts arising from Payment of Price of Property conveyed to a Third Person. This Resulting Trust may be repelled by Evidence.

Whether after the Death of the supposed Nominal Purchaser.

As to following Trust Money laid out by Trustee in Land or Securities.

Assets of Wife's Testator may be followed.

Where a Person acknowledges himself Trustee of Gavelkind Land, &c. it shall go to Heir-at-Law.

Whether the Rule as to Resulting Trust applies to Joint Advance upon a Purchase in the name of one.

Crop v. Norton.

Where two purchase Lands in equal Proportions.

Where the Proportions are unequal.

Where one of Joint Purchasers lays out Money in Improvements.

Doctrine as to Real Estate engaged in a Partnership Concern as between the Partners, and as between the Real and Personal Representatives of each Partner; Constructive Trusts as to Profits arising from the Employment of the Property of others in Trade, &c.

Purchase in Name of Child.

of Father and Son.

of Wife.

Exception to General Rule in the case of the Purchase of a Ship, arising upon the Ship Registry Acts.

THE most important perhaps of the cases of trusts by operation of law are those which are classed under the head of Resulting Trusts.

Soon after the passing of the Statute of Frauds it was determined, that if an estate be purchased with the money of one person, and the estate is conveyed to a third person who is a stranger in blood, that person will be a trustee for the person who advanced the money; and it is such a resulting trust by implication of law, as is saved by the statute, and needs no declaration of trust (a): It is, said Lord Hardwicke, a certain known rule, that when a man purchases land in the name of another, it is a resulting trust (b). The conclusion, indeed, from all the cases on this subject appears to be, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names

(a) 2 Ventr. 361; 2 Ves. & B. 390; *Lade v. Lade*, 1 Serjt. Wilson's R. 21; *Willis v. Willis*, 2 Atk. 71; *sup.* vol. i. p. 512.

(b) *Ryall v. Ryall*, 1 Atk. 59; *S. C.* cited

Lane v. Dighton, Ambler, 413; *Smith v. Baker*, 1 Atk. 385; 2 Atk. 75; *Gascoigne v. Thwing*, 1 Vern. 366; *Finch v. Finch*, 15 Ves. 50.

of the purchaser and others jointly (*a*), or in the name of others without that of the purchaser; whether in one name or several; whether jointly or *successive*; results to the man who advances the purchase money: unless in the particular instance such a resulting trust would break in upon the provisions of an Act of Parliament or the policy of the law (*b*): this is stated to be in analogy to the rule of the common law imported from the Court of Chancery, that where a feoffment is made without consideration, the use results to the feoffor (*c*). Lord Hardwicke is reported to have said that the rule was confined to an advance by one individual (*d*); but Sir Thomas Plumer could find no principle for this distinction, and would not believe that Lord Hardwicke could have used the language ascribed to him, and he unhesitatingly decided that it applied to an advance of a part of the purchase money (*e*). The purchaser of a copyhold estate has the same equitable right as in the case of the purchase of a freehold estate, in whosoever name the estate may be entered on the rolls, and whether the tenure is in the nature of fee simple or for successive lives (*f*): but a custom, that unless it be entered on the rolls that the nominee is a trustee he shall take beneficially, is, it seems, a good custom (*g*).

The law implies a trust in these cases for the person who paid the money, on the presumption that such must have been the intention (*h*); but to establish such a trust, where it cannot be collected from the instrument itself, the proof of payment, or that the money was that of the claimant, must be clear; mere discourses, and even, as it seems, verbal evidence of an acknowledgment, if unsupported, will not be sufficient (*i*). Sufficient evidence may be deduced *inter alia* from expressions or recitals in the purchase deed (*k*); or from some

(*a*) See *Smith v. Baker*, *ubi supra*; *Rider v. Kidder*, 10 Ves. 367; *Benger v. Drew*, 1 P. Wms. 780.

(*b*) *Dyer v. Dyer*, 2 Cox, 92; Sugden, V. and P. 908.

(*c*) Per L. C. B. Eyre, *Dyer v. Dyer*, (*sup.* and vol. i. p. 511,) where all the previous cases are collected: the purchaser had in that case actually devised the estate as his own; and see 15 Ves. 51.

(*d*) *Crop v. Norton*, 2 Atk. 74; 9 Mod. 233; and *Barnardist*, 184-5.

(*e*) *Wray v. Steele*, 2 Ves. & B. 390; Sugd. V. and P. 912.

(*f*) *Smith v. Baker*, 1 Atk. 385; *Howe v. Howe*, 1 Vern. 415, "though it was pressed that there was not any custom in the manor that the first taker might surrender." *Withers v. Withers*, Amb. 152; *Benger v. Drew*, 1 P. W. 781; it was there said that clear evidence might be received to show who paid the pur-

chase money to contradict the entry on the Roll: in *Clark v. Danvers*, 1 Ch. Ca. 310, the Lord Chancellor considered that the grandfather, the purchaser, had agreed that Elizabeth the mother should be considered as the purchaser, as stated on the Roll, though he paid the money.

(*g*) *Edwards v. Fidel*, 3 Mad. 237. See 2 Y. & Coll. 125.

(*h*) See *Young v. Peachy*, 2 Atk. 257.

(*i*) *Willis v. Willis*, 2 Atk. 71; *Groves v. Groves*, 3 Y. & J. 170; *Wilkins v. Stevens*, 1 Y. & Coll. C. C. 435; *Gascoigne v. Thwing*, 1 Vern. 366; and *v. Amb.* 413; Sugd. V. and P. 909.

(*k*) See *Lord Plymouth v. Hickman*, 2 Vern. 168; *Newton v. Preston*, Pr. Ch. 104; there, although parol evidence as to whose money it was, was read *de bene esse*, Justice Powel would not decree a trust; *Kirk v. Webb*, *ib.* 84, cited 1 Sanders on Uses, p. 258.

memorandum or note of the nominal purchaser (a); or from his answer to a bill of discovery (b); or from papers left by him, and discovered after his death (c). Whether, after the death of the supposed nominal purchaser, parol proof alone is admissible, as to whose money it was, against the express declaration of the deed that such purchaser paid the purchase money, (which it may be observed will naturally have been inserted from the instructions of the nominal purchaser, and may have been so inserted with a fraudulent intent,) has been a subject of controversy (d), though it seems pretty clear that it may (e). Where a person employs a person as his agent to purchase an estate for him, and he enters into a contract for the purchase, it is not material whether at the time he intended that the purchase should be for the benefit of his principal or of himself; the principal will be entitled to the benefit of the contract (f): but where a person contracts for the purchase of an estate in his own name, *and pays for it with his own money*, parol evidence, that is, other than writing signed by the party, will not be received, as against the purchaser's denial of any trust, for the purpose of proving that the purchaser had agreed to purchase the estate for another, and thus to create a trust; as that would be directly against the Statute of Frauds (g): proof of direct fraud might furnish an exception to this, as to almost every other general rule.

It is not sufficient to prove that the person who purchased the estate had money belonging to another in his hands, unless the employment of that money in the purchase be also proved, and then it seems a lien only will be created (h). Where trust money has been laid out by a trustee in land, or stock, or on any security, it may be followed so as to be subjected to the trusts, provided the proof that the trust

(a) *O'Hara v. O'Neil*, 2 Eq. Abr. 745; *S. C.* 7 Bro. P. C. 227.

(b) *Cottingham v. Fletcher*, 2 Atk. 155; but see *Moore v. Edwards*, 4 Ves. 23. It is now settled that the Statute of Frauds may be pleaded with effect, though a parol agreement be admitted, Mitf. 267.

(c) *Ryall v. Ryall*, Amb. 413; *Lane v. Dighton*, *ib.* 409; *et v.* 1 P. W. 322; 1 Atk. 59.

(d) See Sand. on Uses, vol. i. p. 259, and the note to *Lloyd v. Spillet*, 2 Atk. 150; *Roberts on Frauds*, p. 99.

(e) See *Lench v. Lench*, 10 Ves. 511; *Carter v. Ratty*, 12 July, 1745, MS.; *Mad. P.* and *P.* ii. 141; and *Sugd. V.* and *P.* ii. 910.

(f) *Lees v. Nuttall*, 1 Russ. & M. 53; *Taylor v. Salmon*, 4 My. & Cr. 139, *Lord Cottenham v. Wilson v. Hart*, 1 J. B. Moore, 45, and *Maclean v. Dunn*, 4 Bing. 722, there

cited; and see 5 Hare, 391.

(g) *Bartlett v. Pickersgill*, 4 East, 577, 1 Cox, 15; *S. C.* 1 Eden, 515; see *Sugd. V.* and *P.* 911-12, *ib.* 46, 138. The statement of the case in Eden's Report, 515, shows the distinction; it was "upon a verbal agreement between them" that the bill was founded, not employment or agency: the purchaser was convicted of perjury, but Lord Northington would not entertain a bill of review on this ground. (1 Eden, 517.) Mr. Justice Story (§ 1201 a.) construes these cases rather differently.

(h) *Kirk v. Webb*, *Prec. Ch.* 84, affirmed in *Dom. Proc.* Justice Powell there cited a case in which it had been decided that where the King's Receiver had laid out the King's money in the purchase of land, yet the King could not claim the land.

money specifically was so laid out be clear (*a*): where it is sought to establish that fact by showing that the trustee could not have made the purchase with his own money (*b*), the only evidence that can be received is such as directly proves the inability of the party to purchase with his own funds; evidence of the opinions of persons acquainted with the trustee, formed in the course of their dealings with him, may indeed be received if coupled with proof of additional facts, but such evidence has been held not to be sufficient of itself (*c*).

It may be taken as a general principle, that where a man is bound, by covenant or otherwise, to do an act, and he does an act which may be converted to a completion of his engagement, it shall be supposed than he meant to complete it (*d*), or, as Lord Brougham states the rule, if he has done anything, it will be presumed that he had done it in pursuance of his obligation (*e*). So that if a person who has covenanted, by marriage articles or otherwise, to lay out money in the purchase of land to be settled, afterwards purchases land to himself and heirs, but does not settle it; as a general rule it will be considered that the lands were purchased to be settled on the trusts, and will be bound by the trust. And this principle will be applied equally in favour of the person liable to the duty, as against him, as between his heir and personal representatives (*f*); so that land purchased, but not settled, will, as between the heir to whom it has descended and the personal representatives of the covenantor, be con-

(*a*) *Kirk v. Webb*, *ubi sup.* Sugd. V. and P. 918-919; see *Taylor v. Plumer*, 3 M. & S. 574-6; *et inf.* p. 221.

(*b*) See *Willis v. Willis*, 2 Atk. 71.

(*c*) *Lane v. Dighton*, Amb. 409; *Lord Chedworth v. Edwards*, 8 Ves. 46, 49; *Taylor v. Plumer*, 3 M. & S. 562; *Liebman v. Harcourt*, 2 Meriv. 513; *Lench v. Lench*, 10 Ves. 516, Sir W. Grant there notices the doubts which had been entertained on the subject of following the purchased property in any case; *Groves v. Groves*, 3 Y. & J. 163; *Wilkins v. Stevens*, 1 Y. & Col. C. C. 434-5; Sug. V. and P. 910-11-19. The trustee cannot claim the investment as his own, and make himself debtor to the *cestui que trust*, *V. C. Wigram, Pinkett v. Wright*, 2 Hare, 127. Even money at a banker's may, it seems, be attached on this ground, provided the proof be clear that it is trust money; *Lord Chedworth v. Edwards, ubi sup.* p. 50. As to following trust money laid out by an executor for the benefit of the estate, see *Waite v. Whorwood*, 2 Atk. 159.

(*d*) *Lord Kenyon, Sowden v. Sowden*, 1 Cox, 166, rather differently stated, 1 Bro. 583; and see *Garthshore v. Chalie*, 10 Ves. 9, where Lord Eldon, referring to *Sowden v. Sowden*,

says that a purchase of less, equal, or greater value, and the conveyance being taken in fee and left to descend on a son who would be tenant in tail, will, notwithstanding Lord Thurlow's doubts, be taken as a satisfaction of a covenant to purchase and settle lands; and see *Lench v. Lench*, 10 Ves. 516, Sir W. Grant. The rule that what ought to be done is considered as done, and the doctrine of satisfaction, which are to some degree involved in what follows, will be considered in separate Sections.

(*e*) Lord Brougham, *Tubbs v. Broadwood*, 2 Russ. & M. 493; that was the case of a tenant for life, bound by the provisions of an Act of Parliament, to lay out the produce of land sold under the act: see Sugd. V. and P. 920. A general covenant to settle land does not create a specific lien, *Freemouth v. Dedire*, 1 P. W. 430; but see *ibid.* 233.

(*f*) *Tubbs v. Broadwood, ubi supra, Wilcocks v. Wilcocks*, 2 Vern. 558. "A man will be presumed to be just before he is generous."—*Lord Hardwicke, Deacon v. Smith*, 3 Atk. 327, and see, on this subject, Sugd. V. and P. 921-2, particularly the distinction, 921, § 6 and 7, 922, § 8.

sidered as having been purchased in satisfaction, or part satisfaction, of his covenant, so as to relieve his estate from the burthen of the covenant in whole or in part. In *Sowden v. Sowden*, Lord Alvanley appears to have gone one step further; he held that where a person was bound to advance money to trustees to be *by them* laid out, and he had made a purchase, it was to be presumed, in his favour, to have been purchased in execution of the trust (a). Where a trustee or agent is bound by the trust to lay out the money in land, if he actually lay it out, it will be presumed to have been done in execution of the trust (b). It cannot, however, be said that in all cases where there is trust money to be laid out in land, all purchases made by the persons into whose hands the money is traced, must be considered as having been made in the execution of the trust. Where it is clear there was no intention to lay out trust money in land, a purchase made by the party holding it or liable to pay it, will not, of itself, raise a trust so as to give the estate purchased to the *cestui que trust* in substitution for the trust fund or even a lien upon it (c); though if the trust money has been employed in the purchase it may, as above mentioned, be followed (d). There is no authority or principle, said Lord Rosslyn, to enable the court, where there is no ground for presumption—where, in point of fact, the court must be satisfied that the party, though having trust moneys in his hands, did not mean to execute the trust, or conceive himself to be under a trust—to hold that the estate he purchased is subject to the trust (e).

In a case where the husband had obtained trust money from the trustees, who were empowered, if they should think fit, to invest the money in land, with the consent of a third party; Sir William Grant

(a) 1 Bro. 582-3; 1 Cox, 166; see also *Lechmere v. Lechmere*, Forrest. 80, 92; S. C. more full, *Lechmere v. Lord Carlisle*, 3 P. W. 211, 228, (see 1 Cox, 166).

(b) Sugd. V. and P. 919, § 3.

(c) *Savage v. Carrol*, 1 Ball & B. 285; the heir, in completing the contract of his ancestor, which, under the circumstances, was not binding, had applied the personal estate for that purpose: and see *Gardner v. Marquis of Townsend*, G. Cooper, Rep. 302—a case of a covenantor having an equitable estate afterwards procuring the legal estate which might have satisfied his covenant: where a person procures the estate with a view to the performance of his covenant the result will be different; see *Wellesley v. Wellesley*, on appeal, 4 My. & Cr. 577.

(d) *Lane v. Dighton*, Ambl. 409, (see, as to this case, *Sanders on Uses*, i. 324); *Lewis v. Maddocks*, 17 Ves. 48, 57, 58; and *Lench*

v. Lench, *ubi sup.*; and see *Taylor v. Plumer*, 3 Maule & S. 575, Lord Ellenborough's judgment, and *Kirk v. Webb*, *supra*, p. 203.

(e) Lord Rosslyn, *Perry v. Phelps*, 4 Ves. 114, 116, (A.D. 1798); the decree was affirmed on a bill of review by Lord Eldon, (17 Ves. 173, A.D. 1810-11; see 183,) not precisely on the grounds taken by Lord Rosslyn, though not disputing them. Mr. Fonblanque, in his Treatise, p. 120, (A.D. 1820,) disputes Lord Rosslyn's doctrine, but without referring to the subsequent hearing before Lord Eldon. It is to be observed that *Wilson v. Foreman*, Dickens, p. 593, (Lord Thurlow, 1782,) was decided on the assumption that the trust money must be taken to have been employed in the purchase by the bankrupt; and see Sugd. V. and P. 919; and see the dict. of Lord Eldon, *sup.* p. 196, note (i), as to trust stock sold out.

held, that a presumption that an estate purchased by the husband was intended to secure the trust money, could not arise (*a*).

Where the circumstances are such as to raise the presumption, it may be rebutted by evidence showing a different intention, for intention it seems is the ground of decision, excepting in cases where trust money is employed in the purchase; for instance, if the purchaser should sell or mortgage the estate, according to Lord Hardwicke that would altogether destroy the presumption (*b*).

Any assets of the wife's testator, existing in specie, may be followed into the hands of the husband after her death; and even, as in the case of *Pagett v. Hoskins* (*c*), though not existing in specie, if the husband had notice when he obtained the property that it formed part of the goods of the testator (*d*).

Where two or more purchase lands, and advance the money in equal proportions, and take a conveyance to them and their heirs, this is a joint-tenancy, that is, a purchase by them jointly taking the chance of survivorship, which may happen to the one of them as well as to the other (*e*): but where two or more persons, who are tenants in common of a mortgage, purchase the equity of redemption, though paying the purchase money in equal shares, the title to the equity of redemption will follow that of the mortgage (*f*). In an ordinary purchase, where the proportions of the money are not equal, and this appears on the deed itself, this makes the purchasers in the nature of partners; and however the legal estate may survive, yet the survivor is considered but as a trustee for the others, in proportion to the sums advanced by each of them (*g*). If two or more make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs and improvements, he has a lien on the land, and a trust is raised for him and his representatives for the amount (*h*).

(*a*) *Lench v. Lench*, 10 Ves. 515.

(*b*) In *Deacon v. Smith*, 3 Atk. 327, Lord Hardwicke says it would take off all evidence of his intention to bind the estate by the articles; but the observation was called for in reference to creditors and purchasers only.

(*c*) Prec. Ch. 431, approved by Lord Hardwicke, *Mead v. Lord Orrery*, 3 Atk. 240.

(*d*) Lord Redesdale, *Adair v. Shaw*, 1 Scho. & Lef. 270.

(*e*) *Lake v. Gibson*, 1 Eq. Abr. 291. In *Moyse v. Gyles*, 2 Vern. 385, a grant from a husband, joint tenant with another, to his wife was not considered sufficient to sever the joint tenancy: this is a strong case, for every previous taking of the lease in joint tenancy had

been under an express agreement that survivorship should not take place; however the deed was made expressly to sever, which seems to imply a recognition of the existence of a joint tenancy; and see *Lake v. Gibson*, 1 Eq. Ab. 291; *Rigden v. Vallier*, 2 Ves. 258; *S. C.* 3 Atk. 734, 735; *Aveling v. Knipe*, 19 Ves. 446; and see the cases referred to in the note to *Jackson v. Jackson*, 9 Ves. 597; the case itself is on the question of implied severance, *inf.* p. 207.

(*f*) *Edwards v. Fashion*, Prec. Ch. 332; 19 Ves. 444.

(*g*) Dict. Lord Hardw. *Rigden v. Vallier*, 2 Ves. Sen. 258, 3 Atk. 735.

(*h*) See the authorities in the next note.

In all cases of a joint undertaking, such as the purchase of lands with a view to draining and levelling them, the purchasers will be considered as tenants in common, and the survivors as trustees for those who are dead (a). But as the title has survived *at law*, the representatives of the deceased parties who seek for equity, namely, to be let in for the shares of the persons who contributed to the original advance, must do equity; they must therefore, if admitted at all (b), contribute their proportions, with interest, to any subsequent purchases made by the other joint contractors, though without notice to the applicant, and although they may have turned out to be losing speculations; in short, they will be treated as partners throughout if they elect to have *any* concern in the speculation (c).

Where land is acquired as the substratum of a partnership, in the Court of Chancery the land is considered as part of the stock, and according to the doctrine of the *lex mercatoria* it will not survive; and where a partnership subsists and land is brought into and actually used by the partnership for partnership purposes, the Court has dealt with it as partnership property, although the ownership apparently has not been in all the members of the firm, or if in all not apparently as partners but under another title; indeed, the person in whom the legal estate is vested, whosoever he may be, is treated as a trustee for all the partners; and a purchaser from any such party with notice will equally be a trustee (d). Whether a subsisting joint tenancy has been severed or not is a mere matter of evidence, in each particular case: where a testator devised real and personal estate to his two sons as joint tenants; though the sons carried on jointly the business of farmers on those estates for twenty years, and carried the profits into the common stock; it was held by Lord C. B. Alexander, that the sons remained joint tenants of the freeholds and leaseholds (in the report it is leasehold and personal estate) devised by the will, but that they were tenants in common of the estates they had purchased with moneys out of the common stock, thus treating these estates as representing the money (e).

(a) *Lake v. Gibson*, 1 Eq. Ca. Abr. 291; *S. C.* nom. *Lake v. Craddock*, 3 P. W. 158-9; *Jackson v. Jackson*, 9 Ves. 596-7, and the note; *Jefferys v. Small*, 1 Vern. 217. Tenancy in common is favoured in Equity, *Parteriche v. Poulet*, West, R. 7.

(b) See *Norway v. Rowe*, 19 Ves. 159.

(c) *Lake v. Gibson*, and the other cases in note (a). *supra*; and Sug. V. and P. 903.

(d) *Jefferys v. Small*, 1 Vern. 217; *Smith v. Smith*, 5 Ves. 193; *Crawshay v. Maule*, 1 Swanst. 518; *Fereday v. Wightwick*, 1 Russ. & M. 45; *V. C. Wigr. Dale v. Hamilton*, 5

Hare, 382; *Elliot v. Brown*, 3 Swanst. 489, note; and see 5 *Hare*, 386-7, 390. The cases of *Bligh v. Brent*, 2 Y. & Coll. 268; see particularly, pp. 298, 269, and *Thompson v. Thompson*, 1 Coll. 381; see p. 386, and the cases cited in *Curling v. Knight*, 6 *Hare*, 49; and *Sparling v. Parker*, 9 Beav. 450, as to whether shares, in particular public companies, are real or personal estate, depends rather on their own particular circumstances than any general doctrine.

(e) *Morris v. Barrett*, 3 Yo. & J. 384, 388; but see *Jackson v. Jackson*, 9 Ves. 591, on

Generally speaking, each partner has a right to have the whole concern wound up by a sale of the partnership stock (*a*), and a division of the produce; and this right continues till that has been effected (*b*). If, therefore, after a dissolution any one or more of the partners shall continue to trade with the partnership premises, or indeed any portion of the partnership stock, or to use it for any purpose other than for winding up the concern, he or they so acting, must account for its use, and they will be treated as trustees for the others, or their representatives, of the profits they may have made; but this doctrine does not necessarily apply to the case of a personal office (*c*). As a general rule, if any person employs the property of another which is under his control in any trade or speculation, he is accountable for the profits he may make, to the owner of the property: the hazard to which the property is thus exposed from possible bankruptcy is a material ingredient in these cases (*d*): the same doctrine applies where a person standing in a fiduciary character has attempted, by means of a purchase directly or indirectly from himself, or from his *cestui que trust* the relation of trustee subsisting, to acquire the property for himself (*e*).

If a partner obtains a renewal of a lease which is part of the partnership property, in his own name, he will be treated as trustee for the partnership of such renewed interest; though after the dissolution one partner may obtain such renewal for himself, provided he take no unfair advantage, and, he and his late partners being on equal terms, the landlord chooses to give him the preference; the same doctrine applies to mortgagees and trustees, and in many cases to persons having partial interests (*f*): whoever, said Lord Bathurst, has a lease

appeal, which was there cited. In that case the premises, which had been used for purposes of trade, were devised with the trade to the testator's two sons. Lord Eldon said, it was very difficult to make a distinction between a joint tenancy by will, by gratuitous deed, or by purchase; the law of merchants, if it applied to one must apply to all; and he seemed to think that the continuing to carry on the trade of a pottery and copperas works upon the premises, by the two sons, would amount to a severance: in the case itself Lord Eldon decided, reversing the decree of Sir William Grant in this respect, that the nature of the dealings between the parties as partners in trade implied a severance, *ibid.* 594; and see *Crooke v. Devandez*, 11 Ves. 333.

(*a*) *Vide infra*, and *Crawshaw v. Maule*, 1 Swanst. 505.

(*b*) *Ex parte Williams*, 11 Ves. 5; see Mr. Swanston's note, 1 Swanst. 506.

(*c*) *Featherstonhaugh v. Fenwick*, 17 Ves. 310; *Crawshaw v. Collins*, 15 Ves. 218; *Clarke v. Richards*, 1 Yo. & Coll. 384-5.

(*d*) *V. int. al. Heathcote v. Hulme*, 1 Jac. & W. 122, 128, 133, 134; *Burden v. Burden*, there cited; *Docker v. Somes*, 2 My. & K. 664-5; *Palmer v. Mitchell*, and the other cases there cited, *ibid.* 669-673, *et v.* 11 Bli. 418-9.

(*e*) See *int. al. Cook v. Collingridge*, Jac. 607, 619, 620-1-2. The same doctrine applies to a surety who purchases the debt of his principal, *Reed v. Norris*, 2 M. & Cr. 374.

(*f*) *Featherstonhaugh v. Fenwick*, 17 Ves. 312, 314; and see *Palmer v. Young*, 1 Vern. 276; *Rawe v. Chichester*, Amb. 715; *Owen v. Williams*, *ib.* 734; *O'Hentihy v. Hedges*, 1 Scho. & L. 126, 131; *Farwell v. Whitehouse*, 1 Russ. & M. 148, 149, note, as to the general principle, which is founded on considerations of general policy.

has an interest in the renewal; therefore the new lease is always subject to the trusts and limitations of the old lease (a).

In cases of partnership where real estate has formed part of the partnership property a similar question has arisen, between the real and personal representatives of the partners, as that which has been discussed as regards conversion by will for a particular purpose which is at an end (b). It has been insisted that whatever may have been the character of real estate, in reference to the purpose of any partnership in which an intestate or a testator may have been engaged, that when the partnership is at an end, it ought, if not wanted for the payment of partnership debts, again to take its natural character.

If it is to be collected that there was an agreement between the parties, express or implied, that the property should at the end of the partnership be sold, as affording the most profitable or convenient mode of division, or that with a view to any other possible event it should be considered not as land, but as amalgamated with the rest of the partnership stock; the property, though remaining real, will be treated as personal estate equally as between the representatives of the partners as between the partners themselves (c).

From what Lord Eldon repeatedly said, it would appear that it was his opinion that where persons engaged *in trade* as partners (and some of his expressions would seem to include *any* partnership concern) purchase, or acquire in any way real estate, all such real estate belonging to them jointly which is appropriated to carrying on the trade, becomes so completely stamped with the character of stock in trade, that it must be considered to have been in the contemplation of the parties that on the dissolution it should be sold, together with the rest of the stock, for the purposes of satisfaction of creditors and division, and to have thus become, equally as the rest of the stock in trade, personal estate for all purposes, unless that character has been taken away (d).

In a case before Lord Thurlow, three persons, being seised in fee of some land, entered into partnership for 21 years as paper makers,

(a) *Rawe v. Chichester*, *ubi sup.*; *Webb v. Ligar*, 2 Yo. & Coll. 255; the other material cases are collected in the argument, p. 251.

(b) See *Ripley v. Waterworth*, 7 Ves. 430, 432, and 435; see the next Section, p. 222.

(c) *Ibid.* pp. 435-6; and see 7 Sim. 288. Lord Eldon, in *Ripley v. Waterworth*, cites some cases to show that there may be a conversion even by relation to some prospective uncertain event, which may not happen in the lifetime of the party, and may depend on the act of a third person, *ibid.* 437; and see *Townley v. Bedwell*, 14 Ves. 591, and *Laues*

v. Bennett, there cited, to the same effect.

(d) *Crawshay v. Maule*, 1 Swanst. 508, 518, 521, 523; *Silkrig v. Davies*, 2 Dow. 242; 7 Sim. 283-4. In *Fereday v. Wightwick*, 1 Russ. & M. 49; and in *Phillips v. Phillips*, 1 My. & K. 663; and *Broom v. Broom*, 3 My. & K. 444, Sir J. Leach expressed his opinion to be that such was the law in his time, and he acted upon it accordingly: and see *Morris v. Kearsley*, Collier on Partnership, where Mr. Baron Alderson followed those cases: and see *Jackson v. Jackson*, on appeal, *supra*, p. 207.

and mills were erected on the land, and they declared the uses of the land to themselves *as tenants in common*. They then took four new partners into partnership with them; and, in the partnership deed, there was a covenant that they would stand seised of the land, in trust for the partners, in the proportions in which they were respectively interested in the concern; with a proviso that in case any of the partners wished to *dispose* of his or their shares, he or they might do so giving notice to the other partners, that they might have an opportunity of purchasing. During the second partnership the partners purchased some adjoining freehold premises for the better carrying on the trade, which was "enjoyed by the partners," so says the report, "as joint tenants:" this partnership expired, and the partners continued the business without any new agreement. Joseph, one of the original partners, purchased from the others one half of the whole concern; how the real portion of the property was conveyed to him is not stated; indeed the report is very scanty for so important a question: on Joseph's death a question arose as to whether the original and the purchased premises ought to be sold as partnership stock, or whether they were still to be considered as real estate, and to be retained by the several partners and their representatives as real estate. Lord Thurlow at first thought they must, according to the general rule, be considered as personal estate, and therefore be sold; but on a re-argument he thought that as there was no agreement that the premises should be *valued* and sold, the transactions between the parties were not sufficient to vary the nature of the property, therefore that after the dissolution it would "result" according to its respective nature—the real as real, the personal as personal estate (*a*): it will have been observed that the executed instrument contemplated that the property should continue real estate, and there was a provision authorizing the sale of each partner's share *as real estate* and distinct from his interest in the partnership effects.

In a case where persons who were in partnership as merchants in London joined with another person, no doubt in reference to their partnership business, in buying an estate in the West Indies, as tenants in common, and their undivided shares had been treated in their books as part of their partnership property, Sir Wm. Grant said, assuming that it was partnership property, he did not consider that that would necessarily operate as a conversion. "If," said he, "there was no occa-

(*a*) *Thornton v. Dixon*, 3 Bro. 198, 200. I am not aware that the authority of this case has ever been directly impugned; it is cited in *Bell v. Phyn*, *infra*, and *Balmain v. Shore*, 9 Ves. 500, 508, without disapprobation.

sion to call for it for any of the purposes of the partnership, it remains clear; each on the dissolution may enter into the enjoyment of his share: then suppose all die, why," said Sir Wm. Grant, "is it to be considered personal property, something different from what it in reality is, as between the real and personal representatives?" (a). The Vice-Chancellor of England, in a late case, considered it to be clear that a mere purchase of real estate with partnership funds, and not for purposes of *trade*, will not of itself give to the purchased property the character of personal property (b); nor if one is to take the estate, and be debtor for the purchase money, will it even be partnership property (c): and it was held by the same learned judge that where each of the partners has land which is made subservient to the purposes of a partnership, not being a trade—for instance, farming—though they may carry on a trade distinct from such concern but connected with it, as that of maltsters and contractors for furnishing biscuits for the navy, that will not operate to convert their land into partnership stock, so as to alter its character (d).

In a later case, where the father, who was then carrying on the trade of a bottle manufacturer on certain freehold premises, took his son into partnership, and conveyed to him and his heirs certain shares in the freehold premises, and articles of partnership were afterwards executed, under which it was agreed that the premises should form part of the joint stock of the partnership business; yet, as nothing contained in the articles was considered to imply that a sale or actual conversion was contemplated by the parties, and as the purposes of the partnership did not require a conversion, the Vice-Chancellor of England held that the shares of each partner in the real estate continued real estate at the death of the father (e). But where it is to be collected from the acts and dealings of the parties that it was their intention that the real estate should be considered as personal, it must be taken as such by their representatives (f).

It may here be noticed that the joint property of a partnership concern is subjected, in case of insolvency, to something analogous to a trust, circuitously in favour of the joint creditors of the partnership.

(a) *Bell v. Phyn*, 7 Ves. 457; and see *Cookson v. Cookson*, 8 Sim. 540, 547; where Sir William Grant's doctrine is recognised and acted upon by the Vice-Chancellor of England, *et v. ibid.* 549; but see Collier on Partnership, p. 86, *et seq.*, where the cases are collected and discussed.

(b) *Randall v. Randall*, 7 Sim. 288; but see *Morris v. Barrett*, *supra*. Much may

depend on how it is conveyed and dealt with; for it is clear that the parties, as between themselves, may stamp it with either character.

(c) *Smith v. Smith*, 5 Ves. 189, 193.

(d) *Randall v. Randall*, 7 Simons, 271.

(e) *Cookson v. Cookson*, 8 Sim. 529, 550.

(f) *Houghton v. Houghton*, 11 Sim. 491, 506.

The creditors themselves, indeed, have no lien on the partnership property; but a long series of authorities, said Sir T. Plumer, has established the equities of creditors to be worked out through the medium of the partners (*a.*) During the continuance of the partnership the joint creditors have no lien, but something approaching to lien; that is, a right to sue, and by judgment and execution to obtain possession of the property (*b.*); but till then they cannot prevent the partners from effectually transferring it by *bonâ fide* alienation: if by *bonâ fide* conveyance a new purchaser is put into possession, he is to all intents and purposes the owner, and joint creditors cannot follow the property into his hands (*c.*); and this although the purchaser may be one who was formerly a partner, and to whom, on the dissolution of the partnership, the partnership effects have been *bonâ fide* assigned for a valuable consideration (*d.*). It is on the dissolution of the partnership that this equity of the partnership creditors, independently of their legal right, arises on the part of the creditors of the partnership through the partners themselves.

Amongst the partners themselves clear equities subsist amounting to something like lien; the property is joint, the debts and credits are jointly due: they have equities that each shall be discharged from liability, and then that the surplus shall be divided in proportion to their respective interests, or if there be a deficiency they may call upon each other to make up that deficiency according to their proportions; a judgment and execution against one partner for his separate debt does not put the other in a worse condition; for he must have all allowances made to him before the judgment creditor can have the share of his debtor applied (*e.*). On a dissolution, whether effected by death, bankruptcy, or effluxion, or however else, it cannot be said that to all intents and purposes the partnership is dissolved, for the connexion still subsists until the concern be wound up; there remains a community of interests which makes it necessary that what was partnership property before shall continue such for the purpose of distribution, not as the rights of the creditors, but as the rights of the partners themselves or their representatives require; and it is thus through the operation of administering the equities as between the partners themselves that the creditors of the partnership have the opportunity

(*a.*) Referring particularly to *Ex parte Ruffin*, 6 Ves. 127; *Ex parte Fell*, 10 Ves. 347; *Ex parte Williams*, 11 Ves. 3; *Ex parte Rowlandson*, 1 Rose, 416; *Ex parte Harris*, 1 Madd. 583.

(*b.*) *Ex parte Williams*, 11 Ves. 5; *Ex*

parte Ruffin, 6 Ves. 126.

(*c.*) *Campbell v. Mullet*, 2 Swanst. 576.

(*d.*) *Ex parte Ruffin*, 6 Ves. 119.

(*e.*) Lord Hardwicke, *West v. Ship*, 1 Ves. 242; *ib.* 456.

afforded of having their claims satisfied (a). The partnership may be dissolved in various ways so as to bring in the application of the partnership effects for the benefit of the joint creditors:—First, by death; secondly, by the act of the parties, that act extending to nothing but dissolution, without any special agreement for a transfer of the property as in *Ex parte Ruffin* above cited; thirdly, by bankruptcy of one or both; or lastly, by effluxion of time. If it is dissolved by death, by the well-known doctrine of this court, the legal title in some respects, in all the equitable title notwithstanding the survivorship will remain; and the executor will have a right to insist that the property shall be applied to the partnership debts. “But I do not know,” said Lord Eldon, “that the partnership creditors would have that right supposing both remained solvent.” So, upon the bankruptcy of one of them, there would be an equity to say the assignees stand in the place of the bankrupt, and can take no more than he could, and consequently nothing until the partnership debts are paid. So, upon a mere dissolution without a special agreement, or a dissolution by effluxion of time; to wind up the accounts the debts must be paid, and the surplus be distributed in proportion to the different interests. In all these ways the equity is not that of the joint creditors, but that of the partners in regard to each other: the joint creditors must of necessity be paid, in order to the administration of justice to the partners themselves (b). When, therefore, a bill is filed to wind up the concerns of a partnership, in any of such cases (the partners not being solvent), the joint creditors obtain the application of the partnership property to the payment of their debts.

In the administration in bankruptcy, the joint or partnership estate is in the first place applied to pay the joint or partnership debts, so in like manner the separate estate of each partner is first applied in payment of his separate debts (c); and where partnerships have commenced at different times, upon the bankruptcy of all, the court will direct separate accounts, so that each estate shall first bear its own debts (d).

It is now fully established that joint creditors may proceed at once against the estate of a deceased partner to recover the debts due to them from the partnership, without showing or alleging that the joint estate is insufficient for the payment of their debts: doubts have been

(a) *V. int. al. Ex parte Williams*, 11 Ves. 5, 6; *Ex parte Kendal*, 17 Ves. 523; *West v. Skip*, *ubi sup.*

(b) Lord Eldon, *Ex parte Ruffin*, 6 Ves. 127.

(c) See, on this subject, Deacon's Bankrupt Law, chap. xv. s. 4, p. 646, *et seq.* and stat. 6 Geo. IV. c. xvi. s. 62.

(d) *Ex parte v. Marlin*, 2 Bro. 15.

entertained by judges of the highest eminence whether the creditors ought not to have been left to their legal remedy against the survivors; but the principle of the modern decisions appears to be that in equity a partnership contract is several as well as joint, so that the creditors, in such case, have no occasion to resort to any equities as between the partners themselves to constitute their claims; and the creditor having an original right against each, the death of any one does not affect the right of the creditor (*a*). Indeed this principle has been applied by the Court of Chancery to securities in form joint only, on loans to persons not partners, on the ground of mistake, the court, in such cases, in fact giving to the instrument the effect which it may be presumed the parties themselves intended to have given to it (*b*).

If two or more persons take a joint mortgage for a sum of money made up of advances by each, there will be no survivorship, but each will be entitled according to the amount of his advance (*c*).

It has been held that where a copyhold estate was surrendered to A. and his heirs, who declared himself a trustee for C. and his heirs, the heir at common law was entitled, and not the heir by the custom; and that where the land was Borough English, the heir at common law should have the estate (*d*); but this must be in the absence of evidence showing a different intention.

The principle on which a trust results in the case of a purchase by one person, with his own moneys, in the name of another is, that it must be presumed that he who advanced the money intended to have the estate for his own benefit; being then founded on a presumption, this resulting trust may be rebutted by written (*e*) or even by mere parol evidence (*f*), and as to part of the land or of an interest in the land as well as to the whole (*g*), for such evidence does not contradict

(*a*) *Devaynes v. Noble*, 2 Russ. & M. 505, (1 Meriv. 529, on the original hearing,) Sleech's case, 1 Meriv. 564; *Wilkinson v. Henderson*, 1 My. & K. 582, where the previous authorities are referred to; *Braithwaite v. Britain*, 1 Keen, 206.

(*b*) *Devaynes v. Noble*, Sleech's case, 1 Meriv. 564; *Thorpe v. Jackson*, 2 Y. & Coll. 553, 561, 562, *et v. infra*.

(*c*) *Petty v. Styward*, 9 Ves. 597, note; *Rigden v. Vallier*, 2 Ves. 258.

(*d*) *Per* Lord Cowper in *Haley v. Halley*, Melmoth's MS. Rep. p. 81, amongst the Hargrave MSS. in the British Museum, Nu.

72; Mr. Vernon, the report states, seemed to doubt it, Mad. P. and P. ii. 142. *V. supra*, vol. i. pp. 571-2; Sugd. V. and P. 910, 914; *Hall v. Hill*, 1 Con. & L. 139; *Carter v. Ratty*, 12 July, 1745, MS. Mad. P. and P. n. ii. 141.

(*e*) *Dyer v. Dyer*, *ubi sup.*; *Lamplugh v. Lamplugh*, 1 P. W. 112.

(*f*) *V. sup.* vol. i. pp. 571-2; *Carter v. Ratty*, 12 July, 1745, Mad. MS.; Sugd. V. and P. 910, 914; *Hall v. Hill*, 1 Con. & L. 139.

(*g*) *Benbow v. Townsend*, 1 Myl. & K. 506; *Cook v. Fountain*, 3 Swanst. 585.

but supports the import of the deed: but parol evidence cannot be received against the legal operation of a deed or will, or an implied trust (a), especially where the subject is real estate.

This presumption may likewise be rebutted by the purchaser being under a species of moral obligation to provide for the person in whose name the purchase is made (b). Thus, if an estate be purchased with the money of the father in the name of his child, whether legitimate, or illegitimate if acknowledged and treated as a child (c), an infant or an adult (d), or by a grandfather in the name of his grandchild (e), (if the father be alive it is different, for in such case the grandfather is under no obligation) (f), it will be an advancement of such child or grandchild; unless some contemporaneous (g) declaration can be proved (h), or some contemporaneous act is done to manifest an intention that the son shall take as a trustee (i): possession taken by the father at the time would, it has been said, amount to such evidence, but not conclusive, for, as is stated below, such possession, when the son is an infant, may not have been taken as owner (k). In the absence of evidence to the contrary, the father's equity to consider a person to whom the estate purchased by him has been conveyed without consideration, as a trustee for him, is repelled by the child's title to have the transaction considered as an advancement (l). This principle is not to be frittered away by nice refinements (m).

The evidence of the intention of the father that he meant his son to be a trustee for him, must, to have the effect of making him a trustee, apply to the time of the purchase; a contemporaneous surrender by the father to the use of his will of a copyhold taken in the name of a child will be sufficient (n): but subsequent acts or declarations will not enable him to convert an advancement for his son

(a) Lord Hardwicke, *Taylor v. Taylor*, 1 Atk. 387; Sugd. V. and P. 914, s. 22.

(b) See 1 Swanst. 17, *Murless v. Franklin*.

(c) *Beckford v. Beckford*, Loft. 490; Fearn, Post. W. 327; *Kilpin v. Kilpin*, 1 My. & K. 542; Sug. V. and P. 913.

(d) *Sidmouth v. Sidmouth*, 2 Beav. 456; but see *Lex Prætor*. 271.

(e) See *Ebrand v. Dancer*, 2 Ch. Ca. 26; recognized in *Currant v. Jago*, 1 Coll. 265, and see the Reporter's note, *ibid.*, and the cases there cited; *Lex Prætor*. 271.

(f) *Id. Lloyd v. Read*, 1 P. Wms. 607; 1 Eq. Abr. 382; see the note 1 Coll. 265, *supra*; and 2 Fonbl. 123, *et infra*.

(g) *Lex Prætor*. 271; *Elliot v. Elliot*, 2 Ch. Ca. 231; and see *Finch v. Finch*, 15 Ves. 52; *Murless v. Franklin*, 1 Swanst. 13.

(h) *Lord Grey v. Lady Grey*, 2 Freem. 6;

Finch, R. 346; and see 2 Swanst. 594.

(i) *Murless v. Franklin*, 1 Swanst. 18; *Sidmouth v. Sidmouth*, 2 Beav. 447, 454-5-6; *Scawen v. Scawen*, 1 Y. & Coll. C. C. 65; 2 Y. & Coll. C. C. 11.

(k) 1 Swanst. 17; *et v. Taylor v. Taylor*, 1 Atk. 387: a contemporaneous surrender to the uses of the will would be sufficient, *Prankerd v. Prankerd*, 1 Sim. & S. 3.

(l) Lord Cottenham, 5 My. & Cr. 254. Lord C. B. Eyre treats the fact of the nominee being a child as a circumstance of evidence, 2 Cox, 94.

(m) *Rider v. Kidder*, 10 Ves. 367; 15 Ves. 50.

(n) *Prankerd v. Prankerd*, 1 Sim. & S. 3; see Sug. V. and P. 914; and see *Cross v. Norton*, 2 Atk. 75, as to contemporaneous instruments.

into a beneficial purchase for himself (*a*); though subsequent acts and declarations of the child may be used as evidence that the son was only a trustee (*b*): it is different in the case of a stranger, for there the purchaser may declare the trusts at any time (*c*): if the father die without having paid the purchase-money, in a clear case of advancement his personal estate must pay it for the benefit of the child (*d*).

If the child be an infant, and the father should take possession of the estate, and receive the rents and profits during his life, the child being an infant, that alone, as it has been held, will not convert the transaction into a trust for the father, he may have received the rents as guardian (*e*). It has been considered by some Judges, that where the father has received the rents and profits after the child was of age (*f*), and where the child was of age when the estate was purchased, the son ought to be considered as a trustee (*g*): but the effect of the taking possession may be different where the purchase is in the name of the father and the son (*h*), and in a late case the mere receipt of the dividends of stock placed in the son's name by the father, under a power of attorney from the son, being an adult, was held not to turn the son into a trustee of the capital (*i*). In all these cases perhaps the question resolves itself into this—was the possession or the receipt of rents or profits by the father, looking to the circumstances under which he and his son were placed, to be considered as the exercise of ownership and dominion over the property from the first? (*k*)

(*a*) 1 Swanst. 19; 2 Beavan, 455; Lex Prætor. 272; *Skeats v. Skeats*, 2 Y. & Coll. C. C. 11; *Kilpin v. Kilpin*, 1 My. & K. 532.

(*b*) *Pole v. Pole*, 1 Ves. 76.

(*c*) Lex Prætor. 272.

(*d*) Sugd. V. and P. 913.

(*e*) *Mumma v. Mumma*, 2 Vernon, 19, and the note; *Lamplugh v. Lamplugh*, 1 P. Wms. 113, that was a case of a purchase in the name of the son and a nephew, the father taking the profits during his life, but he died while the son was an infant; *Taylor v. Taylor*, *ubi sup.*, stated from Reg. Lib. 3 Bro. 231, the father had taken possession, and continued to receive the rents till his death, approved by Lord C., *Crabb v. Crabb*, 1 My. & K. 517; *Reddington v. Reddington*, 3 Ridgw. P. C. 106, 176, 194; and see *Lord Grey v. Lady Grey*, 1 Ch. Ca. 296; 2 Swanst. 594, from Lord Nott. MS.; *S. C. Finch*, 338; a very strong case, the father remained in possession till the death of his son, an adult; good manners might, it was said, induce the son to acquiesce, 2 Swanst. 600; but in *Murless v. Franklin*, 1 Swanst. 17, Lord Eldon said that possession taken by the father would amount to such evidence as would repel the presumption in

favour of the son; and see *Elliot v. Elliot*, 2 Ch. Ca. 231, but that was the case of a grandfather. In *Woodman v. Morrel*, Freem. 32, the father had been in possession ever since the purchase, though the daughter had been married for eleven years; Judge Atkins held her to be a trustee: and see Sugd. V. and P. 914.

(*f*) Dict. *Lloyd v. Read*, 1 P. Wms. 608; but that was a case of a grandmother, and the father was alive, and there was a bond given by the father which made it more manifest that the son was to be only a trustee.

(*g*) Lex Prætor. cited by Mr. Maddock, ii. p. 145, from MS.; and see p. 271, ed. 1758; but see Sugd. V. and P. 915.

(*h*) See the cases referred to, 2 Fonbl. 122, n. (*g*).

(*i*) *Sidmouth v. Sidmouth*, 2 Beav. 457-8, evidence was given, but it was not conclusive.

(*k*) See Gilbert's Lex Prætor. 271. Lord C. B. Eyre, 2 Cox, 95, inclined to think the child could not sustain a bill against the father for an account of the rents received during his infancy, shewing his opinion rather to be that the receipt of the rents would be sufficient to turn the child into a trustee. The doctrine is

Where the son has been before provided for, the son has been considered presumptively as a trustee. "If a father has provided for his son," says Lord Nottingham, "he is under no further obligation to provide more than for a stranger (a), and else no father could trust his child; and this difference I take, and shall always observe" (b); but it has been held, that a reversion settled on the son, expectant on the mother's death, is not such a provision as will prevent the son taking beneficially; and if the father consider him as not having been advanced that is sufficient (c).

A difference (not sustainable, it seems,) has been taken between a purchase in the name of a son and of a daughter; on the ground that though sons are often provided for by a settlement of lands, yet daughters seldom are; possibly the presumption in such case may be said not to be so strong (d): a contract to add the life of a daughter in an existing lease, will not be considered as an advancement (e).

Whether the purchase by the father in the name of his son be of a fee-simple or a reversion, is immaterial, for the proximity or possible remoteness of the possession does not affect the rule (f).

If the father and another pay the money, it will not it seems be an advancement, the child being trustee as regards one, he will, *primâ facie*, be trustee for both (g); but where the father buys the estate in the names of his son, (especially where the son is an infant,) and of a stranger as trustee, it will be an advancement, for the trustee may have been added for prudential reasons (h): and as it seems, if the purchase be made in the name of *himself* and his son unprovided for (i),

thus stated in the Treatise on Equity (ed. Fonbl. ii. p. 122.) But if the trust is declared before, or at the time of the purchase, (*Elliot v. Elliot*, 2 Ch. Ca. 231,) or the father has already provided for him, (*Elliot v. Elliot*, 2 Ch. Ca. 231; *Pole v. Pole*, 1 Ves. 76; the reference to *Lloyd v. Read* seems to be a mistake,) or the whole is not given to him, but part of it to another, (but this is hardly supported by the authority supposed to be referred to,) or if he come of full age (*Atty-Gen. v. Bagg*, Hard. 125,) and the father acts as proprietor, or does any thing that implies him to be owner of the estate, this shall overrule the presumption of law in favour of the child.

(a) The general rule, said Lord Eldon, 1 Swanst. 17, is subject to exception where the purchaser is under a species of natural obligation to provide for the nominee.

(b) *Elliot v. Elliot*, 2 Ch. Ca. p. 232; Lord Hardwicke, *Pole v. Pole*, 1 Ves. 76; *Lloyd v. Read*, 1 P. Wms. 607; "but this distinction is not very solidly taken or uniformly adhered to;" Lord C. B. Eyre, *Dyer*

v. Dyer, 2 Cox, 94; and Lord Brougham, *Kilpin v. Kilpin*, 1 My. & K. 542, said it was far from being decisive.

(c) *Lamplugh v. Lamplugh*, 1 P. Wms. 111; Sugd. V. and P. 913-4.

(d) *Gilb. Lex Præt. MS.*, citing Ch. Ca. 24, 30, 2 Mad. P. and P. 145; and see *Lex Præt.* p. 272, ed. 1758; but see *Lady Gorge's* case, 3 Cro. 550, and *Bedwell v. Frome*, mentioned in *Dyer v. Dyer*, 2 Cox, 97.

(e) *Bedwell v. Frome*, cited 2 Cox, 97.

(f) *Finch v. Finch*, 15 Ves. 15; *Dyer v. Dyer*, 2 Cox, 92; *Murless v. Franklin*, 1 Swanst. 13.

(g) *Finch v. Finch*, 23 March, 1808, Mad. MS. Pr. and P. ii. 118, 2nd ed.; 15 Ves. 43. "If he and another person had purchased jointly, the presumption from the act of the father alone, would not naturally arise from the joint payment;" Lord Eldon, p. 51.

(h) *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Crabb v. Crabb*, 1 My. & K. 511.

(i) *Scroope v. Scroope*, 1 Ch. Ca. 27; *Back v. Andrews*, 2 Vern. 120; S. C. Pr. Ch.

(though Lord Hardwicke considered this to be a weaker case (a),) the purchase will be considered as an advancement; but the father will have the benefit of survivorship in case the son die during his minority; and the son, though his title is good against all volunteers and even purchasers, is not, it seems, entitled to the benefit of survivorship as against a judgment creditor of the father (b): it was anciently a practice to join the son in a purchase, to avoid wardship (c).

In a case where a copyhold was granted to A., the purchaser, and B. his wife, and C. his youngest son, to take in succession for their lives and the life of the survivor, it was held that C. was not a trustee of his life interest for A., but took it beneficially as an advancement from his father (d). So where the father, being entitled to a copyhold estate for the lives of himself and his brother James, surrendered the estate, and took a new grant for the lives of himself, his brother James, and his son William, the Vice-Chancellor K. Bruce held, upon the authorities (there was some evidence, but which does not seem to have influenced the decision), that the son was beneficially entitled; the father had expressly devised the estate, stating in his will that the son was named as trustee (e). When a purchase of a copyhold is in the name of two sons, and the eldest son is not the first named, this is a purchase for the benefit of the sons, to take successively, unless there be a custom in the manor controlling that doctrine, or contemporaneous evidence of a different intention (f). Where, by the custom of the manor, copyholds are granted for lives *successivè*, it was originally holden, that if the father paid the fine, a grant to children should not be an advancement but a trust; but this has been overruled, and it comes within the general rule (g).

If a purchase be made by a husband in the name of his wife, she will not be considered as a trustee, but she will be beneficially entitled (h), for, *primâ facie*, a feme covert cannot be a trustee for her

1; there the title of the wife and daughter to a copyhold estate surrendered to the use of the husband, wife, and daughter, was supported against a mortgagee of the husband; 3 Salk. 367; *Dyer v. Dyer*, 2 Cox, 92, note 1 to 1 P. Wms. 112, and Watkins' Cop. 216; and see *Finch v. Finch*, 15 Ves. 50; Sugd. V. and P. 915; and 1 Atk. 388.

(a) 2 Atk. 480; *Pole v. Pole*, 1 Ves. 76; but see *Back v. Andrews*, *supra*. Lord Hardwicke thought the cases had gone full far enough in cases of advancement, 2 Atk. 480.

(b) *Stileman v. Ashdown*, 2 Atk. 480; S. C. Amb. 13; and 2 Fonbl. 121, note, citing *Scroop v. Scroop*, 1 Ch. Ca. 27; *Back v. Andrews*, 2 Vern. 120; *Dyer v. Dyer*, 2 Cox, 92;

Finch v. Finch, 15 Ves. 43; and as to latter point see Sugd. V. and P. 914, § 32.

(c) 1 Ch. Ca. 28; 3 Salk. 367.

(d) *Dyer v. Dyer*, 2 Cox, 92, 95.

(e) *Skeats v. Skeats*, 2 Yo. & Coll. C. C. 9; *v. supra*, p. 215.

(f) *Murless v. Franklin*, 1 Swanst. 18.

(g) Sugd. V. and P. 913.

(h) See *Rider v. Kidder*, 10 Ves. 367; *Lorimer v. Lorimer*, there cited; and *Kingdon v. Bridges*, 2 Vern. 67; *Back v. Andrews*, 2 Vern. 120; S. C. Pr. Ch. p. 1; and see *Purefoy v. Rogers*, 2 Lev. 39; *Green v. King*, 2 Sir Wm. Black. 1211; Mr. Maddock also refers to *Mence v. Mence*, before V. C. Plumer, 18 July, 1815.

husband (a); though such a transaction, like every other, might no doubt be affected by contemporaneous evidence: and where the husband purchases in the name of himself and his wife, the wife surviving will be entitled to the property as against volunteers (b); and against purchasers and creditors of the husband also, if it be in pursuance of articles, or there be any consideration beyond that which arises from natural affection though inadequate (c): a transfer by the husband of stock already purchased into the joint names would *à fortiori* be presumed to be a gift to the wife surviving (d): a purchase in the name of a child solely, or with the father as before noticed, is not within the stat. 27 Eliz. c. 4; so that a purchaser cannot claim against the child (e).

It is to be observed, that if A. purchases lands in his own name, but in trust for B., and becomes engaged for debts of B., and B. files a bill to have the lands; B. will not be allowed to take the estate unless he will do equity by paying not only the purchase-money but the other moneys which the purchaser has advanced or which he has become liable to pay (f).

If an annuity be purchased by A., in the name of B. a stranger, A. paying for it, B. will clearly be a trustee of the annuity for A., unless proof be adduced that it was intended that B. should take beneficially (g); and it is the same where stock is purchased in the name of the purchaser and a stranger, or is transferred by the owner into the name of himself and a stranger (h); but if a man deliver money or transfer stock to another, even though he should be a stranger, no trust will arise unless upon evidence, it will *primâ facie* be a gift (i). If a bond be taken by A. in the name of B. a stranger, an implied trust will be raised in favour of A.; but if a grandfather, the father being dead, takes a bond in the name of his grandchild, it will be considered as an advancement of the grandchild (k). If A. buys stock in

(a) *Kingdon v. Bridges*, 2 Vern. 67; and see *Lex Prætor.* 272.

(b) *Christ's Hospital v. Budgin*, 2 Vern. 683.

(c) See *Fitzler v. Fitzler*, 2 Atk. 514; and *Jones v. March*, Forrest. 64, there cited.

(d) *Coates v. Stevens*, 1 Yo. & Coll. 74, Lord C. B. Abinger; *Wilde v. Wilde*, 1 Yo. Husband and Wife, Jacob's ed. and the other cases cited p. 54, though the references do not in all cases quite bear out the text; *Dummer v. Pitcher*, 2 My. & K. 273; and see the other cases cited in the argument 1 Yo. & Coll. 72; and *Lex Prætor.* p. 272. See *Sugd. V. and P.* 917.

(e) *Sugd. V. and P.* 916; but see 917 as to the right of creditors.

(f) *Bradburne v. Amand*, 2 Ch. Ca. 87.

(g) *Rider v. Kidder*, 10 Ves. 366.

(h) Vice-Chancellor Wigram, *Freeman v. Tatham*, 5 Hare, 337, referring to *Rider v. Kidder*, 10 Ves. 366, but *v. inf.* p. 220, n. (b).

(i) Lord C. B. Richards, *George v. Bank of England*, 7 Price, 651. A distinction was taken in this case between purchasing stock in the name of another and transferring stock already purchased, see p. 653, Garrow, B. and see *Dummer v. Pitcher*, 2 My. & K. 273; but see 5 Hare, 337.

(k) 1 Eq. Abr. 382; and see *Loyd v. Read*, 1 P. Wms. 607; though in that case it would appear that but for the special circumstances the court would have treated the transaction, though the purchaser was the grandmother and the father was alive, as an advancement.

the public funds in the name of B., who has no proof that it was meant as a provision for him, there will be an implied trust raised in favour of the person who paid the money (a), liable to be rebutted in the same manner as in the purchase of land. If a person having stock in the public funds transfers the same into his own and another's name, and dies, and the circumstances are such as to imply that a gift was intended, the *onus* then lies on the representatives of the deceased to show that it was not intended as a gift (b). These cases may be sufficient to illustrate the principles above stated as applicable to personal estate.

An uncle also may place himself *in loco parentis* towards his nephew, especially if an infant, so that money placed out by him in the name of the nephew, particularly if in a savings' bank, may be considered as an advancement; and a subsequent dealing with the fund, if it was originally clearly an advancement, will not affect the title of the nephew (c).

If a bond were taken by A. in the name of B., and B. became *felo de se*, relief might be had against the king, upon the 33 Hen. VIII. c. 39 (d): the 4 & 5 Will. IV. c. 23, § 2, prevents any forfeiture in such cases.

An exception to the rule as to resulting trust from the payment of the price, was introduced by the Ship Registry Acts (e): if A. purchased a ship in the name of B. and the sale was registered in the name of B., it was held by force of the statutes that B.'s title was absolute (f). Where a ship was purchased with joint-partnership property, but registered in the name of only one of the partners, it was held, owing to the strong provisions of the Registry Acts, that even against a claim by creditors, no implied trust arose in favour of the partners, in whose name the ship was not registered (g), nor could any relief be granted on the ground of accident or fraud (h). It was, however, a question whether the Acts affected titles by operation of law, as distinguished from those arising from contract, as in the case of assignees, executors, or administrators, and it seems that they

(a) See *Rider v. Kidder*, 10 Ves. 366, and *Mortimer v. Davies*, mentioned in 10 Ves. 363.

(b) *George v. Howard*, 7 Pri. 661. There was in that case strong parol evidence that the intestate intended that the defendant, who had married his niece, should have the stock after his death; the object appeared to be to save the legacy duty, *v. sup.* 219, n. (h).

(c) See *Currant v. Jago*, 1 Col. 267-8; the facts in this case are special. And see *Dickenson v. Shaw*, cited 2 Cox, 96-7; *George v. Bank of England*, 7 Price, 646. The general rule is that a nephew is a stranger, *Lex*

Prætor. 272.

(d) *Hix v. Attorney-Gen.* Hard. 176.

(e) 26 Geo. III. c. 60; 34 Geo. III. c. 68.

(f) *Ex parte Houghton*, 17 Ves. 251, 253; *S. C.* 1 Rose, 177.

(g) *Ex parte Yallop*, 15 Ves. 60, 66; and see *Curtis v. Perry*, 6 Ves. 739.

(h) *Thompson v. Leake*, 1 Mad. 39; *Barker v. Chapman*, *ibid.* 44, 400, note; and see *Battersby v. Smyth*, 3 Mad. 110; and *Brewster v. Clarke*, 2 Mer. 75; and see the analogous doctrine as regards the Stamp Acts, *Smith v. Henley*, 1 Phill. 391.

might as such have had and may now have equitable interests in a ship, notwithstanding the Ship Registry Acts (a).

The stat. 6 Geo. IV. c. 110 (1825), does not appear to have made any material alteration in regard to the right to claim any equitable interest in a ship registered in the names of others (b), in virtue of the payment of purchase-money; though the 33rd section, which has been repeated in the subsequent acts, saved the *equitable* title of minors, heirs, legatees, and others, exceeding the number of thirty-two (being the greatest number allowed to be legal owners), "duly represented by or holding from any of the persons within the said number, and registered as legal owners of any share or shares of such ship:" and it provided for the existence of trusteeship on behalf of joint-stock companies becoming purchasers. The act now in operation is the 8 & 9 Vict. c. 89 (1845), by which the act 3 & 4 Will. IV. c. 55 (1833), which was substituted for the act of 6 Geo. IV., and some subsequent acts are consolidated; the provisions of that act, so far as the present question is concerned, do not appear to vary from those of the preceding acts, or, indeed to afford any ground for a different construction, even as regards fraud, from that which prevailed in regard to the original acts (c).

(a) *Ib.* 253, 254. Dict. of Lord Eldon. And there may be an *equitable right* to have the legal title completed; see *Ridgway v. Roberts*, 4 Hare, 112. It has been held that the Bankrupt Acts, in regard to property in the order and disposition of the bankrupt (6 Geo. IV. c. 16, § 72), extend to ships, notwithstanding the effect of the Ship Registry Acts; see the cases cited, *Ex parte Burn*, 1 Jac. & W. 379; 17 Ves. 252.

(b) See particularly the 31st and 32nd sections, and *Slater v. Willis*, 1 Beavan, 354, 361 (A. D. 1838), which was decided upon the operation of that statute, although the subsequent act after mentioned (1833) had passed, which however repeats those enactments; see also ss. 33 to 46. There are special provisions (see ss. 35, 42 and 43) as to mortgages, in that and in the last acts (3 & 4 Will. IV. c. 55, and 8 & 9 Vict. c. 89); as to which see *Lister v. Payn*, 11 Sim. 348; *Langton v. Horton*, 5 Beav. 9.

(c) See particularly s. 2 and ss. 31, 32 and 33 of 3 & 4 Will. IV. and ss. 34, 35, and 36 of

8 & 9 Vict. c. 89. The question as to the effect of the act of 3 & 4 Will. IV. as compared with the preceding act in regard to obtaining an equitable title by contract, came under discussion before Lord Cottenham in *Davenport v. Whitmore*, on appeal 2 My. & Cr. 177; but as his lordship held that the plaintiff's claim in respect of the freight was distinct from any equitable title he might have in regard to the ship, (see also *Mestaer v. Gillespie*, 11 Ves. 621,) his lordship had no occasion to decide that question; though Lord Langdale had allowed the demurrer, apparently on the ground of the agreement giving no title to the ship as the principal subject. In *Follett v. Delany*, xii. Jur. 549, on demurrer, the V. C. Knight Bruce held, that where a bill of sale, which had been retained to be delivered only on payment of the purchase-money, had been fraudulently obtained by the vendee without payment, and he had by means of it procured the ship to be registered *de novo* in his own name, the court was bound by the statute to consider the legal and equitable title as the same.

ADDITIONAL NOTE.—*Supra*, p. 204.

"The product of or substitute for the original thing," said Lord Ellenborough, in *Taylor v. Plumer*, *ubi sup.* p. 204, "still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money and mixed and confounded in a general mass of the same description:" the remainder of the judgment should be consulted.

SECTION III.—Resulting Trusts in favour of the Heir and Next of Kin, in respect of Property given upon Trust, where the Trusts wholly or partially fail or do not exhaust the Beneficial Interest.

General Rule.

The Person to whom Property would devolve by General Law cannot be deprived of his Right excepting by a Gift to some one else.

On Questions as to Resulting Trusts, the First Question to be determined usually is whether the Donee or Devisee, by the original Gift on the face of the Instrument, takes in Trust merely.

Instances where Donee is, and is not to be considered as Trustee merely.

If Donee an Infant or Married Woman, that is only a Circumstance.

Recognition of Relationship and Expressions of Regard may be taken into Consideration in construing a Will in regard to the Interest conferred.

Quære, if any Difference between a Will and a Deed in this respect.

Distinction between Devise of an Estate charged with Debts, and upon Trust to pay Debts; Effect of the intended Purpose as affecting the Right to the Beneficial Interest.

King v. Denison, before Lord Eldon.

Not universally true that the Purpose limits the Devise.

Walton v. Walton, 14 Ves., Sir W. Grant.

General Rule, that where the Purpose fails the Intention fails.

Absolute Gift of Property, with Illegal Condition annexed—Doctrine of Sir J. Leach.

Bland v. Wilkin (1 Bro.), stated from the Registrar's Book.

Cases considered where the Title of the Donee under the original Gift is out of the question.

Legacy to Heir or Next of Kin will not preclude their Claim.

Nor will bare Intention to exclude, or negative Words.

Charity Legacies given out of Mixed Fund composed of Realty and Pure Personalty will not be marshalled in favour of the Charity.

The Rule as stated by Mr. Coz, as to Descent on Heir-at-Law of Surplus Proceeds of Real Estate.

Conversion out and out—for the Purposes of the Will only.

General Law as settled by Cruse v. Barley and Ackroyd v. Smithson, where there is a Mixed Fund of Real and Personal Estate.

Resulting Trust for Next of Kin where Money is directed to be laid out in Land, and a limited Interest is given in the Land so to be purchased, or the Limitations of the Land or any of them fail.

Cogan v. Stevens, before Lord Cottenham.

Where a Mixed Fund of Real and Personal Estate is devised in Trust and the Trusts wholly or partially fail, and there is no Heir-at-Law or Next of Kin, the Donees in Trust keep the Real Estate, but are Trustees for the Crown of the Personalty.

Taylor v. Haygarth, before Vice-Chancellor of England.

Question frequently arises whether the Resulting Trust for the Heir is not intercepted by Conversion out and out in favour of Residuary Legatee or Next of Kin.

Conversion may be in such Terms as to give the Next of Kin a Claim.

But they must claim as Devisees by Express or Implied Gift.

Robinson v. Taylor, 2 Bro., Lord Thurlow.

Direction that Proceeds of Real Estate shall be deemed Part of Personal Estate and the like, not sufficient.

Fitch v. Webber, 6 Hare.

Question has most frequently arisen between the Residuary Legatees and the Heir.

Doctrine stated by Lord Eldon (1803).

Sheddon v. Goodrick, 8 Ves.

Mallabar v. Mallabar and Durour v. Motteux, until lately were considered as the leading Authorities on Conversion as between Heir and Residuary Legatee.

Amphlet v. Parke.

Green v. Jackson.

Principle of Durour v. Motteux still governing Principle—the Surplus may be so converted as to pass to Residuary Legatees.

But it must be given.

Residuary Clause, though generally it includes all, may be restricted.

Effect of Stat. 1 Vict. c. 26, § 25.

The Heir takes the Portion of a Converted Fund which results to him, as Personal Estate.

The Doctrine as expounded by Sir J. Leach.

When Parol Evidence may be admitted to repel the Resulting Trust.

When the entire Property is, on the Construction of the Instrument, fixed with a Trust, Parol Evidence cannot be given.

Where the Resulting Trust arises from Presumption of Law on the Facts, Evidence may be gone into.

On a Devise of Land, apparently for a particular Purpose, Evidence may be permitted.

If Evidence be received on one side, it may be given on the other.

Exception to the Rule as to Resulting Trusts in regard to Gifts for Charity.

Result of the Decisions as to when the Donee in Charity Cases may retain the Surplus or Increased Rents and Profits.

THE general rule which governs cases of the description we have now to consider, has been adverted to in the preceding volume; but the subject, from its importance, and its frequent recurrence in practice requires a particular examination (a).

As regards the heir and the next of kin, their title, as to the one to the real estate of his ancestor, as to the other to the personal estate, depends upon this principle,—that whatever portion of the real estate or its produce is not actually and effectually given beneficially to some one else belongs to the heir,—and that the next of

(a) *Supra*, vol. i. p. 510; and see 2 Fonbl. 116, *et seq.*; 2 Powell on Dev. by Jarman, chap. iii. p. 32-44, *et seq.*; 1 Jarman on Wills, 553; *Morice v. Bishop of London*, 10 Ves. 537, Lord Eldon: and *int. al. Cook v. Hutchinson*, 1 Keen, 50; *Johnson v. Woods*, 2 Beav. 409, 412, 413; and *Watson v. Hayes*, 5 My. & Cr. 131. The early cases on this subject, beginning with *Randall v. Bookey*, 2 Vern. 425, S. C. Prec. Ch. 162, are collected in Mr. Sanders's note to *Hill v. Bishop of London*,

1 Atk. 618 (which is a leading case), also in *King v. Denison*, 1 Ves. & B. 265 (which is also a leading case); Mr. Sanders has also pointed out in the above note the cases which he considers as exceptions: some later cases are collected in the note to *Wright v. Wright*, 16 Ves. 190, note (a). The case of *Cruse v. Barley*, 3 P. W. 21, and Mr. Cox's valuable note, part of which is cited *infra*, should be consulted, and *Stonehouse v. Evelyn*, *ibid.* 252.

kin, that the executor is a trustee only, have a corresponding right as regards the personal estate; both take by law independently of intention. This principle, however difficult of application in some particular cases, will be found to be the key to all the decisions upon this class of resulting trusts (a).

Where a question as to a resulting trust in favour of an heir on a gift of real estate, or in favour of the next of kin through the personal representatives on a gift of personal estate, is raised (b); in most cases, the first question to be determined is, whether the donee, in the case of a conveyance or assignment or other instrument of transfer (c), or the devisee or legatee in case of a devise or bequest, upon the whole context of the instrument, takes the property under the original gift, in the character of trustee only; for an absolute beneficial gift to a person by the name of trustee will not take away from the effect of the gift (d). If it be determined that he takes under the original gift only as a trustee, then the question as regards any alleged undisposed of interest in real estate under the original gift is confined to this; whether or not, upon the intention expressed as regards the beneficial interest, there is an effectual, distinct, substantive gift to the original donee (e), or to some one else; or whether there is an absence of any such gift, and therefore a resulting trust for the heir: and the same principle applies in respect of personal estate as regards the next of kin. Both these questions also depend upon the intention (f), which is to be ascertained according to the ordinary rules of construction, by looking to the whole context of the instrument (g).

As regards the first question, namely, whether the donee takes under the original gift as a trustee merely, if the words "for his own use and benefit," or any other equivalent expressions are introduced in the original gift, nothing but some irresistible evidence to be collected from other parts of the instrument (h), will justify the taking from them their natural import (i); and it is to be observed that the annex-

(a) The cases discussed in *Powell on Devises*, by Jarman, ii. pp. 44 to 49, and *Jarman on Devises*, i. p. 302, *et seq.*, though not so obviously, in truth depend upon the same principle, for the question is whether there is an absolute gift of the whole, and then a reservation or an exception which no one can take advantage of; or a gift subject to an exception or with a portion reserved, so that the exempted or reserved portion does not pass. The decision in *Gravenor v. Hallam*, Amb. 645; (see however *Powell on Dev.* ii. 45; 1 *Jarman on Devises*, 303, *et v. ibid.* 306,) affords an illustration; and see *Henchman v. Att.-Gen.*

3 My. & K. 493, and the add. note, p. 249, *inf.*

(b) See on this subject *Jarman*, i. 504, who has stated some of the most important cases.

(c) *Stubbs v. Sargon*, 2 Keen, 255; *S. C.* on appeal, 3 My. & Cr. 507.

(d) 2 Ves. & B. 297.

(e) See *Gibbs v. Rumsey*, 2 Ves. & B. 297.

(f) See 1 Atk. 618, Lord Hardwicke.

(g) *V. supra*, p. 20, *Ellis v. Selby*, 1 My. & Cr. 298, Lord Cottenham.

(h) See *Stubbs v. Sargon*, *infra*.

(i) *Wood v. Cox*, 2 My. & Cr. 690; and see *Meredith v. Heneage*, *supra*, p. 66.

ation of the words "upon trust," though, generally speaking, according to the authorities they will fix on the donee the character of trustee, whether a trust be declared or not and whether the instrument be a deed or a will (a), yet those words are capable of being explained away upon the context, so as to prevent them from operating to fix the character of trustee upon the donee (b), or at least so as to confine that character to a portion of the property (c). If the devise be to an infant (d) or a married woman, though it is difficult to suppose that either should have been intended to be made a trustee, and that circumstance must be attended to in giving a construction to the will, yet it must not be allowed too much weight: if the will upon a fair construction has made them such, all the consequences must follow (e). A discretion as to the application of the property given may be so large as to amount to an absolute gift; as where there is an uncontrolled power to give away the property as and to whom the donee may think fit (f); but if the discretion to dispose is limited to certain general purposes, though they may be too indefinite to be enforced, the donee is a trustee (g).

A grant of a rent-charge *de novo* in trust is unnatural and unusual, and therefore not to be presumed; it is very different from an assignment of a rent *in esse*, in which case an intention to create a trust may well be supposed (h).

Where the father in a conveyance to his son, made with a view to sever a joint-tenancy, (which in ordinary cases would make the son a trustee, as it excludes the presumption of an advancement,) reserves to himself an estate for life or other limited interest; as this is inconsistent with his taking the whole by resulting trust, the son will take beneficially, subject to such limited interest (i).

(a) *V. int. al. Morice v. Bishop of Durham*, 10 Ves. 537, Lord Eldon; *Pain v. Archbishop of Canterbury*, 14 Ves. 370; and the cases cited Hill on Tr. p. 82; *Hobart v. Countess of Suffolk*, 2 Vern. 644; *Southouse v. Rale*, 2 Ves. & B. 398.

(b) *Dawson v. Clarke*, 15 Ves. 409; 18 Ves. 257; and the other cases cited Lewin, 133.

(c) *Batteley v. Windle*, 2 Bro. 31, stated from Reg. Lib.; *Pratt v. Sladden*, 14 Ves. 199; these cases relate to executors where the leaning is in favour of the next of kin on account of their relationship; Sir A. Hart, *Broune v. M'Guire*, 1 Beat. 366.

(d) In *Williams v. Jones*, 10 Ves. 83, Sir William Grant considered the appointment of an infant as executor as almost conclusive that he was intended to have a beneficial

interest: a legacy to the other executor did not operate against the infant, at least so as to exclude evidence on his behalf.

(e) Lord Eldon, *King v. Denison*, 1 Ves. & B. 275, 278.

(f) *Gibbs v. Rumsey*, 2 Ves. & B. 294; *Flanders v. Clark*, 1 Ves. Sen. 10, *et v. supra*, pp. 68, 69; see also *Cuthbert v. Purrier*, Jacob, R. 417; and *Pope v. Pope*, 10 Sim. 5.

(g) *Ellis v. Selby*, 1 My. & Cr. 299, on appeal; *Fowler v. Garlike*, 1 Russ. & M. 232; *Pain v. Archbishop of Canterbury*, 14 Ves. 370. See the analogous doctrine as to trusts by Precatory words, *supra*, p. 69: *White v. Briggs* is now reported 15 Sim. 34.

(h) *Cook v. Fountain*, 3 Swanst. 597.

(i) *Baylis v. Newton*, 2 Vern. 28; *Sydney v. Shelley*, 19 Ves. 352.

Where a donor has shown that a gift was originally intended to be made upon trust, it is not sufficient to remove that character from the donee, that he has omitted to declare any trust or any effectual trust, or that the trusts have failed. Illustrations of this principle, and of many others which are stated in this section, may be drawn from the old law prior to the late statute in regard to the title of Executors to the Residue undisposed of: under the old law, where a residuary bequest was cancelled, still the executor was held to be a trustee; it appearing to have been the testator's intention to dispose specifically, though to whom was uncertain, that was considered sufficient to repel the presumption that the mere appointment of executors was intended as a gift (a): "any intention of disposition," said Sir Wm. Grant, "would be sufficient to exclude the executor, even supposing the intention to have been to give the residue to the executor himself" (b).

One of the most important of the distinctions applicable to cases of this kind, which indeed has been already adverted to, is pointed out by Lord Eldon, in the case of *King v. Denison*, who adopts the principle laid down by Lord Hardwicke, in *Hill v. Bishop of London* (c). "If I give to A. and his heirs all my real estate, charged with my debts (d), that is a devise to him for a particular purpose, but not for that purpose only; if the devise is upon trust to pay my debts, that is, a devise for a particular purpose, and nothing more: and the effect of those two modes of disposition admits just this difference; the former is a devise of an estate of inheritance, for the purpose of giving the devisee the beneficial interest, subject to a particular purpose (e); the latter is a devise for a particular purpose, with no intention to give him any beneficial interest. In the former case therefore the devisee keeps the

(a) See particularly *Urquhart v. King*, 7 Ves. 225, 229.

(b) *Mence v. Mence*, 18 Ves. 351, 352; 5 Hare, 48; *Browne v. M'Guire*, Beat. 366, 369, where most of the cases relating to executors are noticed; *Skrymsher v. Northcote*, 1 Swanst. 566, *et v.* 2 Fonbl. 128. In *Francis v. Grover*, 5 Hare, 39, the testator had erased a clause in his will in pencil; Mr. Justice Earle, on an issue directed, held that *prima facie* this was not to be considered as indicating an intention to revoke, but only as deliberative or indicative of some future and incomplete purpose, *ibid.* 44; and the Vice-Chancellor Wigram, on a motion for a new trial, agreed in that view; (see the cases on this subject, cited *ib.* pp. 41, 42, 47). In the ecclesiastical court, (*ibid.*), and therefore it is presumed in this court, extrinsic evidence will be admitted,

(*v. ibid.* 49); it is stated in the report, p. 43, that no other evidence than the instrument itself was given, from which I presume it was understood that other evidence would have been received. The cases where the executor was held to be a trustee and excluded from the residue—the principles of which are applicable generally, for they all proceed upon evidence of intention—are stated by Mr. Fonblanque, vol. ii. p. 127 *et seq.*

(c) 1 Atk. 618, *supra*, and see *Wainwright v. Bendlowes*, 2 Vern. 718.

(d) Or legacies, see *Cooke v. Stationers' Company*, 3 My. & K. 265, Sir J. Leach, and the illustrations; *Wright v. Row*, 1 Bro. 61; *Jackson v. Hurlock*, 2 Eden, 274.

(e) See *Dawson v. Clarke*, 18 Ves. 257; *Wood v. Cox*, 2 My. & Cr. 694, *et v.* 3 My. & K. 265, *supra*, vol. i. p. 449.

surplus, for it is intended for him; in the latter the heir takes the surplus, for there is no intention that the donee should keep it" (a).

It is not however universally true, that the expression of a purpose for which even a devise of land is made, confines and limits the devise to the purposes so expressed (b): the conclusion to which Lord Hardwicke came was this: "No general rule is to be laid down, unless where an estate is devised to be sold for payment of debts and no more is said, there is clearly a resulting trust (c); but if any particular reason occurs why the testator should intend a beneficial interest to the devisee, there are no precedents to warrant the court to say it shall not be a beneficial interest" (d). The same principle will of course apply where the transaction is by voluntary deed (e). If the purpose expressed is something in favour of the party to whom the devise or bequest is made, the presumption is rather stronger that the benefit expressed is the *only* benefit which he is intended to derive from the devise or bequest (f): if a legacy be given to a devisee of real estate out of the proceeds of the fund to be formed by the sale of the real estate, that would, no doubt, by analogy to the case of a legacy given to a sole executor, be considered as a circumstance to fix the character of trustee merely on the devisee (g).

A distinction has been taken between a devise and a conveyance, in regard to whether the donee shall or shall not be considered as a trustee in respect of the relationship of the donee to the donor, where it is noticed in the instrument; and it has been said, as affecting this distinction, that a devise always imports bounty, and implies a consideration in itself which a deed does not (h). A testator devised to *his cousin*, Thomas Mellish, a house and premises, to hold to him, his heirs and assigns for ever, in trust, to be sold, for the payment of all his debts and legacies within a year after his death; and he made Thomas Mellish his executor; the plaintiff, who was cousin and heir to the devisor, claimed the surplus as a resulting trust for him: it seems to have been admitted on both sides that on a *conveyance* in these terms he

(a) Lord Eldon, *King v. Denison*, 1 Ves. & B. 272; 1 Keen, 320, *et v. supra*, vol. i. pp. 499, 510.

(b) Sir W. Grant, *Walton v. Walton*, 14 Ves. 322; *Hill v. Bishop of London*, 1 Atk. 618; see 1 Jarm. 507.

(c) As to this see *Walton v. Walton*, 14 Ves. 322, *supra*.

(d) Lord Hardwicke, *Hill v. Bishop of London*, 1 Atk. 618.

(e) *Cook v. Hutchinson*, 1 Keen, 42, 51, *supra*, vol. i. p. 510.

(f) Sir W. Grant, 14 Ves. 322.

(g) See Powell on Devises, by Jarman, ii. p. 40.

(h) *Rogers v. Rogers*, Forrest. 271; so that a limitation to a man and his heirs, without declaring the use, will not pass the use for want of a consideration, *ibid.*: in *Sidney v. Shelley*, 19 Ves. 366, as before noticed, Lord Eldon declared that the court is not at liberty to consider the intention in a deed in the same way as in a will, *et v. infra*.

would clearly have been entitled ; but the Lords Commissioners held that the making Thomas Mellish executor, which was equivalent to a gift of the personal estate, and calling him cousin were circumstances(a) which showed that he was intended to take beneficially ; for if it were a resulting trust, then, as the personal estate must first be exhausted in case of the lands, Thomas Mellish might have nothing, either as devisee or executor, whereas it was plain, as the Lords Commissioners considered, that the testator had a regard and kindness for Thomas Mellish, which might be disappointed if the heir-at-law were to take ; and the heir-at-law was therefore excluded and ordered to join in the sale(b). The principle on which this case was decided is in accordance with Lord Hardwicke's rule(c) ; the only doubt is, whether the intention to benefit the devisee could be collected from the will : other cases have established that the recognition of relationship and expressions of affection or regard, ought to be looked to in construing a will, in reference to the interest intended to be conferred(d). However, it is not quite clear that in this respect there ought to be any distinction made, so far at least as regards the admission of such expressions as circumstances of Evidence, between the case of a surplus arising on a voluntary gift by deed and a devise ; near relationship and expressions of affection and regard, according to the modern doctrine(e), are only to be taken into consideration as circumstances to guide the court in a doubtful case(f), and as matter of evidence may be counteracted by the language of other parts of the instrument : this rule of construction appears to be equally applicable to a voluntary gift by way of trust for such purposes as are above mentioned, in a deed, as to a devise by will, though the appointment of the donee as executor in a will, may be an additional circum-

(a) And see *King v. Denison*, 1 Ves. & B. 279, Lord Eldon ; and *Cook v. Hutchinson*, 1 Keen, 42 ; *Duke of Rutland v. Duchess of Rutland*, 2 P. W. 216, case of wife ; *Lake v. Lake*, Amb. 127, Lord Hardwicke.

(b) *Cunningham v. Mellish*, 1 Eq. Ab. 273 ; Prec. Ch. 31 ; affirmed in Dom. Proc., cited by Lord Hardwicke as of authority, 1 Atk. 619 ; and see *North v. Crompton*, as reported 1 Ch. C. 197 ; *Rogers v. Rogers*, 3 P. W. 193 ; *S. C.* Forrest. 268 ; and see Lewin, 132.

(c) *Hill v. Bishop of London*, 1 Atk. 618 ; *sup.* vol. i. 510, and p. 227 of this vol. "Where the devisees are very near relations, as a wife and children, in all such cases inferences of bounty have been drawn to rebut the equity of the heir," Lord Hardw., *Cook v. Duckenfield*, 2 Atk. 565 ; and see Forrest. 78 and 268.

(d) See *Randall v. Bookey*, 2 Vern. 425 ; *City of London v. Garway*, *ib.* 571 : in both these cases the devise was to strangers, upon trust. In *Hobart v. Countess of Suffolk*, *el* p. 644, one of the devisees was a stranger, therefore the presumption of bounty was excluded ; but the Lord Chancellor added, if the devise had been to the other trustee who was a near relation alone, it might have been different : and see *King v. Denison*, 1 Ves. & B. 279, and the other cases cited Lewin, p. 132.

(e) See *Lake v. Lake*, Ambler, 127, as to relationship.

(f) See *Lake v. Lake*, *ubi sup.* ; *King v. Denison*, 1 Ves. & B. 274, and the other cases cited by Mr. Lewin, 132, note (e) ; and see 1 Jarman, 508 to 511.

stance which cannot occur in a deed: indeed, as a will of itself implies bounty, there seems to be less occasion for resorting to such expressions in a will, in order to show an intent to confer a beneficial interest, than in a deed: if they are found in a deed it would appear therefore to be a stronger case for the donee: but the question is not very likely to arise.

As regards executors: where one was made a trustee, the others in the absence of evidence to the contrary were also held to be trustees (*a*); as there was no principle upon which one could be considered as having a beneficial interest given to him and the other as having a mere office (*b*): the same principle would seem to apply to devisees or any other description of donees taking by voluntary gift.

Where there is an absolute gift of property with an illegal condition (*c*), the donee, as has been noticed before, may retain the whole—there is no resulting trust: thus, where a testator bequeathed a leasehold property, upon condition that the legatee should assign a certain leasehold estate, part of the property, to a charity, the legatee was declared to be absolutely entitled (*d*); and Sir J. Leach held that if the condition had been that he should pay a sum of money to a charity, it would have been the same: such a case seems to be clearly distinguishable from the case of a gift with an *exception* of a part (*e*), which of course would meet with a different construction: the charity was to take by assignment from the donee; but the donee was prohibited by law from making the assignment. However, in *Bland v. Wilkin*, where the estate was given on condition (*f*) of paying 10*l.* to

(*a*) *Milnes v. Slater*, 8 Ves. 308; *Williams v. Jones*, *infra*. As to the admission of parol evidence in such cases, see 10 Ves. 82-3. and *infra* in this chapter.

(*b*) *Williams v. Jones*, 10 Ves. 81.

(*c*) See *Arnold v. Chapman*, 1 Ves. 110, at the foot of the page; *Wright v. Row*, 1 Bro. 60, was a case of an illegal trust, which received the same determination; *et v. supra*, p. 183, n. (*e*). "A condition to pay legacies," said Sir J. Leach, in *Cooke v. Stationers' Company*, 3 My. & K. 266, "is no more than a charge of the legacies," which, as before stated, does not create a trust, though it imposes an obligation.

(*d*) *Poor v. Mial*, 6 Mad. 32, *supra*.

(*e*) But see *Hill* on Tr. 109. In *Baker v. Hall*, 12 Ves. 497, Sir W. Grant held, that where a testator gave a rent-charge to the minister of a parish, for the time being, upon certain void charitable trusts, and devised the estate, *subject* to the charge, to a particular devisee, the charge sunk for the benefit of the specific devisee; but no claim was made on

behalf of the heir, and the case was decided before *Tregonwell v. Sydenham*, 3 Dow. 212, *infra*.

(*f*) 1 Bro. 61, in the note, but the report there is incorrect. In this case, as appears by Reg. Lib. 1781A, p. 456, the testator, by his third codicil, dated 15th February, 1780, revoked the devise of his 24 acres of Dolver ground and devised them to the defendant Eliz. Northcote and to her heirs and assigns for ever, subject to and upon the express condition that she, the said E. N., her executors, administrators or assigns, should pay the several legacies therein bequeathed, namely 10*l.* to the churchwardens and overseers of the poor of Soham, to be distributed in charity; and 10*l.* to the churchwardens, &c. of Fordham, to be distributed in like manner; and the testator gave 10*l.* to his executors, to be distributed amongst the Baptist poor people in St. Mary Costany; which three legacies he directed to be paid by the said E. N., her executors or administrators, within twelve months after his decease. Elizabeth N. insisted (457 b)

a charity, Sir T. Sewell held that the heir was entitled to the 10*l.*, probably on the ground that the payment of it was a condition precedent, and there was no one but the heir who could claim it when paid, and that as the heir might have taken advantage of the condition he was entitled to the fruits of it. Lord Hardwicke appears to have decided *Arnold v. Chapman*,—where a copyhold estate was devised on condition to pay 1000*l.* to the testator's executor, the residue whereof, after payment of debts, &c., was given for charity,—on this ground (a).

If there be a devise of land to A. to be charged with a legacy to B. provided B. attain 21, the devise is absolute to A., unless B. attain 21; if he does he is to have the legacy: but his attaining 21 is the condition on which he is to obtain it; and if he does not, the devisee will have it—the heir can make no claim (b): “but,” said Lord Eldon, “a gift which *fails*, must clearly be intended upon the failure of the condition to be for the benefit of the devisee, otherwise he cannot take advantage of that failure, as he being devisee can only take what is given him by the will” (c). This would seem to impugn Sir J. Leach's doctrine above stated (d), for certainly there is no intention in such cases that the devisee should take; but that doctrine depends, as will be observed, upon another principle, namely, that where a gift is absolute, an illegal condition annexed to it is void, which was not applicable to the case which Lord Eldon was considering.

The heir will have the benefit of the surplus interest in a term or other personal interest carved out of the inheritance for a particular purpose which does not exhaust the whole, as against the devisee, that is, where the devisee takes only what remains after the particular interest so given is carved out; and what the heir so takes in that case, he takes as personal estate (e): it is the same where lands are devised to trustees for a term of years, upon trust, to raise a sum of money for certain

that the legacies thus imposed were void. The will and third codicil were established, and it was declared that the charity legacies were void under the stat. of Geo. II. (Mortmain Act), and that they belonged to the heir-at-law, as a resulting trust.

(a) 1 Ves. 111. The charge was well made, but not well disposed of, *ib.*, and see *Tregonwell v. Sydenham*, *supra et infra*.

(b) Lord Eldon, *Sydenham v. Tregonwell*, 3 Dow. 212. Mr. Jarman draws a distinction between the case of a legatee in such case dying under 21, and his attaining 21 and then dying in the life of the testator, so as to cause a lapse.

(c) See 2 Powell on Dev. by Jarman, 42.

(d) P. 229, *supra*.

(e) *Levett v. Needham*, 2 Vern. 138, 140; so, the surplus proceeds of a term created for payment of debts will result to the grantor and will be personal estate in his hands and will pass as such; *Hewitt v. Wright*, 1 Bro. 90; and see *Watson v. Hayes*, 5 My. & Cr. 125. Of the old analogous doctrine, as to Satisfied Terms being held in trust to attend the inheritance, see *Maundrell v. Maundrell*, 10 Ves. 259; *Sydney v. Shelley*, 19 Ves. 358; *Capel v. Girdler*, 9 Ves. 509-12, 3 Swanst. 201, 612, 622, Hill on Tr. 317, and *supra*, vol. i. p. 514-16.

purposes which are void by law, and then the estate is given over, so that the devisees in remainder are not intended to take any thing but subject to the term, the declared trusts of which would have intercepted *pro tanto* the beneficial enjoyment (a). Lord Eldon, referring to *Levett v. Needham*, cited above, said, "That case and the others rest upon a distinction extremely nice, perhaps not easy of application; that if the estate is given to the devisees in such a way that a charge is to be created by the act of another person, raising a question between that person and the devisees, the heir has no claim; but if the deviser has, as in *Emblyn v. Freeman* (Prec. Ch. 541), and other cases, himself created the charge, and to the extent of that charge the intention appears on the face of the will not to give the estate to the devisees, it will to the extent of that charge, the particular object failing, go to the heir; but the question, if it arises upon a will, is always a question of intention" (b).

According to a dictum of Lord Hardwicke, in *Brown v. Jones* (c), where a term is created by *will* and *no trusts* whatever declared, it will result to the heir; but Lord Eldon doubted the accuracy of this dictum, and was of opinion, and so indeed he decided, that in all cases the whole scope of the will must be looked to, to see whether or not the term could have been intended to interfere with the beneficial enjoyment, under the provisions disposing of the estate; and in the case before him he thought that he might read the will as if "subject thereto," had been introduced, as he would have done in marriage articles (d): the probability in all these cases is, that the term has been created with a view to the raising of portions, or some such purpose, which would not have had the effect of postponing the beneficial enjoyment.

These authorities may be sufficient to give a general idea of the circumstances appearing upon the instrument itself (e), which will or

(a) *Tregonwell v. Sydenham*, 3 Dow. 194, on appeal: the Court of Exchequer had held the term to be void in its creation, as the trusts declared were void, taking it as an absolute gift of the whole, with something to be taken out of it.

(b) 19 Ves. 363-4; and see his lordship's observations in *King v. Denison*, *infra*; and *Andrew v. Andrew*, 1 Coll. 689.

(c) 1 Atk. 191; so also in a voluntary settlement; but, said his lordship, it is different in a settlement for valuable consideration, *ibid.*, and 19 Ves. 365; and see the note, 19 Ves. 361.

(d) *Sydney v. Shelley*, 19 Ves. 359; and

see, as to Lord Hardwicke's dictum, 1 Cruise, Dig. 479. Lord Eldon considered that there was more scope given to the intention in a will than in a deed, 19 Ves. pp. 359, 366. "If it is by deed," said his lordship, "I must give it the legal effect, and cannot consider the intention in the same way as I could upon a will;" but in the case of a legal term created by voluntary deed *upon trust*, and no trust declared, if the other provisions of the deed plainly contemplated immediate enjoyment, it can hardly be doubted that Lord Hardwicke and Lord Eldon would have applied the same principle of construction to the deed.

(e) *Et v. supra*, p. 20, note (g); *Vezey v.*

will not be sufficient to confer on the donee the beneficial interest in the entirety of the property given; but each case must be decided upon its own circumstances (*a*). We are now to consider more particularly the cases where the title of the donee is out of the question; and the only question is as between the heir and the residuary devisee or legatee, or the next of kin, as regards the proceeds of realty; or between the next of kin and the residuary legatee, as regards personalty: the general doctrine applicable to such cases has been already adverted to.

A legacy which has lapsed may be so given, as that some other person shall take it in substitution for the legatee (*b*); and even charitable legacies which fail of effect may also be given by way of substitution, so as to prevent any resulting trust (*c*); but in accordance with the principle stated at the outset, it may be taken as clear that the person to whom property would devolve by the general law, can only be deprived of the right which the law confers upon him, by a clear expression of intention on the part of the person whom he represents or under whom he claims, that he shall be excluded and some one else shall take; the intention of the testator is not to be inferred from a particular expression, which taken alone might not furnish a ground for his exclusion, but it is to be collected from the force and meaning of the expressions used by the testator through the whole will (*d*). No doubt remains at the present day that a legacy to the heir-at-law or next of kin will not of itself preclude their claim to the surplus undisposed of (*e*), though it may be a circumstance to be taken into consideration in putting a construction on the instrument (*f*); nor will a bare intention to exclude, however expressed, and accompanied by words of anger or antipathy, or even negative words, be sufficient to exclude the heir in respect of the beneficial interest in real estate undisposed of, or the next of kin in respect of personalty, unless it be,

Jamson, 1 Sim. & S. 69, 71; and see the other authorities, Hill, pp. 83, 84, 85; the latest is *Stubbs v. Sargon*, 3 My. & Cr. 507, see p. 513-14.

(*a*) See *int. al. Ellis v. Selby*, 1 My. & Cr. 298.

(*b*) *Cook v. Hutchinson*, 1 Keen, p. 50; *Countess of Bristol v. Hungerford*, 2 Vern. 644, as corrected 3 P. W. 194 from Prec. Ch. 81, is an instance of a resulting trust to the heir being repelled by a devise to some one else, and of a trust for the next of kin being fixed upon the devisee (the executor); *Rose v. Rose*, 17 Ves. 352, is a case of special substitution.

(*c*) *Price v. Hathaway*, 6 Mad. 307, 313, is an instance.

(*d*) Sir J. Leach, *Phillips v. Phillips*, 1 Myl. & K. 661; though the application of the principle to the facts in that case has not been approved. See the cases collected Lewin, 133, notes (*d*), (*e*), (*g*) and (*h*), *et v. infra*, in this chapter.

(*e*) *Randall v. Bookey*, 2 Vern. 425; *S. C.* Prec. Ch. 162; *Andrew v. Clark*, 2 Ves. 162; Sir J. Strange, *Lord North v. Purdon*, *ib.* 495; *Wheeler v. Sheer*, Mos. 288; *Kellett v. Kellett*, 1 Ball & B. 543; there the testator had appointed and devised his executors to be residuary legatees, yet the heir, who had a legacy, took the surplus; and see other cases, 2 Fonbl. 129.

(*f*) See *Rogers v. Rogers*, 3 P. W. 193.

either specifically or as part of a fund, actually and effectually devised away to some one else, either directly or by the same kind of necessary implication as is in other cases admitted to constitute an actual gift (a).

Where charity and general legacies are given out of a mixed fund made up of the proceeds of realty directed to be sold and pure personal estate, the court will not marshal the assets in favour of the charity legacies; that is, it will not compel the general legatees to resort to the proceeds of the real estate and chattels real for the payment of their legacies, so as to leave the pure personalty applicable to the payment of the charity legacies (b). The mode of administration, where legacies are given to charity out of a mixed fund so composed, is to appropriate the fund as if no legal objection existed as to applying any part of it to the charity legacies, then holding so much of the charity legacies to fail as would in that way have to be paid out of the prohibited fund (c).

The several cases on the subject of the descent to the heir-at-law of real estate, directed by will to be sold for certain purposes which fail in the whole or in part, says Mr. Cox, in his valuable note (d), to *Cruse v. Barley*, which has often been referred to with approbation (e), seems to depend upon this question, whether the testator meant to give to the produce of the real estate the quality of personalty to all intents, or only so far as respected the particular purposes of the will; for unless the testator has sufficiently declared his intention not only that the realty shall be converted into personalty for the purposes of the will (f), but further, that the produce of the real estate shall be taken

(a) As to heir, see *Cook v. Duckenfield*, 2 Atk. 565, Lord Hardwicke: and see *int. al.* 2 Vern. 571-2; 1 Ball & B. 541; *Pickering v. Lord Stamford*, 3 Ves. 492-3; *Wilson v. Major*, 11 Ves. 205. As to next of kin, *Clennell v. Leathwaite*, 2 Ves. Jun. 465: *S. C.* on appeal, *ibid.* 644; and see *Mayor of Gloucester v. Wood*, 3 Hare, 147, *et v. infra*. Whether a declaration that the next of kin should not take, was sufficient as between the executor and next of kin appears to have been undecided; see *Langham v. Sanford*, 2 Meriv. 6, 10. The question whether, where lands are devised by will dated before the late Will Act, 1 Vict. c. 26, came into operation, (*v. sup.* vol. i. p. 474,) to trustees in fee in trust for a person without any words of limitation as to his interest, the *cestui que trust* would take an equitable co-extensive with the legal estate devised to the trustees, has been lately definitively settled in favour of the *cestui que trust*. *Moore v. Cleghorn*, before Lord

Cottenham, xii. Jur. 591; before the M. R., ix. Jur. 958, (and see *Knight v. Selby*, 3 Man. & Gr. 92, there cited).

(b) *Philanthropic Society v. Kemp*, 4 Beav. 581; *Sturge v. Dimsdale*, 6 Beav. 462; *Mann v. Burlington*, 1 Keen, 235; *Pritchard v. Arbouin*, 3 Russ. 456; *Giblett v. Hobson*, 3 My. & K. 517.

(c) Lord Cottenham, *Williams v. Kershaw*, cited 1 Keen, 274; *Hobson v. Blackburn*, 1 Keen, 273. In *Middleton v. Spicer*, 1 Bro. 201, it seems to have been considered that the purchase money of the estate, which the testator had contracted to sell during his life, was personal estate applicable to the payment of charity legacies, which perhaps is the only case in which a charity can take an interest in lands against the Mortmain Act.

(d) Published A.D. 1793.

(e) 3 P. W. 22; see 2 Russ. & M. 227.

(f) The subject of Conversion generally will be treated of in the next section.

as personalty whether such purposes take effect or not; so much of the real estate, or the produce thereof, as is not effectually disposed of by the will at the testator's death, whether from silence (a) or the inefficacy of the will itself, or from subsequent lapse, will result to the heir (b).

A testator may convert his real estate out and out in one sense, that is, for all the purposes of his will, so as to affect the character of the property, as between the real and personal representatives of persons taking under the will (c); but that will not prevent the heir from taking any part that is undisposed of, by way of resulting trust (d); and if he will pay off the charges he may prevent a sale and take the estate (e):—*à fortiori*, where real and personal estate is devised to trustees, and the testator has only said what is to be done with the personalty, there is a resulting trust as to the real estate for the heir-at-law (f). Though the testator may have directed that the funds should be united and blended, so as to form one fund for the purposes of his will, if those purposes fail, the separate character of each, as noticed more particularly below, survives, for the benefit of the next of kin and heir-at-law (g). Where no object exists for which a conversion of land into money was to be made, the court will not change or vary the property from that state in which it was found at the death (h), the next of kin cannot call for a conversion merely that they may take the proceeds as personal estate (i); the same principle applies to personal estate:—"where the purpose fails," said Lord Eldon, "the intention fails, and the court regards the testator as not having directed the conversion" (k).

The general law, as originally settled by the cases of *Cruse v. Barley* (l), and *Ackroyd v. Smithson* (m), and explained by the sub-

(a) *Collins v. Wakeman*, 2 Ves. J. 687.

(b) Citing *int. al. Randall v. Bookey*, Prec. Ch. 162, and *Ackroyd [Akeroid] v. Smithson*, (1 Bro. 503,) stated from the Registrar's book; *Digby v. Legard*, (cited 1 Bro. 501, 3 P.W. 22,) also from the Registrar's book: *Ogle v. Cook*, (cited 1 Bro. 501,) as the last editors of Peere Williams have observed, appears from *Collins v. Wakeman*, 2 Ves. J. 686, not to stand in contradiction to the other cases; and see *Tregonwell v. Sydenham*, 3 Dow. 203, and the other cases cited in the last edition of P. W.

(c) See *Tily v. Smith*, 1 Col. 440, 441.

(d) *V. int. al. Hopkinson v. Ellis*, 2 R. Prop. & Conv. Ca. 431.

(e) *Nicholls v. Crisp*, cited 4 Ves. 65; this case is misreported, Amb. 769.

(f) *Dunnage v. White*, 1 Jac. & W. 585.

(g) Lord Cottenham, *Christian v. Foster*, 2 Phillips, 166; *S. C.* 7 Beavan, 540; nom.

Bunnett v. Foster, see p. 543; *et v. infra*.

(h) *Croft v. Slee*, 4 Ves. 65.

(i) *Chitty v. Parker*, 2 Ves. J. 271; *Collins v. Wakeman*, *ibid.* 683; *Maugham v. Mason*, 1 Ves. & B. 410, 2 Russ. & M. 229.

(k) *Ripley v. Waterworth*, 7 Ves. 435; *Hill v. Cock*, 1 Ves. & B. 174.

(l) 3 P. W. 20, *supra*.

(m) 1 Bro. 503. Before this case was decided it had been generally considered, even by Lord Thurlow himself, that if a general conversion were directed and it became necessary for any of the purposes of the will that it should be made, the heir was excluded: and down to the time of *Cogan v. Stevens*, after cited, the notion prevailed that the next of kin were excluded and that the heir would take, when money was directed to be laid out in land, and partial interests only in the land were given, *v. infra*.

sequent cases, is, that where a testator creates from real estate and personal estate a mixed and general fund, and directs the whole of that fund to be applied for certain stated purposes, as for the payment of debts and legacies, he does in effect direct that the real and personal estates which have been converted into that fund shall answer the stated purposes, and every of them *pro rata*, according to their respective values (a). If any of those purposes fail, then the part of the fund, which according to the intention of the testator would otherwise have been applicable to those purposes is undisposed of. As far as this part of the fund has been composed of real estate, the heir is to have the benefit of it, as so much real estate undisposed of, whether the estate be eventually sold or not (b); and as far as this part of the fund has been composed of personal estate, it is personal estate undisposed of for the benefit of the next of kin (c). But if there are any words of devise which will embrace the surplus, the person in whose favour it is made may of course claim the benefit of the bequest (d), as will be more particularly noticed hereafter.

Where money is devised to be laid out in land, the same principle applies as where land is directed to be converted into money; the conversion will operate only so far as the will disposes of the land into which it is to be converted; so that if the land is devised for a limited estate only, the produce of the fund, or the fund itself, if unconverted, beyond the interest so given, will result to the testator's next of kin, unless it be devised away to some other person (e): it had been con-

(a) So that where there is a conversion, and charity legacies are then given, they will be considered as charged on the personal estate and proceeds of the real estate proportionately, and will therefore fail as to that proportion which would have come out of the proceeds of the real estate; *Flint v. Warren*, 14 Sim. 554; *et v. supra*, p. 233, *Philanthropic Society v. Kemp*, 4 Beav. 581.

(b) *Hill v. Cock*, 1 Ves. & B. 173. The cases are collected, Lewin on Tr. 135, n. (b).

(c) Sir J. Leach, *Roberts v. Walker*, 1 Russ. & M. 767. Before this case, which was also decided by Sir J. Leach, it had been contended that the debts and legacies should be thrown on the personal estate only till exhausted, that being the natural fund for their payment; this is the leading case for the contrary doctrine, which is stated in the text: where the real estate is a *subsidiary* fund, there of course it is different; see *Inchiquin v. French*, 1 Cox, 1; and see *Phillips v. Phillips*, 1 My. & K. 659; *Johnson v. Woods*, 2 Beav. 413; *Salt v. Chattaway*, 3 Beav. 579; *Smith v. Claxton*, *infra*; and *Christian v. Foster*, *supra*; *et v. infra*, add. note, p. 250.

In the case of *Christian v. Foster*, *supra*, the Lord Chancellor confirmed the decree of the Master of the Rolls, throwing the costs upon the two funds proportionably, (the heir-at-law having been declared, as against the next of kin, to be entitled to so much of the fund as had arisen from real estate,) following *Howse v. Chapman*, 4 Ves. 542; *Ackroyd v. Smithson*, 1 Bro. 503; *Attorney-General v. Winchelsea*, 3 Bro. 373; and see on this point Seton on Decrees, 130; *Attorney-General v. Hurst*, 2 Cox, 364; and *Eyre v. Marsden*, 4 My. & Cr. 231; and 1 Tamlyn, Rep. 277; *et v. sup.* p. 183, n. (b).

(d) *Griffith v. Pruett*, 11 Simons, 202: as to what general words will carry real estate, as against the heir claiming by resulting trust or directly, see also, *Day v. Daerson*, 12 Simons, 200, and *Kellett v. Kellett*, 3 Dow. P. C. 248, there cited.

(e) *Cogan v. Stephens*, before Lord Cottenham, M. R. 1835: the judgment, one of Lord Cottenham's ablest, (and the argument of Mr. Pemberton was one of his ablest,) is reported fully by Mr. Lewin, Append. vii. p. 719; the case is shortly reported 1 Beav.

sidered before Lord Cottenham's time (a) that the contrary was settled by the cases of *Fletcher v. Chapman* (b) and *Leslie v. Duke of Devonshire* (c), and that the heir would take. Lord Cowper was of opinion that when money was directed to be invested in land, and *no trusts* of the lands were declared, the money should go to the heir as land, just as he would have given the produce of the sale of an estate directed to be sold out and out, where no trusts were declared, to the executors (d), but which, as will have been seen, is not now the law. However, Lord Cottenham observed, in *Cogan v. Stephens*, that if the testator were simply to direct an investment of a sum of money in land and declare *no trust* of it, the heir might with some plausibility contend that the testator could have had no other object than to create or add to his real estate, and that it might be enjoyed in that line by whom that description of property is by law inherited; so that perhaps this point is not absolutely concluded.

Where the interest of a mixed fund, consisting of the proceeds of real and personal estate, is directed to be accumulated for a space of time exceeding the limits allowed by the Thellusson Act (e), so that the accumulation for a portion of the time is unlawful under the provisions of that act only; the interest of the mixed fund, which accrues between the end of the 21 years and the period fixed for the termination of the accumulation, unless there be some person who would be entitled in possession to the rent or interest directed to be accumulated but for such direction, will result to the heir-at-law and next of kin, in the proportions in which the mixed fund is constituted of real and of personal estate: the statute does not accelerate the possession of those who are to take subject to the direction for accumulation, and the accumulation of the rents so as to form a money fund being directed only for the purposes of the will, the next of kin cannot claim as against the heir (f).

Where a mixed fund of real and personal estate is devised in trust,

note, p. 483; *Hereford v. Ravenhill*, 1 Beav. 481; 5 Beav. 51, 55; the fund had not, in either case, been invested in land, but that it is presumed could make no difference.

(a) Powell on Devises, by Jarman, ii. p. 74. Mr. Jarman, on Wills, i. 554, is mistaken in supposing that *Fletcher v. Chapman* and Lord Redesdale's dictum were not cited; they were particularly observed upon by the counsel and the judge, see the Report, Lewin, Append. 726-7.

(b) 3 Bro. P. C. 1.

(c) 2 Bro. 187.

(d) *Hayford v. Benlow*, Amb. 582; S. C.

2 Vern. 718; but see *Townley v. Bidwell*, 6 Ves. 198; and Lord Cottenham's observations on Lord Cowper's doctrine, in *Cogan v. Stephens*, Lewin, 725; and Lord Redesdale's, *M'Clelland v. Shaw*, 2 Scho. & Lef. 545.

(e) V. *supra*, chap. v.

(f) *Eyre v. Marsden*, 2 Keen, 573-4-5. The Lord Chancellor, on appeal, only varied the decree by directing that the costs should be borne by the general estate, not by that part only which resulted to the heir-at-law and next of kin as had been directed by the Master of the Rolls, 4 My. & Cr. 236, 248.

and the trusts for any reason become inoperative in the whole or in part, and the testator has left neither next of kin nor heir, and there is no residuary gift, the trustees are trustees of the personal estate for the crown; but, as was observed in the former volume, the crown has no equity against the trustees, the legal owners, as regards the real estate, and they keep it themselves (a).

A question often arises in cases of devises of real estate in trust for sale, whether the title which would otherwise accrue to the heir-at-law by way of resulting trust is not intercepted by reason of the proceeds of the real estate having the character of personal estate so completely impressed upon them as that they shall pass under a residuary bequest as personal estate, or even, in the absence of any such bequest, that they shall vest in the executor or administrator in trust for the next of kin.

It is not to be expected that in the case of a devise of real estate upon trust for sale, the testator, who supposes, in most cases at least, that he has effectually disposed of his entire property and that his dispositions will be effectual, should make such a disposition of his real estate or its proceeds, as that the next of kin should be able to claim any portion of it that may lapse, or not be effectually disposed of, as against the heir (b): it is however of course possible that such a case should arise, and that without the subject of lapse being present to the mind of the testator; thus, if the testator should direct expressly, or by necessary implication, that the proceeds of the real estate should be considered as having been converted into personalty *before* (c) the time of his death; and *à fortiori* if he should direct that it should be treated as personal estate for every purpose, whether disposed of by his will or not, and whether as regards legatees or next of kin (d); such a devise would operate to give such proceeds to the next of kin: but as they can only claim such proceeds as actually given, that is as devisees, the direction would require to be very explicit (e): if, as before observed, there be no specific devise the heir-at-law can never

(a) *Middleton v. Spicer*, 1 Bro. 201, and the other cases cited 14 Sim. 10, 18, as to the first point; *Burgess v. Wheate*, 1 Eden, 177; *Walker v. Denne*, 2 Ves. J. 185; *Taylor v. Haygarth*, 14 Sim. 17, and the other cases there referred to, as to the second point; *Henchman v. Attorney-General*, on appeal, 3 My. & K. 485, *et v. sup.* vol. i. p. 177, 504.

(b) See 2 Russ. & M. 236.

(c) *Robinson v. Taylor*, 2 Bro. 589; 1 Ves. J. 44; 6 Hare, 148.

(d) Dict. Lord Langdale, *Johnson v. Woods*, 2 Beav. 413. In the case itself the conversion was to have taken place 12 months after the testator's death; the heir-at-law had the benefit of so much of the residue of the mixed fund as had arisen from real estate.

(e) In *Phillips v. Phillips*, 1 M. & K. 649, Sir J. Leach considered that the proceeds of the realty had been so given; but *v. infra*, as to this case.

be defeated by the next of kin (*a*); the mere intention to exclude the heir cannot operate unless the proceeds be given to some one else (*b*). Of course personal estate could never have been so converted by anticipation as to exclude the claim of simple contract creditors (*c*).

The mere direction that the proceeds of the real estate "shall be deemed part of the personal estate," or "shall be a fund of personal and not of real estate," is not sufficient to give the surplus to the next of kin (*d*), nor will a reference to a mixed fund, composed of personal estate and the proceeds of real estate directed to be sold at a specified period after the testator's death, by the name of "personal estate," be sufficient to show that the entire fund is to be treated for all purposes as personal estate (*e*); and *any purpose*, however limited, as payment of costs, apparent upon the face of the will, with reference to which the conversion might have been directed, is conclusive against the next of kin (*f*). In a very late case the testatrix declared that her trustees should stand possessed of the proceeds to arise from the sale of real estate as a fund of personal and not real estate, adding, "for which purpose I declare that such proceeds or any part thereof shall not in *any event* lapse or result for the benefit of my heir-at-law;" the testatrix then directed the payment of the legacies after mentioned out of such proceeds; and as to the residue of her estate and effects she directed her trustees to apply the same to such persons as should be appointed by codicil appoint. She made no codicil. Sir James Wigram decided that the heir-at-law took the surplus: "the next of kin," he said, "could no more take it by way of devise than the heir; the testatrix had intended to give it away from both:—therefore, in the absence of any disposition, it must devolve according to the rule of law (*g*)."

Lord Thurlow seems to have been of opinion that the personal representatives could not get at that which was not personal estate at the death of the testator, excepting by *express* words (*h*); but this seems to

(*a*) *Maugham v. Mason*, 1 Ves. & B. 410; *Collins v. Wakeman*, 2 Ves. J. 683, approved by Sir J. Wigram, 6 Hare, 150; *Chitty v. Parker*, 2 Ves. p. 271; 2 Russ. & M. 229; *Jessop v. Watson*, 1 My. & K. 665; *Cogan v. Stephens*, before Sir C. Pepys, M. R., Lewin, Append. 724.

(*b*) See 6 Hare, 152, and *supra*.

(*c*) *Beauclerk v. Mead*, 2 Atk. 170.

(*d*) This is now established by the concurrent opinions of Lord Cottenham, Lord Langdale, and Sir J. Wigram, against Sir J. Leach's decision in *Phillips v. Phillips*, *supra*, see 6 Hare, 150-1; and of the Vice-Chancellor

of England in *Flint v. Warren*, and of the Vice-Chancellor Knight Bruce in *Gordon v. Atkinson*, cited *ibid.* 151.

(*e*) *Johnson v. Woods*, 2 Beav. 414.

(*f*) *Hill v. Cock*, 1 Ves. & B. 173; 6 Harf. 148.

(*g*) *Fitch v. Weber*, xii. Jur. 646, 6 Hare, 153-4. However the Vice-Chancellor guarded against his being supposed to entertain an opinion that the next of kin can never take by implication, *ibid.*; see add. note, No. 23, p. 250.

(*h*) In *Robinson v. Taylor*, 2 Bro. 589. he

be carrying the rule in favour of the heir-at-law rather too far : if there be what, upon the whole will, is to be construed as a gift by necessary implication, there seems to be no reason for not applying to such a case the ordinary rules of construction ; "when the meaning of a will is ascertained by construction it is the same as if it were distinctly expressed" (a).

The question, however, has most frequently arisen between the residuary legatee and the heir (b).

Lord Eldon, on a review of the authorities (c), (1803), in reference to an analogous point (d), said, "The only cases in which the surplus of money, the produce of an estate converted by the will, has been held to pass, are those that have been cited at the bar and cases like them, where the instrument, executed in the presence of three witnesses, has itself treated the surplus as comprehended in the description under the words 'my personal estate;' and the court has collected from the whole will, duly attested, an intention to give the property, which was surplus after payment of the debts and legacies arising from real estate—to give his real interest in that property and surplus, in terms *prima facie* descriptive of personal property only, but which, upon the whole taken together, the court adjudged to be, according to the meaning of the testator, calculated and intended to pass such surplus; the cases are not carried farther than that, and I am not at liberty," said his lordship, "to extend the doctrine without an authority for it" (e).

The cases of *Mallabar v. Mallabar* and *Durour v. Motteux* (f), were

(a) Sir W. Grant, *Walton v. Walton*, 14 Ves. 321; *Durour v. Motteux*, *infra*; and see 6 Hare, 147, 154, and 2 Beav. 413.

(b) A further question may arise between the legatees of a particular residue and the legatees of the general residue; each case, of course, must depend upon its particular circumstances in this respect—see *Master v. Laprimaudaye*, 2 Coll. 445.

(c) *Mallabar v. Mallabar*, and *Durour v. Motteux*, after stated, were cited *int. al.*

(d) *Sheddon v. Goodrich*, 8 Ves. 495. The question was whether the surplus was so converted as to pass by an unattested codicil, (a question much discussed in *Habergham v. Vincent*, 2 Ves. J., 204, but which the late Will Act has put an end to); the question is, said Lord Eldon, which it was in his lifetime and at his death, and by what instrument he could have disposed of it in his lifetime, 8 Ves. *ubi sup.*

(e) This dictum called forth some observations from Sir Wm. Grant, in *Hooper v.*

Goodwin, 18 Ves. 166; and see Sir S. Romilly's argument, *ibid.* p. 163: but the new Wills Act has rendered the point to which Sir Wm. Grant referred immaterial for the future.

(f) The case of *Mallabar v. Mallabar*, as Sir J. Leach observes, in *Phillips v. Phillips*, 1 My. & K. 660, was not a case of lapsed legacy (where the original intention is defeated); the sole question was whether the testator intended to comprise the proceeds of the sale of his real estate in the residuary gift; he had directed his debts and legacies, and amongst the rest a legacy of 500*l.* to his heir, to be paid out of the proceeds: on the inference to be derived from the general scope of the will fortified by the gift of the legacy to the heir (but which alone will not exclude the heir in a case of lapse, *v. supra*, p. 232), the court held that the surplus proceeds did pass to the residuary legatee (see 1 My. & K. 660, *Phillips v. Phillips*); Sir J. Leach, in the same case, comments upon the case of *Durour v.*

considered until lately the leading cases in questions as to the produce of real estate between the heir-at-law and the residuary legatees of the personal estate. In those cases, at least in *Durour v. Motteux*, the court was of opinion that upon the construction of the will the real estate was converted into personalty for *all* the purposes of the will, and therefore for the purposes of the residuary bequest; nor perhaps has *Durour v. Motteux* been impeached so far as it established this proposition, that although the testator does not in express terms state that the produce of his real estate shall for all purposes have the same quality as if it had been part of his personal estate at his death; yet such intention may be collected from the general tenour of the will; and in such case the heir will not be entitled to any portion of a lapsed or failing legacy as against a *residuary* legatee (a).

Motteux, as corrected from the Registrar's book, 1 Sim. & S. 292, n. It is to be observed that Sir J. Leach in referring to his own previous decision in *Amphlett v. Parke*, does not advert to his opinion upon the words of the residuary clause noticed above, which, but for *Durour v. Motteux*, would have led him to decide differently, see 1 My. & K. 662.

(a) See *Phillips v. Phillips*, 1 My. & K. 659, dict. of Sir J. Leach. In the following cases the court held that there was a conversion out and out, so as to give the lapsed portions of the proceeds to the residuary legatee to the exclusion of the heir; *Kennell v. Abbott*, 4 Ves. 802, 809, which according to Lord Brougham's view was founded on *Durour v. Motteux* (see below in this note), and therefore not to be considered as a binding authority; *Brown v. Bigg*, 7 Ves. 279; *Green v. Jackson*, 5 Russ. 35, affirmed 2 Russ. & M. 238, by Lord Lyndhurst (after Lord Brougham's reversal of *Amphlett v. Parke*, *infra*), on the principle laid down by Lord Hardwicke in *Durour v. Motteux*, *ib.* 246, and probably Lord Brougham would, under the circumstances, have decided the same way. *Amphlett v. Parke*, before Sir J. Leach, 1 Sim. 279, and 4 Russ. 75, was reversed by Lord Brougham, 2 Russ. & M. 221, on the ground that as the decision of Sir J. Leach was founded, *against his own opinion*, on the cases of *Mallabar v. Mallabar*, Forrest. 78, and *Durour v. Motteux*, 1 Ves. 320, (this was before *Phillips v. Phillips*, *supra*, came before him,) and as those cases, when examined, did not necessarily govern the case of *Amphlett v. Parke*, it ought to stand upon the general doctrine. The question was, who was entitled to a lapsed legacy payable out of the proceeds of real estate directed to be converted: each of the learned judges in that case seems to have thought that if after directing the sale of her real estate, and that the moneys to

arise by such sale should form *part of her personal estate*, the testatrix had then simply given the residue of *her personal estate* to the legatee, it must have been taken that she was devising the proceeds of the real estate under the name of personal estate, and that the lapsed legacy therefore would have passed; but she included in the residuary bequest *nominatim* the moneys to arise by the sale of the real estate, and one of the purposes for which such sale was directed having failed, the money directed to be raised to answer such purpose could not be considered as included in such residue, it was therefore on the face of the will, independent of authority, undisposed of. Lord Brougham did not consider himself fettered in his construction of this particular will by the preceding cases, he therefore put the construction upon the will which, but for those cases, Sir J. Leach would have put upon it, (see 1 Sim. p. 279). The difference between Lord Brougham and Sir J. Leach was, whether the point of construction was an open question; Lord Brougham thought that as regards that particular case it was, Sir J. Leach that it was not; an appeal to the House of Lords was presented, but it was compromised, (see *Phillips v. Phillips*, 1 My. & K. 653, 660). In *Salt v. Chattaway*, 3 Beav. 579, (1841,) Lord Langdale followed *Durour v. Motteux*, and *Green v. Jackson*, in favour of the residuary legatee. In *Yates v. Compton*, 2 P. W. 308, (rather a strong case,) A. devised an estate to his executors to sell, and with the proceeds and the surplus of his personal estate to purchase an annuity for the life of Jane Styles, which he disposed of partly to her, partly to her children, and gave the residue of his personal estate to Jane Styles, and appointed other persons executors. Jane Styles died three months after the decease of the testator. Lord King compelled the heir

Where even the real estate is converted for all the purposes of the will, a question may arise whether the residuary clause is such as will carry it. The word "residue," in its largest and general sense, comprehends whatever, in the events which happen, turns out to be undisposed of; which is founded upon this—not that it effects in specie what the testator intended, but because the testator is supposed to give it away from the residuary legatee only for the sake of the particular legatee; so that upon failure of the particular intent the court gives effect to the general intent (*a*), and therefore a lapsed legacy will pass under a general residuary gift (*b*). But if it appears that the word "residue" is used in a more restricted sense, in that restricted sense the court is bound to construe it (*c*).

If a portion of the *residue itself* lapses or becomes undisposed of, it will go to the heir-at-law or next of kin, according to the nature of the property, unless there be a gift of it, express or implied, to some one else (*d*).

According to the authorities, it is not sufficient, to give a title to the residuary legatees any more than to next of kin (*e*), if the testator merely directs that the moneys to be produced by the sale of his real estate shall be considered and taken as part of his personal estate; and if he directs the application of such mixed fund for particular purposes, the surplus of the mixed fund—if any such should arise by lapse or otherwise—must be *given* to the claimant or he cannot take. If the testator directs that out of the moneys to arise from *such sale*, and all

at law to join in the sale; and though only a part of the proceeds were then required to answer the purposes of the will, he gave the whole that might remain and the intermediate rents to the representatives of Jane Styles, probably as residuary legatee: it was possible that, if the sale had taken place immediately on the testator's death, the *whole* might have been wanted to purchase the annuity. In *Gibbs v. Rumsey*, 2 Ves. & B. 294, 296, before Sir Wm. Grant, one of the questions was as to who was entitled to a legacy to a charity, given out of the proceeds of the real estate, which was void under the Statute of Mortmain; Sir William Grant there said it was clear that it would go to the heir, and not to the next of kin or the residuary legatee; but the report is not full on this point. In *Wilson v. Major*, 11 Ves. 205, the same very able judge decided, upon the context of the will, that the word "effects" in the residuary clause would not carry the portion of a converted fund which was undisposed of, distinguishing it, on the special circumstances, from *Mallabar v. Mallabar*, *ib.* 208.

(*a*) *Cambridge v. Rous*, 8 Ves. 25; Lord

Cottenham, in *Easum v. Appleford*, on appeal, 5 My. & Cr. 62; and see *Henniker v. Henniker*, before V. C. K. Bruce, xii. Jur. 618.

(*b*) *Leake v. Robinson*, 2 Meriv. 366; *Ackers v. Phipps*, 9 Bli. N. S. 430; and see *Cunningham v. Murray*, on appeal, xii. Jurist, 547. Under the 25th section of the statute 1 Vict. c. 26, a residuary gift of a mixed fund, consisting of the proceeds of real and personal estate, would pass a lapsed legacy given out of such mixed fund, and so no doubt would a residuary gift of personal estate, if the will for all the purposes of the will has converted the real estate into personal, though the words of the clause are "shall be included in the residuary devise, if any."

(*c*) Vice-Chancellor Wigram, *Green v. Per-twee*, 5 Hare, 252; and see *Easum v. Appleford*, 5 My. & Cr. 62.

(*d*) *Easum v. Appleford*, *ubi sup.*; *Lloyd v. Lloyd*, 4 Beavan, 231, and *Skrymsher v. Northcote*, 1 Swanst. 570, both special cases; the earlier authorities are referred to in those cases.

(*e*) *V. supra*, p. 238.

other his personal estate, certain legacies shall be paid, and then the residue of the personal estate, *and of the moneys arising from the real estate*, are given to other persons, that does not necessarily imply that a lapsed legacy, payable out of the mixed fund, shall go to such persons—for the residue given is after the payment of the legacy (a): though under a residuary gift of *personal estate* generally, after such a direction for conversion and amalgamation, the mixed fund may pass, subject only to the charges which are or may in event become actually payable out of it (b).

If the intention of a testator is, to convert real estate into personal for all the purposes of the will, and some only of such purposes should fail, and in consequence of such failure part of the proceeds should result to the heir, as a general rule, what he so takes will vest in him as personal estate, and be so considered in a question between his real and personal representatives (c). Sir John Leach, in the case of *Smith v. Claxton*, has so clearly expounded the doctrine on this subject, as well as in regard to others points which have been adverted to in this section, that it may be useful to set forth the main portion of his judgment, though at the expense of some repetition.

“Where,” said that very able Judge, “the testator directs his real estate to be sold, and the produce to be applied to particular purposes, and those purposes partially fail, the heir-at-law is entitled to that part of the produce which in the events is thus undisposed of. The heir-at-law is entitled to it, because the real estate was land at the devisor’s death; and this part of the produce is an interest in that land not effectually devised, and which therefore descends to the heir. It is for this reason that the produce of an estate which the devisor directs to be sold, can never be strictly part of his general personal estate. If a devisor directs such produce to be paid to his executors, and applied as part of his personal estate, the executors take it as devisees. Every person taking an interest in the produce of land directed to be sold, is in truth a devisee and not a legatee.”

“A devisor may give to his devisee either land or the price of land at his pleasure, and the devisee must receive it in the quality in which it is given, and cannot intercept the purpose of the devisor (d). If it be the purpose of the testator to give land to the devisee, the land will descend to his heir; if it be the purpose of the devisor to give

(a) *Amphlett v. Parke*, *supra*, note (a), p. 240; see additional note, No. 2.

(b) *Ibid.* v. *supra*, p. 240, note.

(c) *Wright v. Wright*, 16 Vesey, 88;

Ashby v. Palmer, 1 Meriv. 296; *Dixon v. Dawson*, 2 Sim. & St. 340; *supra*, p. 230, n.

(e); and see *Smith v. Claxton*, *infra*.

(d) See *Ashby v. Palmer*, 1 Meriv. 296.

the price of land to the devisee, it will, like other money, be part of his personal estate. Under every will, when the question is whether the devisee, or the heir failing the devisee, takes an interest in land as land or money, the true inquiry is whether the deviser has expressed a purpose that, in the events which have happened, the land shall be converted into money. Where a deviser directs his land to be sold, and the produce divided between A. and B., the obvious purpose of the testator is that there shall be a sale for the convenience of division, and A. and B. take their several interests as money, not land. So if A. dies in the lifetime of the deviser, and the heir stands in his place, the purpose of the deviser—that there shall be a sale for the convenience of division—still applies to the case, and the heir will take the share of A. as A. would have taken it—as money and not land : but in the case put, let it be supposed that A. and B. both die in the lifetime of the deviser, and the whole interest in the land descends to the heir, the question would then be—whether the deviser can be considered as having expressed any purpose of sale applicable to that event, so as to give the interest of the heir the quality of money ; the obvious purpose of the deviser being that there should be a sale for the convenience of division between his devisees, that purpose could have no application to a case in which the devise wholly failed, and the heir would therefore take the whole interest as land "(a).

The resulting trust in favour of the heir or next of kin, may be repelled by parol, that is extrinsic, Evidence ; but as to some of the points we have been considering extrinsic evidence cannot be received. It has been observed in the former volume (b), that no evidence can be received as against a positive rule of construction of a written instrument, therefore no evidence can be received to show that a person was not intended to be a trustee, when by the terms of the instrument he is expressly or by construction of law conclusively made a trustee. As an illustration ; if upon the face of the instrument the property is vested in the donee, upon certain trusts or for certain purposes, which if they should be carried out would exhaust the whole of the property, (and the insertion of a residuary clause which becomes inoperative by the legatee dying in the testator's lifetime is an example of such a case (c),) the entire property in such case is

(a) Sir John Leach, *Smith v. Claxton*, 4 Mad. 492-3 ; and accordingly in that case one portion of the property was held to have descended to the heir, as land, and another portion as money ; and it went to his repre-

sentatives respectively accordingly.

(b) Vol. i. p. 566-7.

(c) *Bennet v. Batchelor*, 3 Brown, p. 30 ; *Nicholls v. Crisp*, Amb. 769. Lord Hardwicke seems to treat an imperfect residuary-

impressed with a trust (a); a surplus undisposed of can only arise by reason of the failure of some of the trusts; and so far from there being any presumption that the trustee should in that case take beneficially, the inference is plainly to the contrary (b), and by construction of law the donee is conclusively fixed with the character of trustee: no parol or extrinsic evidence can be admitted in such a case. So where the character of trustee was given expressly (c), or conclusively upon the construction (d), by the will to the person who was constituted executor, parol evidence of an intention that the executor should take the surplus beneficially was never admitted (e). In these cases evidence could not be admitted without contradicting or at least adding to the instrument, that is, giving a beneficial interest where upon the construction of law a fiduciary interest only was conferred by the instrument, which would have been contrary to one of the established rules of construction (f). But where, the instrument being silent on the subject, the law gives the beneficial undisposed of surplus to the donor or his representatives; as this is only upon a presumption that the donor did not intend to pass such beneficial interest to the donee, the general rule applies that such presumption may be rebutted by evidence of the intention of the maker (g) at the time the instrument was executed (h). Such evidence does not

clause only in the light of a presumption, *Bishop of Cloyne v. Younge*, 2 Ves. 98, but see p. 99; and see *Nourse v. Finch*, 1 Ves. J. 344, and *Mence v. Mence*, 18 Ves. 351.

(a) See *Dawson v. Clarke*, before Lord Eldon, on appeal, 18 Ves. 255; *Ellis v. Selby*, 1 My. & Cr. 297.

(b) See 18 Ves. 254, as regards an executor.

(c) See *Langham v. Sanford*, on appeal, 2 Meriv. 17; *Gladding v. Yapp*, 5 Mad. 59; that is of the entire property, not of part only, *Pratt v. Sladden*, 14 Ves. 198, Sir W. Grant.

(d) *Dean v. Dalton*, 2 Bro. 635; *Clennell v. Lewthwaite*, 2 Ves. J. 473; *White v. Evans*, 2 Ves. J. 22.

(e) Sir W. Grant, *Walton v. Walton*, 14 Ves. 322; but where the character of trustee arose only by reason of the circumstances which afforded a presumption of trust, as from a legacy being given to the executor generally, not expressly for his care and trouble (see 2 Ves. J. 22), or from expressions in the will importing, *primâ facie*, that he was to be trustee, as that he should keep proper accounts (5 Mad. 60); or from one or more of several executors being made trustees so as to raise the presumption against all (10 Ves. 77); there evidence might be given

by the executor against whom the presumption arose that he was intended to take beneficially; *Clennell v. Lewthwaite*, 2 Ves. J. 474, 649; *Langham v. Sanford*, 17 Ves. 449; *S. C.* on appeal, 2 Meriv. 14, 17, 20; *Gladding v. Yapp*, 5 Mad. 59; *Oldman v. Slater*, 3 Sim. 95. The act of 1 Will. IV. c. 40, has, for the most part, superseded all such questions for the future, but the cases are material to illustrate the principle as to the admission of parol evidence. As Mr. Hill has observed, p. 87, note; the act does not apply to cases where there is an express disposition of personal property, upon trust or otherwise, to a person who is appointed executor.

(f) *Supra*, vol. i. p. 555. The case of *Brown v. Selwyn*, *supra*, vol. i. pp. 567, 570, (*et v. Ambl.* 127) was determined by the House of Lords on a similar principle; the evidence was offered to avoid what was considered to be upon the face of the will a direct gift to another.

(g) Vol. i. p. 565; *Trimmer v. Bayne*, 7 Ves. 508; *Cook v. Hutchinson*, 1 Keen, 50, dict. of Lord Langdale, in the case of a deed: *Mallabar v. Mallabar*, Forrest. 80, and the cases cited *ibid.* in the note; and *Docksey v. Docksey*, 2 Eq. Abr. 506-7, upon a will; *Hall v. Hill*, 1 Conn. & L. 146.

(h) *Duke of Rutland v. Duchess of Rutland*,

contradict the apparent meaning of the instrument—it only gives to it an operation which but for the legal presumption the instrument itself would effect—for it is assumed that upon the face of the instrument the whole of the donor's interest has passed to the donee; the beneficial interest is taken out of him again, to the extent of the unapplied surplus, by the effect of the presumption; the evidence is applied to prevent the property being taken from him by the sole operation of this presumption. Even in the case of a devise of land for a particular purpose, it has been considered that if the implication contended for, namely, that the devisee was a trustee only, be raised for the heir on the words of the will; yet the devisee will be let in to give parol evidence of the actual intention in his favour: *à fortiori* evidence may be let in as regards a bequest of personal estate (a). It may be observed that the exclusion of one executor from taking the residue beneficially by the character of trustee being fixed upon him, *primâ facie* excluded his co-executor; but as it was on presumption only as regards him, evidence of intention in his favour might be given (b): the stat. 1 Will. IV. c. 40, requires that the intention that the executor should take beneficially should appear upon the will itself; parol evidence cannot now be admitted (c).

Where the next of kin or the residuary legatees claim a legacy by reason of its having been given for an illicit purpose, and the terms of a bequest are such that it is doubtful whether the purposes to which the legacy is devoted are illegal or not, evidence may be given, on the part of those who claim the legacy, of the surrounding circumstances, so as to place the court in the situation of the testator, and thus to be enabled to form a judgment as to the meaning of his words, and if the evidence be satisfactory to support the bequest (d). Thus, in *Giblett v. Hobson* (e), evidence of extrinsic circumstances at the time when the testator made his will was received, with a view of showing that the testator meant by the expressions in his will that the legacy should be

2 P. W. 214; 2 Ves. 99. But as regards declarations of a testator, though they must have reference to his intention at the time of making his will, they need not be contemporaneous; *Lord Alvanley, Clennell v. Lewthwaite*, 2 Ves. J. 473.

(a) *North v. Crompton*, cited in *Lord Gainsborough v. Lady Gainsborough*, 2 Vern. 252, cited also by Sir W. Grant, without disapprobation, 14 Ves. 323; *Lake v. Lake*, 1 Wils. 313; *S. C. Ambl. 126*; *Clennell v. Lewthwaite*, 2 Ves. J. 465, 644; *Pratt v. Sladden*, 14 Ves. 193, and the references

ibid. 197, note (a). The evidence of declarations of the donor in such cases, referred to in these cases, is observed upon *infra*. There is no instance of an issue being directed in such cases, at least as between the executor and next of kin, Sir W. Grant, 14 Ves. 323.

(b) *Williams v. Jones*, 10 Ves. 77; *Pratt v. Sladden*, 14 Ves. 193; *Dawson v. Clark*, 15 Ves. 416.

(c) *Love v. Gaze*, 8 Beav. 478.

(d) *V. supra*, vol. i. p. 557.

(e) 3 M. & K. 517. The evidence failed.

employed in building upon land already in mortmain, and not of having it laid out so as to bring any land into mortmain.

Evidence of Declarations of the Testator, so as to rebut a resulting trust, it has always been considered must be received with great caution: under some circumstances it would be proper to confine it to declarations made at the time; thus, if it should be proved that the testator declared at the time that he intended that the donee should take beneficially, or the converse; such a declaration ought not to be controverted, at least otherwise than as in connection with such contemporaneous declarations, by contrary declarations made prior or subsequent to the making of the instrument. But if no declaration took place on the subject at the making of the instrument, it would seem, that as regards a deed, as well as a will, subsequent declarations may, under proper caution, be admitted: there is indeed less reason for admitting subsequent declarations in the case of a will than in the case of a deed; as a testator may alter his will to give the property expressly, therefore he need make no declaration on the subject, but a deed he cannot; it is natural therefore that if the deed be not in accordance with his intentions he should so declare; besides any statement which a testator may make in regard to his will may be intended as a blind—as regards a deed no such purpose can be answered. As to declarations prior to the making of the instrument, they can have little or no effect, unless they are connected with the actual making of the instrument, or as forming part of the instructions upon which it was framed, and then they assume the character of evidence to correct the instrument on the ground of mistake (*a*).

If evidence is received on the one side, evidence may of course be produced to avoid its effect by the other (*b*).

There is an exception to the doctrine as to resulting trusts, as regards gifts for Charity, to which kind of gift the Court of Chancery, which has an original inherent jurisdiction to support devises made for charitable purposes, following the Roman law, applies different principles to those by which it is governed in gifts to individuals (*c*).

(*a*) The above observations are mainly founded on Mr. Fonblanque's note, vol. ii. 131, and the cases there referred to; *Clenell v. Lewthwaite*, 2 Ves. J. 473, *sup.* p. 245; *Trimmer v. Bayne*, 7 Ves. 508, 517, 518, and Lord Eldon's observations, *Langham v. Sanford*, 17 Ves. 443, 2 Meriv. 23.

(*b*) *Bishop of Cloyne v. Younge*, 2 Ves. 95; *Coote v. Boyd*, 2 Bro. 521; *Hall v. Hill*, 1 Conn. & L. 149.

(*c*) Lord Eldon, *Mills v. Farmer*, 1 Meriv. 94-5, 101; 1 Conn. & Laws. 69; Swinburne, part i. § 13, pp. 52-3; Domat, vol. ii. pp. 161-2; 2 Fonbl. 218, *sup.* vol. i. p. 587.

If a fund which may be properly devoted to charity, that is, without infringing upon the mortmain acts, be given to trustees, and they are directed to apply a part to some charitable purposes which are pointed out, and the intention appears to be that the rest should be applied for other charitable purposes which are not declared at all; there will be no resulting trust, but the whole of the property will be considered as devoted in substance to charity; and the Court of Chancery will apply it for charitable purposes, according to a scheme to be approved by the court: and it will be the same if no particular purposes are declared as to any part of the fund, provided the plain intent is that the donees are to be trustees for charitable purposes (a). Where there is a general indefinite purpose, not fixing itself upon any objects, the disposition is by the King, as *parens patriæ*, by sign manual; but where the execution is to be by a trustee, with general or some objects pointed out, there the court will take the administration of the trust and direct a scheme; not however interfering with the exercise of any absolute discretion that may be given to the trustee (b). It is perfectly established, that though the object of a devise be to some future establishment of a use good in itself, the intermediate rents and profits are not capable of being taken by the heir standing in the place of his ancestor, but at law they are applicable to the use, if the use is a legal one (c).

In the construction of the wills of the founders of charities, it has been held that where the testator has by his will given the whole of the then value of the lands to charitable purposes therein expressed, denoting upon his will that he knows what is the whole value of the lands; as giving the yearly value is equivalent to giving the rents and profits, and giving the rents and profits is equivalent to giving the lands themselves, the consequence must be that the increase of the rents and profits will belong to those to whom he has given the yearly value *alias* the rents and profits *alias* the lands themselves (d);

(a) *Mills v. Farmer*, on appeal, 1 Meriv. 55, 94-5-6, 100; the case, in 2 Freeman, 330, *Attorney-General v. Syderfins*, and *Moggridge v. Thackwell*, 7 Ves. 36, and the other cases there cited, which are collected and some of them stated by Mr. Hill on Trustees, p. 98; *Pieschel v. Paris*, 2 Sim. & St. 392; *Simon v. Barber*, 5 Russ. 113.

(b) *Moggridge v. Thackwell*, 7 Ves. 75, 84, 86; *Paice v. Archbishop of Canterbury*, 14 Ves. 372; see Roper on Legacies, ii. p. 1182, *supra*, vol. i. 588.

(c) *Attorney-General v. Bowyer*, 3 Ves. 725-7.

(d) Lord Eldon, *Attorney-General v. Mayor of Bristol*, 2 Jac. & W. 317, 318; the rules there stated have been the guide to all judges who have followed him; and see *Jack v. Burnett*, 12 Cl. & Finl. 826. In that case Lord Eldon came to the conclusion that the fund was given to the corporate body, subject to the charge imposed, and not as mere trustees: in *Attorney-General v. Cordwainer's Company*, 3 My. & K. 535, Sir J. Leach, and in *Attorney-General v. Smythies*, 2 Russ. & M., 717, Lord Brougham came to the same conclusion; see 12 Cl. & F. 827, and 5 My. & Cr. 83; and see *Attorney-*

so that no one in such case can claim any increase in the rents, either by way of resulting trust or by any other title as against the charity.

So if the testator shows clearly in any other way an intention to devote the whole income of a property to charitable purposes, then, although he does not in specifically directing the application of portions of it, exhaust the whole income, still the general intention that the whole shall be applied to charitable purposes will prevail; and on the other hand, although he does not make any such general declaration of devoting the whole to charity, but gives each and every portion of the whole income at the time to some charitable purposes, and by that means exhausts the whole (a); then if the income should afterwards increase, the increase will also be applicable to charitable purposes (b).

However in gifts for charity, as well as to individuals, the intent may plainly appear to be to give the property beneficially to the donee, subject only to a charge in favour of a charity; if so the construction will be according to the intent (c). Where the gift is to a Corporation, and such corporation appears to have been a material and prominent object with the author of the gift, and more especially where it is to a College or institution having duties to perform in which the public at large or a community are concerned, the intention may well be considered to be to endow such corporation or public body with the surplus if any, that is, to consider the property as given subject only to the charges (d).

It is a general rule, long established, whether well founded or not, that where the charity would lose if the fund decreased in value, it ought to gain in the event of an increase (e); and the converse of this proposition will hold as a general rule, namely, that where the corporation would lose in the event of a decrease it should have the benefit of any increase. "The result of the decisions (f)," says Lord Cottenham, "is, that generally speaking in searching for the intention of the donor, it will be assumed that he intended to confer a benefit upon the donee,

General v. Skinners' Company, 2 Russ. 435; followed in *Attorney-General v. Christ's Hospital*, 4 Beavan, 75, and *Attorney-General v. Drapers' Company*, *ibid.* 70. If certain payments to a definite amount are directed to be paid, and the surplus is actually given, expressly or by necessary implication, as surplus, or by the effect of the original gift of the property, the donees may of course take the increase or surplus beneficially, 2 Russ. 435, 438; *Attorney-General v. Coopers' Company*, 3 Beav. 35; and see 2 Beav. 511.

(a) Lord Eldon, *Attorney-General v. Mayor of Bristol*, 2 Jac. & W. 318.

(b) Lord Langdale, 3 Beavan, 34; *Attorney-*

General v. Coopers' Company. See on this subject Hill on Trustees, p. 98, *et seq.*, and Roper on Legacies, 1182, *et seq.*, where the principal cases are collected, and the distinctions pointed out.

(c) *Supra*, p. 226.

(d) *Attorney-General v. Mayor of Bristol*, 2 Jac. & W. 317, 332; and see the other cases, Lewin, p. 134, note (a), where this doctrine has been followed; *et v. Attorney-Gen. v. Fishmonger's Company*, 2 Beav. 151; 5 My. & Cr. 11.

(e) Lord Eldon, *ibid.* 318, 319.

(f) In *Jack v. Burnett*, 12 Cl. & Fin. 828.

in the enjoyment of any increase of the fund—First, should such gift be to the donee, subject to certain payments to others; 2ndly, if the gift be upon condition of making certain payments, subject to a forfeiture upon non-performance of the condition; or, 3rdly, if the donee might be a loser by the insufficiency of the fund, which indeed is consequential upon the last (a). But in a late case (b), although it was admitted that the company would be bound to perform the trust to the full extent, though there might happen to be a diminution in the income of the trust property, (excepting in the case of loss by inevitable accident or by diminution of fines,) and there was a clause of forfeiture, which generally implies that the party must have something valuable to lose (c); yet, as the transaction originated in contract establishing a trust for the charity alone, and the company who were the trustees had obtained considerable collateral advantages,—the patronage of a vicarage and the nomination of boys to the school,—Lord Langdale decided that the whole of the rents, whether more or less, ought to be applied for the purposes of charity.

(a) In the case above referred to, Lord Cottenham considered that all the rules concurred, and though it was a Scotch case, as there were no decisions on the subject in the Scotch courts, the Lord Chancellor applied the above rule to the case before the House of Lords, pp. 826, 830; v. *supra*, p. 15.

(b) *Attorney-General v. The Merchant*

Venturers' Company, 5 Beav. 338: see pp. 356 to 358.

(c) *Attorney-General v. Cordwainers' Company*, 3 My. & K. 534; *Attorney-General v. Coopers' Company*, 3 Beav. 29. My friend, Mr. Blunt, has been kind enough to furnish me with several of these authorities.

ADDITIONAL NOTE, I.—*Supra*, p. 224.

Where there is a gift, and then a direction as to the manner in which the legacy is to be invested and applied for the benefit of the legatee; not a diminution or qualification of the original gift, but merely a direction as to the mode in which it is to be dealt with and enjoyed in a certain event; this will not destroy or impair the gift; *Whittle v. Dudin*, 2 J. & W. 279; *Mayer v. Townsend*, 3 Beav. 443; *Campbell v. Brownrigg*, on appeal, 1 Phillips, 304; *Hulme v. Hulme*, 9 Sim. 644: but where the subsequent directions amount to a diminution of the original gift (the clause, 2 Phillips, 107, affords an instance), whatever interest is not exhausted by the gift as so diminished remains the property of the testator, and will go to his next of kin or residuary legatees; *Gompertz v. Gompertz*, on appeal, 2 Phillips, 109. All the cases on this subject, including, besides the above, *Harvey v. McLaughlin*, 1 Price, 264; *Arnold v. Congreve*, 1 R. & M. 209; *Carver v. Bowles*, 2 R. & M. 301; *Kampf v. Jones*, 2 Keen, 756; *Green v. Harvey*, 1 Hare, 428; *Winkworth v. Winkworth*, 8 Beav. 576; *Eaton v. Barker*, 2 Coll. 124; and *Billing v. Billing*, 5 Sim. 232; were examined by Lord Langdale, in the late case of *Scawin v. Watson*, 1 Beavan, 202. Lord Langdale sums up the result thus:—"In this case, as in all others of the same description, the ques-

tion is whether, having regard to the general purport and effect of the will, the words import an absolute gift modified only by certain restrictions, so that the first absolute gift may have its full effect in every event to which the restrictions are inapplicable; or whether the effect is to give a restricted or limited interest only, so as not to be affected or enlarged by any failure of the subsequent limitation: that is the question." Lord Langdale held, in the principal case, that it was not an absolute gift, but restricted and limited: the decision of Lord Langdale was affirmed by Lord Cottenham, *ib.* 203.

ADDITIONAL NOTE, II.—*Supra*, pp. 235, 238, 242.

A direction by a testator that his debts shall be paid out of his personal estate may be controlled by the context, so as to make a mixed fund created by the same will liable for the debts, where the testator has, in a subsequent part of his will, referred to such mixed fund as his common personal estate; *Hopkinson v. Ellis*, 10 Beav. 174, 176. The Master of the Rolls said he should be willing to hear any case which there might be on this point, if he had any doubt upon it, which he had not; the Counsel (Mr. Kindersley) did not desire that the judgment should be reserved. But it was held that such a direction did not operate as a conversion out and out of the real into personal estate, so as to prevent the heir-at-law from taking so much of the proceeds of the real estate as would have been applied for the payment of certain charity legacies, which failed under the operation of the Mortmain Act, as it is called; the conversion was only for the purposes of the will, *ibid.* 175. The charity legacies were ordered to be paid *pro rata*, adopting the form of decree in the *Attorney-General v. Winchelsea*, Seton on Decrees, 130, and 3 Bro. 373. "So far as the residue consists of pure personalty," added his lordship, "the executors are to apply it to charitable purposes, according to their discretion; and they are at liberty, if they think fit, to apply it to making good the charity legacies given by the testator to the extent to which they have failed by the application of the Mortmain Act: that, I think, is the best way to do it."

SECT. IV.—*Trust Estates and Interests arising from the Maxim that “What ought to be done is considered as done.”—Conversion of Real Estate into Personal, and of Personal Estate into Real, and some Incidental Doctrines.*

GENERAL RULE—*What ought to be done considered as done.*

Kettleby v. Atwood.

Consequence of this Maxim—the Person in whom the Property is vested, is Trustee for the Purposes to which it is devoted.

Land turned into Money, Money into Land.

The Conversion must be definitely fixed.

Option given.

Direction to sell with all convenient Speed.

Event may determine whether the Rule is to be applied.

Where Intent was to rely on Personal Covenant.

Principle carried out in all its Consequences unless controlled.

Not in favour of mere Stranger, as the Crown, or Lord, by way of Escheat.

Burgess v. Wheate, before Lord Northington, Lord Mansfield, and Sir Thomas Clarke.

WHO ARE ENTITLED TO CARRY OUT THE PRINCIPLE.

I.—*Where the Question arises upon a Devise by Will.*

Rights of Heir, and of Next of Kin and Personal Representatives.

II.—*Where the Question arises upon Contract.*

1st. *Where the Contract affects some existing Property, Real or Personal, which belongs to one of the Parties.*

Heir entitled where Real Qualities are impressed on the Fund.

Personal Representative or Next of Kin.

Wheldale v. Partridge.

Lingen v. Sowray.

Chaplin v. Horner.

Stead v. Newdigate.

Qualification of the Rule as to Conversion.

Where the same Person is Obligor and Obligee.

1. *Where the Money is at Home.*

2. *Where the Property is outstanding.*

Election.

2nd. *Where the Contract does not affect any specific Property.*

Lechmere v. Lord Carlisle.

3rd. *As to Stipulations in favour of Strangers to the Contract, as Brothers or other Relatives—When and as against whom such Stipulations can be enforced.*

If Two Persons enter into an Agreement for the Benefit of a Third Person each may enforce it.

Davenport v. Bishop.

The Stranger stands in a Different Situation.

Doctrine of Common Law as to Deeds.

Deed made between Parties.

Stranger cannot enforce it.

Either may release the other.

Doctrine of Common Law as regards Agreements on which Equitable Action of Assumpsit may be brought.

Strangers have in some Cases been permitted to enforce such Agreements, when it was part of the Consideration that the Stranger being a Relation, Child for instance, should have a Benefit.

Indeed a Child appears not to have been considered in such Case as a Stranger.

Dutton v. Poole.

Physician's Case.

Where Stranger has performed the meritorious Act.

Sprat v. Agar.

Where Favour to the Third Person does not appear to have been the Motive, he is considered as a mere Stranger.

Crow v. Rogers.

Bourne v. Mann.

Buller, Justice's, Opinion.

Marchington v. Vernon.

Lord Mansfield's.

Lord Eldon's.

Ex parte Williams.

Ex parte Williams, distinguishable from the Cases cited.

Also Phillips v. Bateman, 16 East.

Where Promise made to the Stranger, he may sue.

Old Rule of the Court of Chancery followed the Law.

And the General Law is the same at this Day.

Colyear v. Lord Mulgrave.

Gibbs v. Glammiss.

So that each may abandon the Contract.

But if the Condition of Life of the Stranger has been altered by reason of the Promise, he may enforce it.

Hill v. Gomme.

A Distinction has been taken where a Person who has contributed any Valuable Consideration has stipulated for some Benefit for a near Relation, and the Arrangement was a reasonable one.

Edwards v. Countess of Warwick.

Osgood v. Strode.

Vernon v. Vernon.

Stephens v. Freeman.

But Lord Hardwicke would not carry such a Contract into Execution, if the Heir would be Disinherited.

Goring v. Nash.

It is assumed in all these Cases that the Parties have not released one another, and that the Person claiming seeks to stand in the Place of the Covenantee or Party who exacted the Stipulation.

Lord Northington's Opinion that the Covenant might be enforced against the Heir of the Covenantor—on the ground of Intention.

Hale v. Lambe.

Modern Doctrine that a Volunteer cannot compel the Performance of a Covenant in his favour.

Jefferys v. Jefferys, 1 Cr. & Phillips, overruling Ellis v. Nimmo.

Does not controvert the Decisions establishing that a Third Person may enforce a Stipulation exacted in his favour.

Sutton v. Chetwynd, a Case of a mere Stranger for whom no one could have been interested to exact the Covenant.

Where the Money has been deposited, or the Estate conveyed to Trustees, it is a stronger Case for the Collateral.

Instances where a Third Person has been permitted to treat the Party exacting a Stipulation as his Trustee.

Gregory v. Williams.

Hook v. Kinnear.

Where there are a Series' of Limitations, some of which are in favour of Strangers, if any Party seeks to have the Agreement carried into effect it must be performed in toto.

Davenport v. Bishop.

III.—*Of the Rights of Purchasers, for Valuable Consideration, without Notice, as against Voluntary Conveyances and Limitations, under the operation of the Stat. 27 Eliz. c. 4, and of the Rights of Creditors under the Stat. 13 Eliz. c. 5, in connection with this subject.*

ANOTHER and a very important kind of trust which arises by operation of law, and which very frequently arises upon marriage articles and settlements, is that which results from the maxim that "What ought to be done is to be considered as done," which maxim has indeed been already adverted to in some of its bearings. This maxim, where any specific property is the subject of its application, gives rise to equitable interests in such property analogous to those which arise upon express trusts; the interests of the parties in the property is secured to them by the court enforcing this rule, as the execution of a trust, against all persons having any legal estate or interest which might interfere with the appropriation of the property to the purposes to which, by the operation of this maxim, such property is applicable (a).

It may be taken then as a general rule that what *ought* to be done is

(a) See *Matson v. Swift*, 8 Beavan, 375; and *Legard v. Hodges*, *infra*.

to be considered as done (a), and it is the deed or instrument that must determine the question in whatever state the property itself may be found, unless it gets into the hands of a party who would have it either way (b), and, generally speaking, the conversion is to be allowed in all its consequences (c); but these rules, with their qualifications, will be more particularly adverted to hereafter.

This rule applies wherever there is an obligation, whether that obligation arises under a devise imposing the obligation, or whether it arises from a contract entered into by the party; but in the latter case, it need hardly be added, a contract according to the rules of law must exist (d). A covenant to settle or charge or dispose of or affect property hereafter to be acquired, is a good and available covenant, and it will operate in equity upon the property so afterwards acquired (e). If there be an option in the party as to how the contract is to be completed, the court will not permit him under the pretence of exercising his option to evade the performance of his contract (f), nor can a person by payment of the penalty imposed on a breach of his contract evade its performance (g), and although the condition of a bond to do an act may be saved, so that no recovery could be had at law, yet the contract, if complete, will be decreed in the Court of Chancery (h). There is some difference in the application

(a) *Kettleby v. Atwood*, 1 Vern. 471, stated *infra*; *Lechmere v. Lechmere*, Forrest. 90; *Guidot v. Guidot*, 3 Atk. 256; Mr. Sanders has collected and arranged the cases in his note to this case: *Trafford v. Boehm*, 3 Atk. p. 446; *Burgess v. Wheate*, 1 Eden, 186; *Wheldale v. Partridge*, 8 Vesey, 227; *Thornton v. Hawley*, 10 Ves. 138; *Kirkman v. Miles*, 13 Ves. 338; *Buckmaster v. Harrop*, 13 Ves. 472. Lord Thurlow in *Pulteney v. Lord Darlington*, 1 Bro. 236, calls this "a cant expression;" and he refers it to the case of *Kettleby v. Atwood* above cited, adding, "either that idea should have been fully carried out or abandoned." In the case before Lord Thurlow, as will be noticed hereafter, one of the exceptions to the rule was established, there are others which will be presently adverted to.

(b) *Thornton v. Hawley*, 10 Ves. 136-9, a case of a settlement; *Kirkman v. Mills*, 13 Ves. 338, case of a will.

(c) Lord Hardwicke, *Earl of Buckingham v. Drury*, in the House of Lords, 2 Eden, 65; *S. C.* 3 Bro. P. C. 492; see 1 Russ. & M. 371. Lord Hardwicke added, especially if the condition of the parties is changed. The case itself related to an equitable jointure settled on an infant, which was established as a good bar to her dower.

(d) *Buckmaster v. Harrop*, 13 Ves. 472; a case arising on a contract for sale.

(e) *Metcalfe v. Abp. of York*, 1 My. & Cr. 547, 556; *Lyde v. Mynn*, 1 My. & K. 683; *Wellesley v. Wellesley*, 4 My. & Cr. 561; *Lewis v. Maddocks*, 17 Ves. 48; *Tooke v. Hastings*, 2 Vern. 97; see *Douglas v. Congreve*, 1 Keen, 423, 561, as to what property of the wife will be subject to such a covenant on the part of the husband.

(f) *Wellesley v. Wellesley*, *ubi infra*; *Deacon v. Smith*, 3 Atk. 323; and see *Wood v. Percy*, 5 Vin. Ab. 547, pl. 36.

(g) A person intending to devise his copyhold estate to his sister's son, and finding a surrender not then practicable, prevailed on his sister, who was his heir, to give a bond in a penalty to surrender at her son's request, on a payment of 200*l.* It was held that the sister was a trustee for her son, and a surrender by her was decreed on payment of the 200*l.*; *Parks v. Wilson*, 10 Mod. 515; *Howard v. Hopkins*, 2 Atk. 371.

(h) As where the condition of a bond was to settle land situate within a certain manor by a given day, and the obligor died before the day, *Holtham v. Ryland*, Nels. Chan. Rep. 205; and an agreement may, as will be more fully noticed under the head of "Specific Performance," be decreed to be specifically

of the maxim above alluded to in the case of an obligation imposed by a will and one by contract, as will presently be seen; where the obligation arises on contract, the party seeking to enforce it must show that there was a consideration, of which he may take advantage; and that the parties by the terms of the contract have given to him the right which he seeks to enforce (*a*): as regards devisees and legatees, though they are all volunteers, yet, as has been frequently observed, they have no occasion to shew more than that such was the will of their testator (*b*).

The doctrine above alluded to was first completely established by Lord C. Jefferys, in the case of *Kettleby v. Atwood*. In that case, which is still a leading case, it was agreed, by marriage articles, that the wife's portion, 1500*l.*, and 500*l.* to be added by the husband, should be deposited in the hands of trustees till a convenient purchase could be found for investing it in land; the land, when purchased, was to be settled to the use of the husband and wife for their lives, remainder to the first and other sons of their two bodies in tail, remainder to their daughters in tail, with the ultimate remainder to the right heirs of the husband, who, as regards the 1500*l.*, it will be observed, could only claim under the contract. There was this special circumstance, that in the articles there was a proviso, that in case the husband should die without issue the wife might make her election whether she would have the trust property as land or money, and she had six months to make her election. The husband died before any purchase was made, leaving the wife enceinte of a daughter born soon after the husband's death, but who lived but a month; the wife was administratrix to her husband and to her child. The plaintiff, who was the brother and heir-at-law of the husband, filed the bill to have the 1500*l.* and 500*l.* settled according to the articles. On the original hearing, Lord Keeper North said that if a bill had been brought in the lifetime of the infant to have the money laid out he would have decreed it, it being safer for the infant to have land than money, but he saw no equity for the heir against the administratrix; he therefore thought that the property must be left as it was, and accordingly dismissed the bill; but Lord Chancellor Jefferys reversed

performed, though relating to personal estate as stock in the funds, *Gardner v. Pullen*, 2 Vern. 394; *Colt v. Netherville*, 2 P. W. 304, q. v.; or to purchase an annuity, *Annandale v. Harris*, 2 P. W. 433, *affir.* in Dom. Proc. 3 Bro. P. C. 445.

(*a*) As in the case of *Vernon v. Vernon*, 2 P. W. 594, stated *infra*; that was the case of

a stranger to the contract (a brother); but, as will be seen in most of the cases, the heir of one of the contracting parties has usually been the claimant.

(*b*) See *Lechmere v. Lechmere*, Forrest. 90, and 2 Fonbl. book ii. c. viii. § 2 and 3, and the cases in the notes.

this decision and decreed for the heir, following the case of *Lawrence v. Beverley* (a), and the case of *Whittech v. Jermin*, previously decided by himself, on the ground that the money was *bound by the articles*. It was insisted that under the proviso, (which was material as shewing that it was intended that in a certain event which had not happened the money should not be absolutely bound,) the wife had her election to take it as money or land, but as the husband had not died without issue, it was considered that the right of election on her part did not arise (b).

It is a consequence of this maxim that as a general rule the person in whom the property is or becomes vested, with the exception of a *bonâ fide* purchaser without notice, becomes a trustee of that property for the purpose to which it is devoted; I take this maxim, said Lord Thurlow, to be universal, that wherever persons agree concerning any particular subject, in a court of equity, as against the party himself and any claiming under him voluntarily or with notice, it raises a trust (c). The same principle applies to a devise; and as regards a contract, for the present purpose, it makes no difference whether the property be transferred to trustees, in order to their completing the purpose agreed upon, or covenanted to be transferred to them with that object: a covenant to convey is in equity equivalent to a conveyance (d).

Generally speaking, therefore, money directed to be employed in the purchase of land and land directed to be sold and turned into money, are to be considered, "by the transmutation of a court of equity," to use Lord Hardwicke's expression (e), as that species of property into which they are directed to be converted (f), and this in whatever manner the direction is given, whether by will, or by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited or only covenanted to be paid; whether the land is actually conveyed or only agreed to be conveyed (g): the owner of the fund, or the contracting parties, may make land money or money land (h).

(a) 2 Keb. 841.

(b) *Kettleby v. Atwoc*, 1 Vern. 298; on rehearing, *ibid.* 471.

(c) *Legard v. Hodges*, 1 Ves. J. 478; 4 Bro. 421, on rehearing.

(d) Sir W. Grant, *Stead v. Newdigate*, 2 Meriv. 530.

(e) *Guidot v. Guidot*, 3 Atk. 256.

(f) *Doughty v. Bull*, 2 P. W. 323; *Best v. Stamford*, 1 Salk. 154; *Attorney-Gen. v. Johnston*, Ambl. 580; *Williams v. Coade*, 10 Ves. 500; *Gibbs v. Ougier*, 12 Ves. 415; *Berry v. Usher*, 11 Ves. 87; *Robinson v. Taylor*, 2 Bro. 589; *S. C.* 1 Ves. J. 44.

(g) See Mr. Hargrave's argument in *Pulteney v. Darlington*, 1 Bro. pp. 226-7; *Stead v. Newdigate*, 2 Meriv. 530-1; and see *Oldham v. Hughes*, 2 Atk. 452; *Edwards v. Warwick*, and *Lechmere v. Lord Carlisle*, *ubi infra*; and *Ward v. Arch*, x. Jur. 978.

(h) Dict. *Fletcher v. Ashburner*, 1 Bro. 499; cited by Lord Alvanley, *Wheldale v. Partridge*, 5 Ves. 396, though his decision was against the application of the principle in that particular case; Dict. of Lord Redesdale, *Tregonwell v. Sydenham*, 3 Dow. 207; but this dictum, as Lord Cottenham observed in

This principle has been applied even in favour of a wife living in adultery, suing to have the specific performance of a covenant on the part of the husband to secure to her a jointure (a).

It is a necessary circumstance, in order to bring the rule into operation, that where it is by contract, the deed or other instrument, and where it is by will, the will, should decisively and definitively fix upon the money the quality of real estate, and upon the land the quality of personal estate (b): where the directions for the conversion are not explicit the court will not interfere (c).

When, therefore, money is directed to be laid out by trustees, and an option is given to them to purchase freeholds or leaseholds for long terms of years, with the moneys to be invested, and no investment has been made, the money will not be considered to all intents as real estate (d); and to this extent therefore, contrary to the general rule, the interests of the parties concerned, or of their representatives, as between themselves, may be affected by the conduct of the trustees in acting or declining to act in making the conversion. Where the words directing the investment in land are followed by the words "or some other security," these words may, on the context, be construed to refer to an interim investment in money; but that construction is not lightly to be resorted to (e). If upon the whole context the conversion from money into land, or land into money, is clearly made to depend on a Request to be made by the parties interested, or any of them, and no request is made, the property will retain its actual character—will remain as it is (f): but a simple direction to convert *after request* does not of itself imply that it is to be done without request; where the limitations are strictly applicable to real estate, that direction may be inserted to put the trustees in default if after the request the conversion is not effected (g). If in the case of a

Cogan v. Stevens, (1835,) Lewin, Append. vii. cannot be sustained without some qualification.

(a) *Sydney v. Sydney*, 3 P. W. 269; approved *Seagrave v. Seagrave*, 13 Ves. 443; *Buchanan v. Buchanan*, 1 Ball & B. 206; and see the cases cited in the note, *Haworth v. Bostock*, 4 Y. & Coll. 6.

(b) Lord Rosslyn, *Walker v. Denne*, 2 Ves. J. 170; *Wheldale v. Partridge*, 5 Ves. 396-7; S. C. affirmed by Lord Eldon on Appeal, 8 Ves. 234; and see *Stead v. Newdigate*, 2 Mer. 521, 530; and *Biddulph v. Biddulph*, 12 Ves. 161.

(c) *Curling v. May*, cited in *Guidot v. Guidot*, 3 Atk. 363; *Cowley v. Hartstonge*,

stated *infra*, 1 Dow, 378-80; *et v.* 12 Cl. & Fin. 145, 146.

(d) *Walker v. Denne*, 2 Ves. J. 170; *Swann v. Fonnereau*, 3 Ves. 50; *Wheldale v. Partridge*, 5 Ves. 388; 8 Ves. 227; *Van v. Barnett*, 19 Ves. 102.

(e) See *Earlom v. Saunders*, 1 Ambl. 241; (12 Cl. & Fin. 141-2, 145, 149;) and *Cookson v. Reay*, and *Hereford v. Ravenhill*, *ubi inf.* The use of the words "remainder" and "heirs" is by no means conclusive that the conversion is to be in all events into land, Lord Campb. 12 Cl. & Fin. 149.

(f) See *Stead v. Newdigate*, 2 Meriv. 530; and the case in the next note.

(g) See *Thornton v. Hawley*, 10 Ves. 133,

direction for conversion into real estate the limitations are such as are exclusively applicable to real estate and cannot be effected if the fund be left as money or be invested in leaseholds, any option that may be given will be put aside in order to effect the plain and paramount intention (a).

Lord Eldon observed, that notwithstanding the general doctrine there may be, in a particular case, enough appearing upon the instrument to show that the parties did not mean that the money should be impressed with real qualities and clothed with real uses immediately upon the execution; but either that, or that it should remain personalty in an event to which they looked in case the purchase was not actually made; for instance, when the money is to be laid out in land in some particular situation. The inference in such case is less strong where it is to be laid out in a County than in a Parish: but suppose it was to be laid out in a parish as soon as conveniently should be, and the parties showed upon the face of the instrument that they adverted to the difficulty of procuring lands in that parish for a long period, and dealt with the property as money until that difficulty should be removed, and that in the interval they looked to some events in which the principal (b) was to be paid over; the intention must be taken to be that the instrument should not immediately upon the execution impress the property with real qualities, and clothe it with real uses (c).

Where there is a Power to lay out money in real estate under some particular circumstances, but the original intention was, that it should be considered as money if it were not actually invested in land, it shall not be considered as land and go to the heir, unless it be actually invested (d). If in such cases, or in any case where the conversion into realty is to be by the act of the trustee and at his discretion, and the trustee has made no election, the court will act upon the fund in the state in which it finds it, and will not direct it to be laid out unless it can see a clear, manifest, definitive intention for that purpose (e):

135; the direction was, that after request of the husband and wife, the money should be laid out in land, with power for the husband to jointure.

(a) See *Thornton v. Hawley*, 10 Ves. 133, 135, 136-7; *Earlom v. Saunders and Cowley v. Hartstonge*, *ubi supra*; *Cookson v. Reay*, 5 Beav. 30; *Hereford v. Ravenhill*, *ibid.* 51.

(b) Not the interest merely, as to which see 8 Ves. 238-9.

(c) Lord Eldon, *Wheldale v. Partridge*, 8 Ves. 236. Lord Eldon referred to a note of his own of such a case; and see *ibid.* 239-40.

(d) *Stamper v. Millar*, 3 Atk. 212. Lord Hardwicke said "shall or may," though imperative in an act of parliament, are not so in cases of this description; here they only give an option, *ibid.*; the heir-at-law, said his lordship in that case, is not at all in the consideration of the settlement; a circumstance which is always to be attended to.

(e) Lord Alvanley, *Swann v. Fonnereau*, 3 Ves. 50; the trust was to lay out the trust fund on freehold lands, or leasehold estates for lives. Lord Alvanley held that the conversion into realty was not imperative; he com-

but as regards money, if it can be collected from the deed or will that the ultimate object of the parties was conversion, and that its being in the shape in which it is found is only temporary, then it will be considered as real estate (a).

If a testator clearly manifests his intention on the face of the will that his trustees shall have an absolute Discretion as to the conversion of money into land, or the converse, the court, in conformity with the rule before alluded to (b), will not control the exercise of that discretion, if the words are so express and clear that the design to give an absolute uncontrolled discretion to the trustees cannot be misunderstood; but where the trustees do not act, the court is not precluded from looking at the object the testator had in view, in order to ascertain with more exactness the meaning of his expressions if otherwise at all doubtful; where it is evident that the testator intended that the money should sometime or other be invested in land, but giving the trustees a discretion, this discretion must be understood in reference to the testator's main intention (c). In the case of *Cowley v. Hartstonge* (d), which called forth the above remarks from Lord Eldon, the testator had given his real and personal estate, and subjected it to various limitations, giving a discretion to his trustees as to laying out the personal estate, but his evident meaning was that the real and personal estates should go to the same persons; the limitations were not at all applicable to personal estate (e), the trustees had not exercised their discretion. Lord Eldon put the case of the nephew, one of the devisees, being in a condition to say, that having had a son born, though he had died the hour after his birth, as the trustees had not before exercised their discretion, the money should be considered as the property of the son, who would necessarily have died intestate: Lord Eldon held that the trustees might, in such case, in the exercise of their discretion, determine that the money should be invested in land, and should be considered as such, in order that it might go according to the limitations of the will; and the very occurrence of such a circumstance as that above referred to might, it was said, be a good reason for their interposition; and the House of Lords, on Lord Eldon's advice in this case, confirming the decree of the Lord Chan-

pared it to the case where trustees have an option to lay out money in a way that would be void by the Mortmain Act, and in a manner that would not be void, *ibid.* p. 50; *Curtis v. Hutton*, 14 Ves. 537; *Davies v. Goodheir*, 6 Sim. 585; *Polley v. Seymour*, 2 Y. & Coll. 708.

(a) *Swann v. Fonnereau*, 3 Ves. 49.

(b) *Supra*, pp. 85-6-7; and see *Polley v. Seymour*, 2 Y. & Coll. 721.

(c) Lord Eldon, *Cowley v. Hartstonge*, 1 Dow, 379-80.

(d) Dom. Proc. 1 Dow, 378.

(e) *Ibid.* p. 381.

cellor of Ireland, held that an *ex post facto* exercise of an absolute discretion ought to be supported, it appearing to be in accordance with the general scheme of the will that such a discretion should be exercised: in the case itself, it was held that the discretion had devolved on the court (a). But it is to be observed that the court will never admit trustees to have such an election as to change the property, unless it be expressly given to them (b). Where no option is given, whether the trustees act or neglect or refuse to act, according to the general rule in such cases, the rights of the parties will not be affected. "If the trustees," said Lord Macclesfield, "by delaying the purchase, might alter the right, and give it to the executors, by leaving the fund as money; this would be to make it the will of the trustee and not the will of the testator, which would be very unreasonable and inconvenient (c), and the trustees would become judges whether and how men should be bound by their covenants" (d). A direction to sell with all convenient speed after a particular event will not keep in suspense the character in which the property is to be taken; such a direction is *primâ facie* a direction for an immediate sale after the event (e).

It is not absolutely necessary that the conversion of personalty into realty be effected within the Time specified, as the Court of Chancery will dispense with that circumstance where a conversion appears to be the ultimate object (f): the same principle will apply to a direction for the conversion of land into money. And where the intention in marriage articles is plain, that a conversion should be made, but Consents of the parties interested to the actual purchase cannot be obtained as required by the instrument, by reason of their deaths or for some other cause, if any convenient purchase could have been obtained, the court will take upon itself to judge whether such consents ought to have been given, and the conversion being the paramount object, it will be considered as made; else the parties to consent would have the option of determining whether the property should be real or personal, which, unless it be clearly given to them, will not be permitted (g). An equitable conversion of land into money or of

(a) The case was decided on its own peculiar circumstances and the language of the testator in his will, 1 Dow, 379.

(b) Lord Hardwicke, *Earlom v. Saunders*, 1 Amb. 241; *Selby v. Alston*, 3 Ves. 341.

(c) Lord Macclesfield, *Scudamore v. Scudamore*, Pr. Ch. 543 (1720), cited and approved 1 Bro. 501.

(d) Lord Talbot, *Lechmere v. Carlisle*, 2 Forrest. 83.

(e) Sir J. Leach, *Fitzgerald v. Jervoise*, 5

Mad. 29; but see, as regards tenant for life, *Sparling v. Parkes*, x. Jur. 448, M.R.

(f) *Kentish v. Newman*, 2 P. W. 236.

(g) *Per Hutchins*, Lord Comm., *Symons v. Rutter*, 2 Vern. 228, whose opinion, though against that of the other two Lords Commissioners, has been approved by subsequent judges; *Lechmere v. Lord Carlisle*, 3 P. W. 220, Sir J. Jekyl, affirmed by Lord Talbot, Forrest. 80; *Scudamore v. Scudamore*, Prec. Ch. 543; *Wrighton v. Macaulay*, 4 Hare, 497.

money into land takes place by force of the direction, notwithstanding the conversion or investment is directed to be made with the *approbation* of certain parties (a); and legatees of legacies out of a property directed to be converted with the consent of the tenant for life in writing, are entitled to their legacies whether the property be converted or not; and the residuary legatees of the proceeds are entitled, subject to the legacies, to the estate itself, if not converted (b): there is an implied or constructive trust in their favour; though, of course, as before mentioned, a previous request *may* be made a necessary preliminary (c). Real estate *charged* with debts remains real estate till actually converted (d).

It is a general rule that if all the purposes with a view to which the parties have contracted that a particular act shall be done are at an end, persons who were not in the contemplation of the parties in making the contract cannot call for its completion merely that they, collaterally, may obtain an advantage by it (e). So if in the case of a will it should appear that the conversion of real estate into personal or personal into real was only intended to be made for the purposes of convenience, and in the events it is not necessary that a conversion should take place, as where there is a direction for sale, with a view to divide the proceeds amongst the children of a person, and it should turn out that there is only one child to take, then, the reason failing, the property will not be considered as converted as between the real

(a) *Wrightson v. Macaulay*, 4 Hare, 487; and see *Shedden v. Goodrich*, 8 Ves. 481.

(b) *Waddington v. Yates*, 15 Law J. 223, Vice-Chancellor K. Bruce.

(c) *V. sup.* p. 257.

(d) *Bourne v. Bourne*, 3 Hare, 35, 38.

(e) The case of *Godsall v. Webb*, 2 Keen, 121, may be taken as an illustration of the general rule. One of the clauses of a marriage settlement was that the trustees should, out of the trust funds, effect and keep up an insurance on the life of the intended wife, and on her death the money insured was to be laid out by the trustees and they were to pay the interest to the husband for life, *if he should survive*, and after his death to such persons as the wife should by will appoint; in default of appointment to the persons entitled under the Statute of Distributions. The policy was effected, but the husband having died the surviving trustee of the settlement and the wife assigned over the policy to the plaintiff, a relation, on condition of his paying the future premiums. On her death her next of kin claimed the amount received on the policy on the effect of the ex-

press words in their favour. The Master of the Rolls construed the settlement as being an agreement between husband and wife only, for his benefit, (pp. 120, 121,) that the next of kin (being mere volunteers) could not have compelled *the wife* or the trustees to keep up the insurance for their benefit, indeed that she might have prohibited the trustee from applying the funds for that purpose, (p. 122,) and that the plaintiff was entitled under the assignment; but he intimated that if the wife had chosen to keep up the policy the next of kin would have been entitled (p. 121), it would have been an intimation of an intention that they should have it.

The Master of the Rolls distinguished this case from *Anderson v. Dawson*, 15 Ves. 537, where it was held the wife had only a life interest, with a power of disposition only by will, (see Sugd. Powers, ii. 237-8); there the fund was actually realized and in the hands of the trustees bound by the trust; here the next of kin would have had to compel the trustee, that is the wife, to *create the fund* by keeping up the policy.

and personal representatives (*a*); in such cases therefore the event may determine whether the rule is to be applied. But if the contract or direction for conversion of an existing fund is absolute and unrestricted (*b*), if any event shall have happened on which the conversion ought to have taken place, as if a child be born, though it live but for an hour (*c*); and, what is stronger, if in the case of marriage articles the marriage take place, and the obligation to invest has in the terms of the articles become absolute, so that one of the parties has a right to insist upon the conversion as against the other (*d*), the property, the subject of the covenant or direction, is bound, though it may be only for the benefit of some collateral heir as regards personal estate, or the personal representative as regards real estate, though neither of them could have been personally or *specifically* the object of consideration. Thus, where by marriage articles it is stipulated that money shall be laid out in land, to be settled on the husband and wife, and their issue, with remainder to the *heirs of the wife*, if the marriage take place, the money must be laid out or considered as laid out, though the wife die without issue in the lifetime of the husband (*e*).

(*a*) See *Crabtree v. Bramble*, 3 Atk. 687. However, in that case the child had done acts to shew that she desired that the property should remain as land, and she was clearly entitled to elect; and see the cases cited in Mr. Raithby's note, p. 680. In *Abbott v. Lee*, 2 Vern. 284, a testator gave to his two daughters 550*l.* a-piece, which he directed to be laid out in lands, at the discretion of his executors, one year after his death, to the use of the two daughters, and in case of the death of either before marriage, 150*l.*, part of the portion of the one so dying, or, if the 1100*l.* should have been laid out, so much of the land as should be of the value of 150*l.* should go to the surviving sister, the rest to go to the two sons and their *heirs*. Jane, one of the daughters, died unmarried, leaving Mary, the other, surviving, who married but died without issue; both the sons died without issue. The court decreed that the personal representative of Mary took both the sums of 550*l.* and 150*l.* against the claim of the heir of the testator, who was also the heir of his four children. This case appears to have proceeded on the principle that there was *not an absolute conversion*, but as it was left to the discretion of the executors (see Lewin, 717,) the fund must be taken as it was found. It may have partly turned on the words "or 150*l.* part of the portion," &c., which contemplated that so much might go over *as money*, out of the *whole fund as money*; besides the original gift was of so much money; *et v. sup.* p. 243.

(*b*) See *Stead v. Newdigate*, 2 Mer. 530-1, a case as to conversion of money into land.

(*c*) *Kettleby v. Atwood*, on re-hearing, 1 Vernon, 471; *Edwards v. Countess of Warwick*, 2 P. W. 171, 3 P. W. 221, *inf.* p. 282, and the cases cited below, and in *Pulteney v. Darlington*, 1 Bro. 227.

(*d*) See *Stead v. Newdigate, sup.*, and the cases cited below.

(*e*) *Lancy v. Fairechild*, 2 Vern. 102; the money indeed had been the wife's, though on principle it would have made no difference if it had been the husband's; a wife has a clear right to exact a stipulation in favour of her heir. *Knights v. Atkyns*, 2 Vern. 20, stated *infra*, is a stronger case, for the limitation to the heirs of the husband had to be implied. In *Lechmere v. Lord Carlisle*, 3 P. W. 211, 217; *S. C.* Forrest, 80, on appeal, also stated *infra*, the claimant was a collateral heir; there was no specific purpose to answer by enforcing the covenant, excepting that Lady Lechmere was entitled to a jointure out of the lands. In *Chaplin v. Horner*, 1 P. W. 483, the husband stipulated by marriage articles to lay out a sum of money then in the hands of trustees in the purchase of lands to be settled on himself and *his heirs*; the marriage took effect, the father received 1300*l.* part of the 2000*l.*, and applied it to his own use, which it was admitted he had a right to do; it was decreed that the remaining 650*l.* was converted into land, and that the heir, an only daughter, was entitled to it; (and see the opinion of Lord

Lord Rosslyn indeed appears to have doubted the right of the heir, merely as such, the particular objects being gone, to have a conversion, in order to give him the money, his lordship conceiving that there was no equity, as between the real and personal representatives, to induce the court to interfere (a); but this doubt of Lord Rosslyn seems, on reference to the cases cited in the preceding notes, to have been without foundation, and it was so considered by Lord Eldon and Sir Wm. Grant, who were both of opinion that when money is impressed by the instrument with the real uses, as land, one of those uses being for the benefit of the heir, it will remain for his benefit, no act being done to alter its character (b): this subject will be again considered in treating of who may call the court into activity to enforce a conversion.

In the case of a contract, if upon the context it appears that the intent was to rely upon the personal covenant, the Court of Chancery will not apply the maxim. Thus, where by a settlement a person was made tenant in tail with remainder to his issue, and by the same instrument he contracted not to suffer a recovery, the object being that the descent of the estate to the issue might not be barred, and he did suffer a recovery, an attempt was made to have that agreement considered as a covenant binding in equity upon the subject-matter of the agreement; but Lord Cowper was of opinion that it was plain, as the entail was created by the same deed which contained the covenant, it was the intention of the parties to rely upon the security of that covenant, and that the court ought not to vary the security which the other side had agreed to accept, for that would be going beyond if not against the intent of the parties, and an issue *quantum damnificatus* was accordingly directed (c).

Commissioner Hutchins, in *Symonds v. Rutter*, Prec. Chan. 23, which has been approved by subsequent judges, though the other two commissioners were of a contrary opinion, as there was *no child or creditor* in the case). In *Oldham v. Hughes*, 2 Atk. 452, 455, the covenantor had left no issue; the heir, who was a collateral, was alone interested in the conversion. In *Biggs v. Andrews*, 5 Sim. 424, 430, a case of conversion of real into personal estate by a voluntary deed, it was contended that there was no longer any *specific purpose* to answer; as all the testator's debts had been paid, which was the main object, by the sales already made; but the conversion was held to be complete, and the unsold estates were treated as personalty. In *Scudamore v. Scudamore*, Prec. Ch. 543, the same principle was applied to a will; 8000*l.* was devised to Mrs. Prince, the testator's daughter, to be laid out in land to be settled on herself for

life, with remainder to John Scudamore and his heirs, and in case he died in the lifetime of Mrs. Prince (as he did) to the Lord Scudamore and his *heirs*, executors, and administrators; it was decided that the heir of Lord Scudamore was entitled to the money; so that, as a general rule, whether a person covenants with trustees of a marriage settlement that his money shall be turned into land, or directs it by deed or by will, it is the same thing in reference to the doctrine of conversion.

(a) *Walker v. Denne*, 2 Ves. Jun. 175-6, 183-4; *Oxenden v. Compton*, *ibid.* 70; *Lord Compton v. Oxenden*, *ib.* 265; Lewin, 674.

(b) Lord Eldon, *Wheldale v. Partridge*, 8 Ves. 235; Sir W. Grant, *Thornton v. Hawley*, 10 Ves. 138; *Kirkman v. Miles*, 13 Ves. 339.

(c) *Collins v. Plumer*, 1 P. W. 106, cited with approbation by Lord Loughborough; but if the agreement had been by a subsequent

Generally speaking the court carries out the principle in all its consequences (a); thus, the real and personal representatives respectively take the property in that state in which it ought to be. Real estate and personal estate were devised to trustees, in trust to sell so much as was sufficient to pay the testator's debts, then to permit the testator's widow to enjoy the residue during widowhood, and on her death to sell and divide the proceeds between the testator's son and daughter, with benefit of survivorship: the son survived and attained 21, but died in the life of the widow; the contest on her death was between the heir of the son and his personal representative; it was decided, on the principle above adverted to, namely, that the land was turned into money, that the whole of the trust property must be considered as personal estate, and go to his personal representative (b). So, where a person who had become absolutely entitled under the limitations in a will to 3,148*l.*, which by the will had been directed to be laid out in land, made his will, devising his real and personal estate in different channels, but without any intimation as to the character in which he viewed this trust money, Sir Wm. Grant held that, in the absence of all intention on his part, it must be considered as of that character which the Court of Chancery impressed upon it, namely, land; if he had died intestate, it would have gone to his heir (c). Again, where money was devised to be laid out for the benefit of a *feme sole* in the purchase of lands in fee, and the *feme* married and had issue and died, the husband surviving; it was decreed that though the money was not invested in a purchase during the life of the wife, yet in regard in this case, if it had been laid out, the husband would have been tenant by the curtesy, and that this was as land in equity, therefore the husband was entitled to a life estate in the money by analogy to an estate by curtesy (d).

Money devised or contracted to be laid out in land will pass under a devise of all the testator's messuages, lands, tenements and hereditaments (e).

deed, as in Lord Peterborough's case, where he by a subsequent deed covenanted not to execute his power to make leases, it might have been different, *ibid.* 1 P. W. 107.

(a) Lord Hardwicke, *Trafford v. Boehm*, 3 Atk. 445; *Crabtree v. Bramble*, *ibid.* 687, where Lord Hardwicke mentions the exception in not giving the wife a right to dower.

(b) *Fletcher v. Ashburner*, 1 Bro. 499, 500.

(c) *Biddulph v. Biddulph*, 12 Ves. 165. There was a tenant for life of the estate to be purchased living at the death of the deviser

and at the date of his will, though that is not adverted to in the argument or the judgment.

(d) *Sweetapple v. Bindon*, 2 Vern. 536; 1 P. W. 110; *Cunningham v. Moody*, 1 Ves. 174. The new act relating to dower has settled that the wife is entitled to dower in money directed to be laid out in land, which before, though contrary to principle, she was not, 1 Bro. 500.

(e) *Rashley v. Masters*, 1 Ves. J. 204; 3 Bro. 100. In *Green v. Stephens*, 17 Ves. 77, Lord Eldon held that money so circumstanced would pass under the words "mes-

The terms of the will, as was noticed in the last section, may turn real estate so completely into personal estate that it will go to the residuary legatee or even to the next of kin.

Money directed to be laid out in land might, by the general doctrine of the court independently of the late statute, be rendered available to judgment creditors (a).

The doctrine of constructive conversion will not be extended to cases where the act *might* have been done merely. The case in which this point first arose, and which has been noticed in the former volume, was this: a woman seised *ex parte paternâ* conveyed the estate to trustees, in trust for herself, her heirs and assigns, and died without heirs of the paternal line; of course in such a case the *cestui que trust* might have called upon the trustee to convey the estate to her in fee, so as to give to her the legal estate which would have been descendible to the heirs general, including those of the maternal line: on this ground the heir *ex parte maternâ* claimed the estate. The case was heard before Lord Northington, assisted by Lord Mansfield and Sir T. Clark, and is referred to in the former volume. On the part of the heir *ex parte maternâ* it was urged, that as the settlor *might* at any time have called upon the trustees to convey, and equity looked upon what ought to be done as done, the court would consider what ought to have been done as actually done, and would consider the conveyance as actually made by the trustees, and then in default of heirs of the paternal line the estate would have descended to the heir *ex parte maternâ*. Sir Thomas Clark, M. R., admitted that this would have been the effect of an actual reconveyance to the settlor,

snages, lands, tenements, and hereditaments," adding that although it was very improbable that the testator contemplated that it would so pass by his will, yet he could not take it out of that constructive intention, which had in many cases been collected from such words. The price of land taken under an improvement act or the like, passes as money if not reinvested; *Ex parte Hawkins*, 13 Sim. 569.

(a) *Frederick v. Aynscombe*, 1 Atk. 393. By marriage articles the father covenanted to pay to the trustees 12,000*l.* to be settled on his son Philip for life, remainder to the wife for life, remainder to sons in tail, remainder to daughters in tail, remainder to the right heirs of Philip the son, with a proviso that if there should be one only child a daughter (which event happened), and the heirs or executors of Philip should, within three months after his death, pay 4000*l.* to such daughter, then the estate should be discharged of the estate tail to the daughter.

Philip died leaving an only daughter; the 4000*l.* was not paid within the three months; the money was not laid out in land. Lord Hardwicke held, at the instance of a judgment creditor of Philip the son, that the reversion dependent on the widow's life estate was *real* assets, and that the creditor, though the three months had elapsed, might pay the 4000*l.* so as to discharge the estate tail of the daughter, the Lord Chancellor considering the proviso only a security: but money directed to be laid out in land was not, till the act 3 & 4 Will. IV. c. 104, liable to simple-contract debts, *Whitwick v. Jermin*, cited 2 Vernon, 53; *Fulham v. Jones*, cited *Pulteney v. Lord Darlington*, 7 Bro. P. C. 550, approved by M. R., *Lechmere v. Lechmere*, 3 P. W. 217; and see Lewin, p. 672, n. (g); unless it were in the hands of the covenantor, &c. at his death, and there was no one to call upon him to invest it; *Chichester v. Bickerstaff*, 2 Vern. 295: *et v. infra*, and Lewin, 677.

but as no conveyance had been executed, the consequence insisted upon would not follow; that it *might* have been done was not sufficient; the settlor never prayed a reconveyance, and it was impossible to say whether she ever would, and the maternal heir was not to be considered a privy in blood, but a mere stranger: Lord Northington adopted the same view (a).

One of the grounds for denying the right of the heir *ex parte maternâ* in the last-cited case was, as above stated, that the heir *ex parte maternâ* was to be considered as a *stranger* to the settlor and to the trust: on the same ground it was decided, that the crown could not claim. The claim of the crown was founded upon this, that there being no heir *ex parte paternâ*, the original grant in virtue of which all lands in England are assumed to be held (b), was spent; and consequently the estate ought to be considered as having reverted to the crown, and therefore that a conveyance by the trustees to the crown, in right of such title by reverter, ought to be enforced; but there was, in fact, a legal tenant of the estate, so that the crown had no title at law, and as the crown was an entire stranger to the trust, the court refused to interfere on behalf of the crown (c). In a subsequent case, before Lord Rosslyn, where money was devised to be laid out in land, and the person who would have been entitled to the land had died without an heir, though his lordship decided the case on another ground, he intimated a strong opinion that there was no equity for the crown, being a stranger, to call for a conversion, and such is now the settled doctrine: the same reason will apply to the lord of a manor seeking to enforce a trust, in order to have the benefit of an escheat (d): but the lord may redeem a mortgage upon an estate which has come to him by escheat (e).

(a) *Burgess v. Wheate*, 1 Sir W. Black. 123; 1 Eden, 177, 186; *supra*, vol. i. p. 504.

(b) *V. supra*, vol. i. p. 93. Lord Mansfield, as before noticed, would have carried out the principle in *all* its consequences.

(c) *V. supra*, vol. i. p. 504.

(d) *Walker v. Denne*, 2 Ves. J. 170, 185; recognised by Lord Brougham, *Henchman v. Attorney-General*, 3 My. & K. 494; though the decision was made on a different ground. Lord Rosslyn added, that he thought the limitation to "the right heirs" meant nothing; that they were only inserted because the testator did not know what to do with the estate when the express limitations were spent; but as Mr. Lewin observes, p. 682, this doctrine has been repeatedly disapproved; indeed it would make a serious inroad on the general rules: for the construction of wills, see *int. al. Robinson v. Knight*, 2 Eden, 155; *et supra*.

The claim of the crown, under similar circumstances, was rejected on the same grounds in the late case of *Taylor v. Haygarth*, 14 Simons, 8, 17, 19; viii. Jurist, 138, V. C. E. The rights of the crown to personal estate are larger: the executors are as much trustees for the crown as they would be for the next of kin, *Middleton v. Spicer*, 1 Bro. 201; 14 Simons, 13, 16, 18; and see *Du Hourmelin v. Sheldon*, 1 Beav. 93, though that case turned on a different point. It has been equally held that in the case of a contract for a purchase the rule only applies to the parties to the contract; a third person, a stranger to the contract, cannot intervene to enforce it, *Tasker v. Small*, 3 My. & Cr. 70; and see *Moore v. Croat*, 8 Sim. 522; and *Arkwright v. Colt*, 2 Y. & Coll. C. C. 4.

(e) *Downe v. Morris*, 3 Hare, 394.

It is a general rule that settling lands by a freeman of London on a child is not such an advancement as shall be brought into hotchpot, so money laid out in lands for the benefit of a child takes it out of the customary estate, and is not subject to be brought into hotchpot; it is considered as equivalent to a purchase of the lands, and a gift of them by the father (a).

Real estate may be so converted into personal estate as to be liable to legacy duty. Real estate was devised to trustees to be sold, and the proceeds to be considered as part of the testator's residuary estate (after disposed of), or to go in aid, if necessary, of the rest of his property in discharge of his legacies. Lord C. B. Thomson considered that under this direction the proceeds were to go as the residue of the testator's *personal estate*, and that if the residuary legatee and devisee had died before making any election, it would have gone as part of his personal estate; and he held that it was liable to legacy duty, under 48 Geo. III. c. 149, sched. 3; for the person entitled could not, by preventing a sale, which he might do as between himself and the trustees, intercept the attaching of the legacy duty (b).

It may here be observed that where an estate is devised to a particular person, and then the testator contracts to sell the estate, as this operates to convert the deviser into a mere trustee of the estate for the purchaser, subject to a lien for the payment of the purchase-money, and the purchaser into a trustee of the purchase-money for the vendor (c) it is the purchase-money alone that the vendor is entitled to at his death; it will therefore go to the personal representatives or legatees of the vendor; he has at his death no interest in the real estate within the 23rd sect. of the 1 Vict. c. 26 (d). Even where the contract is binding at the death of the testator, but the right to enforce it is lost by subsequent laches, the estate is so converted that it will belong to the personal representatives (e).

Where a person conveys a mortgaged estate to a trustee and empowers him, not making it compulsory but at his discretion, on non-payment of the debt charged in the estate, within a certain time to sell it, and to apply the proceeds in payment of the debt, and to pay the residue to the grantor, even should the period at which the

(a) *Hume v. Edwards*, 3 Atk. 453; *Annauld v. Honeywood*, 2 Cha. Rep. 117, 129; *Babington v. Greenwood*, 1 P. W. 531, referred to in note. N.B. The money had been laid out in land, though not settled according to the testator's intention. Query, if the money had only been directed to be laid out?

(b) *Attorney-General v. Holford*, 1 Price, 426.

(c) *V. supra*, vol. i. 509; *Wall v. Bright*, 1 Jac. & Walker, 500.

(d) *Sup. vol. i. p. 476*; *Farrar v. Earl of Winterton*, 5 Beav. 7.

(e) *Curre v. Bowyer*, cited 5 Beav. 6.

trustee is authorized to sell happen during the life of the donor; if in fact no sale has taken place, the mortgagor's interest in the property will descend as real estate, or go to the devisees of the grantor (*a*). If the direction for sale is imperative, or a clear intention is shown that there shall be a conversion out and out, then the surplus will go as personal estate whether the estate has been sold or not (*b*).

We have now to consider more particularly who are the persons in whose favour the court will interfere, and under what circumstances the court will refuse to interfere to carry out this principle; for it is not in favour of every one that the rule is enforced, but only between the parties who stipulate and those who stand in their place (*c*).

I. As regards Devises of land or of money. The right of the heir-at-law, where a particular sum of money has been directed by *will* to be laid out in land, the ultimate limitation being to the testator's right heirs, to have the money or the estate to be purchased in the event of such ultimate limitation coming into possession, has been repeatedly recognized (*d*); and as consideration and even privity in the case of a will are out of the question, and the intention only is to be looked to, there seems to be no necessity in such cases to resort to the once-admitted principle that favour should be shown to the heir (*e*).

In *Wheldale v. Partridge*, Lord Alvanley, M. R., said the only question in such cases is whether the character of land or money is *definitively* affixed to the property or whether it is left as matter of uncertainty in what manner the *owner* of the property intended it to descend (*f*). In the case in question Lord Alvanley held that the character of land was not definitively affixed, and Lord Eldon affirmed the decree; but his Lordship said that if the deed had concluded with the first limitation it would immediately have impressed this money

(*a*) *Bourne v. Bourne*, 2 Hare, 35; Dalzell on Conversion, p. 89, *et seq.* cited 2 Hare, 35; and see the distinction, *ib.* p. 91, where the interest of the person dying vests before his death under a deed *absolutely requiring conversion*.

(*b*) As in *Vân v. Barnett*, 19 Ves. 102, 109-10-11; *Biggs v. Andrews*, 5 Sim. 424, *supra*; *et v. supra*; and see *Malson v. Swift*, 8 Beav. 375-6.

(*c*) See *Burgess v. Weale*, 1 Eden, R. 186; 1 Fonb. 419-20-22-25.

(*d*) *V. supra* p. [263]; and see *Robinson v.*

Knight, 2 Eden, 156, 158; though this case seems to have been decided against the residuary legatee on the ground that the plain intent was not to give this property as part of the residue.

(*e*) See the reporter's note to *Scudamore v. Scudamore*, Prec. Ch. 544. Lord Thurlow, in *Rashley v. Masters*, 1 Ves. Jun. 204; 3 Bro. 99, notices the effect which this favour to the heir had produced in some of the earlier decisions, which he would not follow.

(*f*) *Wheldale v. Partridge*, 5 Ves. 396-7; case of a Deed.

with *real qualities* (a); and he added, that if the instrument was to be taken as having impressed the fund with real qualities immediately upon the execution, in the question between the heir and executor, the money being once clearly and plainly impressed with real uses as land, and one of those uses being for the benefit of *the heir*; the impression, in his opinion, unless removed, would remain for the benefit of the heir (b).

II. Where the rights of the parties depend upon a Contract. In such cases it frequently becomes an important question as to who is entitled to put the court in motion, in order to have the contract carried into effect. It is not, as above observed, in favour of every one that it is to be carried into effect. The trustee, as he cannot, by delaying to invest or to sell, affect the interests of the *cestui que trust*, so neither can he of himself give efficacy to a contract, which would otherwise be dormant, according to his whim and caprice; there must be some purpose to answer, and some person entitled to call the trustee into activity. The general rule is that it shall be between the parties who stipulate what is to be done, or those who stand in their place (c).

First. As regards the rights of the Heir and Personal Representatives and Next of Kin, where the contract affects some *Existing Property*, real or personal, which belongs to one of the parties. In ordinary cases where there is a contract, under which certain lands are to be settled, and the lands are expressly limited to the heir of one of the contracting parties, after the particular limitations have become expended, or in the event of their not taking effect; and where land is directed to be converted into money, and after the particular limitations have been satisfied, or in the event of their becoming ineffectual, the money so to be raised is limited to the next of kin; the heir is entitled to have the contract carried into effect in the one case, and the next of kin in the other (d); but there is no equity between the two lines of heirs to call for a conveyance in order to alter the course of descent (e). So if there be a contract that money then in the hands of a third person, or afterwards to be deposited, and which is actually deposited,

(a) *S. C.* on appeal, 8 Ves. 227, *et v. sup.* p. 270—272.

(b) And see *Biddulph v. Biddulph*, 12 Ves. 166; in which the dictum of Lord Eldon in opposition to that of Lord Rosslyn; viz., that there was "no equity between representatives to change the nature of the property," was followed.

(c) See *Lord Compton v. Oxendon*, 2 Ves.

J. 264; *S. C.* 4 Bro. 397; *Langley v. Sneyd*, 1 Sim. & S. 54; *Burgess v. Wheate*, 1 Sir Wm. Black. 123; 1 Eden, 177, 186, Sir T. Clark, M. R. *et v. sup.* p. 261.

(d) Lord Alvanley, M. R., *Lord Compton v. Oxendon*, 2 Ves. J. 264; and see *Rashley v. Masters*, 1 Ves. J. 204; 3 Bro. 99.

(e) *Langley v. Sneyd*, 1 Sim. & S. 55.

shall be laid out in the purchase of lands to be settled to certain uses, with the ultimate remainder to the heir of one of the contracting parties, the heir will be entitled to have that contract carried into effect (a).

It has already been noticed that the rule that what ought to be done is considered as done so as to effect a conversion of real estate into personal, and personal into real, is subject to some qualifications.

It is a clear principle, both at law and in equity, that where there is a confusion of rights,—where the debtor and creditor, the obligor and obligee, become the same person,—there can be no right put into execution, but there is an immediate merger, though on the intent, express or implied, equity will keep them distinct (b).

1st. When therefore the money bound by the direction or contract for conversion gets into the hands of the person who is absolutely entitled to it either way, when as it is sometimes said the money is "at home," the operation of the rule of conversion will cease; the fund and the uses coming together the uses are discharged and merged (c).

But if a part only of the money bound by the contract has been called in, by a party having a power to do so, the remainder of the money will still be considered as retaining its real character as between the real and personal representatives (d).

(a) *Chaplin v. Horner*, 1 P. W. p. 483; *Edwards v. Countess of Warwick*, 2 P. W. 171; *Lancey v. Fairchild*, 2 Vern. 101.

(b) *Lord Compton v. Oxendon*, 2 Ves. J. 264; *Philips v. Brydges*, 3 Ves. J. 127; *Selby v. Alston*, 3 Ves. 342; *Harmood v. Oglander*, 8 Ves. 128; *et v. sup.* vol. i. p. 508.

(c) *Rashleigh v. Master*, 1 Ves. J. 204; *Wheldale v. Partridge*, 8 Ves. 235; *Pulteney v. Darlington*, 7 Bro. P. C. 530, there cited; *Chichester v. Bickerstaff*, 2 Vern. 295. Assuming that Mr. Lewin's view of this case is correct, as it appears to be, and that the 3000*l.* covenanted to be furnished by Sir Ch. Bickerstaff himself had been given to the heir, then Sir J. Jekyll's and Lord Talbot's objections to this case would be removed; see Lewin, 677-9.

(d) By articles before marriage, the husband agreed to add 700*l.* to his wife's portion, and the securities were assigned to trustees to be invested in land, and settled on the husband for life, with remainder to the wife for life, remainder to the first and other sons, and then to daughters in tail, with remainder to the right heir of the husband. There was no issue of the marriage; the husband received a part of the trust fund, and invested it in

his own name on personal security, though his wife was alive. By his will he devised all his real estates, and appointed executors: it was held that such part as he had called in should go to his executors, for having the right to elect to take the reversion of the fund as he chose, and having taken the security in the names of his executors, it was clear he did not mean his real representative to have it, but the rest went to his devisee, the articles having changed the money into land, *Lingen v. Sowray*, 1 P. W. 172, Lord Harcourt; affirmed on rehearing by Lord Cowper. So where by marriage articles a father in consideration of the marriage and of the marriage portion brought by the wife covenanted *int. al.* that 2000*l.* belonging to him, then in the hands of trustees, should be invested in lands to be settled on himself and his heirs, without any intermediate limitations, and there was issue of the marriage one daughter: on a question between the daughter as heir, and the personal representative of the father, it was held that all the residue of the fund which had not been called in by the father belonged to the daughter: it was remarked that this was not a question between the person who was to pay the money,

2nd. Where the property is Outstanding in a trustee, but there is some person in whom both the qualifications are united, that is, who is absolutely entitled to the property in whichever quality it is to be taken, such person may declare his election in what quality it shall be taken, whether for descent or otherwise (*a*); and then the property must be taken for all purposes, according to the quality which such election has impressed upon it (*b*). All the cases establish this, said Lord Cottenham in a late case in the House of Lords, that where the conversion has not in fact taken place, and the interest vests absolutely, whether in land or money in one person, any act of his indicating an option in which character he takes or disposes of it, will determine the succession as between his real and personal representatives (*c*): such election may be made by any act from which the intention can be collected, and slight circumstances have been considered to be sufficient (*d*); but of course no election can determine the question; as regards other parties claiming under the trust, the election can affect those only who claim as *volunteers* (*e*) under the party electing; therefore where the entire absolute interest never vests in a person during his life, he has no power by any act of his to effect a present re-conversion, though he may dispose of his reversionary interest in the property by whatever denomination he may think fit, and it will be taken by his donees accordingly (*f*).

and the person to receive, but between the heir and executor in respect of money outstanding in trustees; but as regards that portion which the father had called in from the trustees, as he would have had the absolute dominion over it, had it been land, the daughter had no claim against the father's executors to refund this portion, *Chaplin v. Horner*, 1 P. W. 484; M. R. 1718.

(*a*) *V. Thornton v. Hawley*, 10 Ves. 129; *Triquet v. Thornton*, 13 Ves. 345, 357.

(*b*) Lord Eldon, *Wheldale v. Partridge*, 8 Ves. 235-6.

(*c*) Lord Cottenham, *Cookson v. Cookson*, 12 Cl. & F. 146, on appeal from Lord Langdale's decision, 5 Beavan, 22. The cases down to *Langley v. Sneyd*, 1 Sim. & S. 45, are collected by Mr. Vesey in his note to *Rashleigh v. Master*, 1 Ves. J. 204; the rest may be found in Mr. Bethell's argument, 12 Cl. & F. p. 137: Lord Cottenham, p. 145, particularly noticed *Earlom v. Sanders*, 1 Amb. 241, and *Cowley v. Hartstonge*, 1 Dow, 361; and see, as to the general doctrine, *Wrightson v. Macaulay*, 4 Hare, 487, affirmed on appeal, Nov. 1846.

(*d*) Lord Langdale, stating the result of the authorities, *Matson v. Swift*, 8 Beav. 375;

et v. int. al. Lord Eldon's judgment, *Wheldale v. Partridge*, *ubi sup.*; *Pulteney v. Darlington*, 1 Bro. 223; *Van v. Barnett*, 19 Ves. 109.

(*e*) Lord Hardw., *Crabtree v. Bramble* 3 Atk. 686.

(*f*) In the case of *Stead v. Newdigate*, 2 Meriv. 521, by marriage articles *int. al.* land of the husband was agreed to be conveyed within two years to trustees, and after the death of one Sarah Nievel to be sold, and the produce settled on the husband for life, then to the issue of the marriage; if no issue then to the husband, his executors, &c., or as he should appoint. There was no issue, and the estate was not conveyed according to the articles, nor was it sold. The husband by his will confirmed the articles, and gave to his wife, *int. alia*, the residue of his personal estate, and appointed the wife executrix. Sarah Nievel survived the testator, and afterwards died. The widow gave her personal estate to the plaintiff; the defendant, to whom the legal estate had passed by the will of the husband, had entered upon the estate so articulated to be sold. The plaintiff claimed the estate as having been converted into personal estate of the husband, and having been therefore

Until an election is made, by the person capable of electing, (it is different, as we have seen where the property has come into his possession,) the property remains and passes as it would have done if a conversion had actually taken place as directed, and the *onus* lies on those who would show an election to take it in another character than that it would have if converted (*a*). The decisions, as before stated, have overruled the general proposition of Lord Rosslyn (*b*), that, in these cases, in the absence of an election, the court will not interpose, and the property is to be taken as it happens to be at the death of the party through whom it is claimed (*c*); for, as Lord Eldon observed, it is not correct to say that the court does not interpose between volunteers, if it gives to the executor that money which the instrument gives to the heir (*d*).

Secondly. Where the contract does not affect any specific property.

Where the matter rests on a general covenant in a settlement not affecting any specific property, there the only legal title is a right in the covenantees to sue the covenantor or his representatives; and this right, as has already been observed, is not to be put into activity by a mere trustee, unless there be some person who is entitled to call upon the trustee to do so. Where one of the parties to a settlement has contracted to pay a sum of money which is to be laid out in land to be settled in favour of the husband and wife, and their issue, with remainder to the heirs of the husband or of the wife being a stranger to the covenantor; the heir, it is conceived, in default or on failure of issue, is entitled as against the contracting party and his representatives to have the contract carried into effect; the heir in such case is only seeking to enforce a contract for valuable consideration entered into with his ancestor, and which, by the general law, he is entitled to enforce by himself or through the trustee, according as the covenantee was the ancestor himself, or a trustee. In *Knights v. Atkins* the father, on the marriage of the daughter, agreed to give to his daughter 1500*l.* as her portion, the husband agreed to add 1500*l.* to it, and

given to the wife by his will. Sir W. Grant said, the case was the same as if the estate had been conveyed at the end of the two years upon the trusts of the settlement (p. 530); the trust to sell at the period prescribed was absolute and imperative. The event of there being no issue was provided for, but the provision was not that there should be no sale, but that the money should be paid to the husband; therefore, in contemplation of equity, the estate was to be considered as converted into money: the *onus* was on those who said that it was real estate. As to election on the

part of the husband, the time for sale, said the learned judge, did not arrive in his lifetime; there was no moment of his life when the absolute interest in the property as money or land could be considered to be his (p. 531).

(*a*) See *Stead v. Newdigate*, 2 Mer. 521 *supra*.

(*b*) In *Walker v. Denne*, 2 Ves. J. 170.

(*c*) See *Kirkman v. Miles*, 13 Ves. 338; *Biddulph v. Biddulph*, 12 Ves. 161.

(*d*) See *Wheldale v. Partridge*, 8 Ves. 227, 235.

the whole 3000*l.* was to be laid out in land to be settled on the husband for life, then to the wife for her jointure, with remainder to the heirs of their two bodies ; but nothing was said as to any ultimate remainder : 500*l.* of the wife's portion was paid to the husband afterwards, he then died without issue, and then the wife died : the heir of the husband claimed the remainder of the wife's portion ; and the court being of opinion that if a settlement had been made the ultimate remainder would have been directed to be limited to the heir of the husband, the money was decreed to be paid to him, though, in that particular case, there were strong grounds for contending that, in the absence of any express limitation, the money should have reverted to the wife or her ancestor (*a*). But where the covenant has to be enforced by the heir against the personal representative of his ancestor the remedy is not so plain. It seems to be settled that, where in the events that have happened, the covenant has been broken at the death of the covenantor, and therefore ought to have been enforced in order to secure the interests of some of the *particular* objects contemplated by the covenant, and at the death of the ancestor there is still some person in existence having a right to enforce the contract, the heir, in the event of the limitation in his favour taking effect by the non-existence or extinction of the objects of the particular limitations, is entitled to enforce the covenant against the personal representatives of his own ancestor, even though at the time he files his bill no one but himself is interested to enforce it (*b*).

One of the leading cases on this subject is *Lord Lechmere's* case, which has before been adverted to. Previously to Lord Lechmere's marriage, marriage articles were executed by Lord Lechmere, by which it was agreed that 30,000*l.* should be laid out in land, with the consent of the trustees of the settlement, within one year after the marriage. The lands were to be settled for the benefit of Lord Lechmere for life—there was a provision for securing a jointure to the intended wife (Lady Lechmere)—and subject to these provisions the estate was to be settled in strict settlement on the issue of the marriage, with the ultimate limitation to the heirs of Lord Lechmere ; a term was to be created for securing portions for daughters, which, in the event of there being none, was to sink for the benefit of Lord Lechmere and his heirs ; 6000*l.* belonging to the wife was to be contributed towards the 30,000*l.* ; Lord Lechmere covenanted to provide the remaining 24,000*l.* within a year. The marriage took place,

(*a*) 2 Vernon, 20, referred to *supra*.

(*b*) V. *supra*, p. 263, &c.

the year elapsed, but the 24,000*l.* was not provided, so that the covenant was broken. Lord Lechmere died without issue, leaving his widow surviving, who, as before stated, was entitled under the articles to a jointure in the lands to be purchased. On Lord Lechmere's death, Lady Lechmere took out letters of administration to his personal estate, and his heir, a nephew—who was well provided for, as estates of considerable value had descended to him from Lord Lechmere—instituted a suit against Lady Lechmere, as administratrix of Lord Lechmere, and the trustees, in order to enforce the performance of the contract, in effect claiming the 30,000*l.*, subject to Lady Lechmere's jointure. Lady Lechmere insisted that the contract ought only be enforced, if at all, for the purpose of securing her jointure. Sir Jos. Jekyll, M. R., on the original hearing, and Lord Talbot on appeal, decided that the claim of the heir was well founded, and that the covenant ought to be specifically performed (*a*). Lord Lechmere being contingently entitled to the money, subject only to the jointure, might have disposed of such interest as he pleased, or might as regards himself and those claiming under him, have extinguished the obligation; and if he had survived his wife,—in which case there would have been no third person interested to enforce the covenant,—then, according to the principle above stated (*b*), Lord Lechmere being covenantor, and in effect also covenantee, the covenant would have been extinguished without any act on his part, and his heir could not have required to have it enforced.

When and to what extent a person, not being the heir or next of kin or personal representative of any one of the parties to the contract, may enforce a covenant to settle money or land in such manner as that he may take under the limitations, is now to be considered.

It frequently happens that some stipulation is introduced into a contract in favour of some Third Person, not a party, and most commonly in favour of some Relation of one of the parties. The question as to how far the statutes in favour of purchasers and creditors operate upon limitations to collaterals, which is intimately connected

(*a*) *Lechmere v. Lord Carlisle*, 3 P. W. 211 (1733); *S. C.* Forrest. p. 80. Sir Joseph Jekyll observed that the covenant was broken during Lord Lechmere's life, and the trustees might have filed a bill against him to have enforced a specific performance of the covenants, 2 P. W. 213, and the forbearance of

the trustees shall in no case prejudice the *cestui que trust*, *ib.* p. 215; and see Forrest. 83. Sir Jos. Jekyll relied chiefly (pp. 215-6) on Lord Jeffrey's decision in *Kettleby v. Atwood*, 1 Vern. 471, *v. supra*.

(*b*) *Supra*, p. 54.

with this subject, will be noticed at the end of this chapter. I propose now to take a general view of the rights which may thus be conferred on a stranger, when the matter rests on contract, and to consider under what circumstances and to what extent they may be enforced, as against the parties to the settlement, or any of them, and their representatives.

It is to be observed, in the first place, that if two parties, in contemplation of a marriage intended, and afterwards had between them, or for any other consideration between themselves, coming under the description of *valuable*, have entered into a contract together, in which one of the stipulations made by them is a stipulation solely and merely for the benefit of a third person, that third person being even a stranger in blood to each, a stranger to the contract, and a person from whom not any valuable or meritorious consideration moves, has moved, or is to move, it cannot, generally speaking, be competent to *one party* to the contract, or those representing that party in estate, to say to the *other party* to the contract, that that stipulation shall go for nothing, or shall not have any effect given to it. The two parties to the contract having made the stipulation with each other, mutual assent must generally be requisite to dissolve that which by mutual assent was created; with the question between them, the gratuitousness of the provision towards the stranger as far as the stranger is concerned, seems generally to have little or nothing to do (*a*); each of the parties therefore may enforce the contract against the other. Even where one of the parties has omitted or even become incapable of performing his part of the contract that will not in all cases discharge the other party. In marriage contracts there may in various instances be default of performance on one side, without giving the other any title to be discharged or relieved from his part of the agreement; though the contracts *may* be so framed as to be mutually dependent (*b*): but a stranger to the contract stands in a very different situation to that of the parties and their representatives.

As to the *doctrine at law* in regard to strangers.—Where a *deed* is made between parties, whether indented (*c*) or not, according to the doctrine of the common law, the stipulations it contains are suable and releasable by the parties only, and not by a stranger, though made for his benefit (*d*). When therefore two persons covenant be-

(*a*) Dict. Vice-Chancellor K. Bruce, *Davenport v. Bishop*, 2 Y. & Coll. C. C., 460.

(*b*) *Lloyd v. Lloyd*, 2 Mylne & Cr. 192, 203-4.

(*c*) Indenting is not now material, *vide sup.* vol. i. p. 291.

(*d*) *Per* Levinz, J., *Gilby v. Copley*, 3 Lev. 138. Though two of the judges were of dif-

tween themselves to do some act for the benefit of a mere stranger, as a general rule that stranger has no right to enforce the covenant against the two, or against either of them (a), each may effectually release the other.

This doctrine, however, has not been applied with the same rigour to *agreements*; a stranger has in some cases been permitted to bring the equitable action of *assumpsit* to enforce a stipulation for his benefit contained in an agreement, to which, nominally at least, he was not a party, when it has been clear that the inducement operating upon one of the parties was, in whole or in part, that some specific benefit should be secured for that particular person, he being a person in whom the party exacting the stipulation might be supposed to have taken an interest, as, for instance, a child or near relation: indeed it would seem that a child is not to be considered a stranger in such a case.

A person seised of certain lands was about to cut some timber to provide a portion of 1000*l.* for his daughter; the son, who was heir apparent, and to whom the land descended on the death of the father, promised the father, that if he would not cut the timber, he, the son, would pay the daughter the 1000*l.* He not having done so, the husband of the daughter, together with her, brought an action of *assumpsit* to recover the 1000*l.* from the son. It was insisted that the father, whose wood it was, or his executors, were alone entitled to sue; but it was held by the whole court, that the plaintiffs might bring the action; it might have been another case if the money had been to be paid to a *mere stranger*; "But there is such a nearness of relation between the father and child, that it is a kind of debt to the child to be provided for, so that the plaintiff, the daughter, is plainly concerned" (b). *Pollexfen* argued, that the promise was [to be taken] *indifferently to the party or the cestui que use*, therefore that either might bring the action (c). So in another case, a person promised a physician that if he cured him of a disease under which he laboured, he would give the physician a certain sum of money, and another sum to his daughter; it was resolved that the daughter might bring *assumpsit* on this promise, though not a party, because the nearness of the relation

ferent opinion, and no judgment was given; *Riley v. Demell*, 1 Danv. Abr. 64; *et v. infra*, *Ex parte Williams*.

(a) *Colyear v. Countess of Mulgrave*, 2 Keen, 98; *Davenport v. Bishopp*, 2 Y. & Coll. C. C. 462; vii. Jur. 1077; and see *Hill v. Gomme*, 1 Beav. 554; affirmed 5 My. & C. 255;

9 Law J., N. S. 56.

(b) *Dutton v. Poole*, 1 Ventris, 318; 30 Car. II.; 2 Levinz, 210, affirmed in Excheq. Chamber; Sir Tho. Raymond's Rep. p. 302; see 9 Law J., N. S. p. 56.

(c) 2 Levinz, 212.

gave the daughter the benefit of the consideration performed by the father (a).

Where the stranger to the contract, especially where that person has been a child, has done the act which was the consideration of the promise, he has been permitted to sue; thus, where a person promised the father, in consideration that he would give his daughter in marriage with his son, he would settle so much land upon the son, and the marriage was had; afterwards the son brought an action on the covenant, and it was adjudged to be maintainable, because the son had done the meritorious act, though the promise was made to another (b): although the stranger to the covenant was a son, the decision was not put upon that ground.

But where the agreement has been one that appeared to have had for its object the mere private convenience and benefit of the party himself, and the stranger did not sustain such a character as that particular favour to him could be supposed to have influenced the party exacting the stipulation, there the third person has been treated as a mere stranger, and consequently the general rule of law has been applied.

One Hardy owed the plaintiff 70*l.*; Hardy and the defendant agreed that the defendant should pay the debt due to the plaintiff instead of Hardy, and that in consideration thereof Hardy should assign a house to the defendant; Hardy was ready to perform the agreement on his part; the plaintiff brought assumpsit against the defendant for the 70*l.*, but as he was a stranger to the consideration judgment was given against him (c).

One Parry was indebted to the plaintiff in one sum, and to the defendants in another sum of money, and a *stranger* was indebted in another sum to Parry. The defendants, in consideration that Parry would permit them to sue the stranger in Parry's name for what was due from him to Parry, promised they would pay the debt which Parry owed to the plaintiff, and thus relieve Parry from the debt he owed to the plaintiff. They accordingly sued and recovered, and according to the agreement ought to have paid the debt due from Parry to the plaintiff; but not having done so, the plaintiff, no party to the agreement, brought an action against the defendants, and obtained a verdict. But the court arrested the judgment on the ground that the

(a) *Physician's case*, cited and approved 1 Ventris, 6.

(b) *Sprat v. Agar*, cited and approved in *Dutton v. Poole*, 1 Ventris, pp. 318, 332; and

see the cases cited, *ibid.*

(c) *Crow v. Rogers*, 1 Strange, 592, 10 Geo. I.

plaintiff was a stranger to the consideration (a). In these cases it is obvious that the parties were not stipulating for any benefit for the stranger; however, Mr. J. Buller, in his *Nisi Prius* (b), stated that perhaps in these days these cases would receive a different determination, as the courts have been more liberal than formerly in extending the benefit of the action of assumpsit; and the same learned judge, in the case of *Marchington v. Vernon* (c), said that independently of the rules which prevail in mercantile transactions, if one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it; and Lord C. B. Eyre did not object to this doctrine, but he said the promise must be laid as made to the third person himself (d).

In *Martyn v. Hind* (e), Lord Mansfield (after referring to *Dutton v. Poole*) said he wondered how a doubt could have arisen upon it; and in the principal case he held that on a promise by a rector to the bishop to pay a fixed salary to the curate, the curate might recover in assumpsit the amount of the stipulated salary. The case of *Dutton v. Poole* being the foundation of these cases, it would seem that the generality of the expressions in those cases is to be interpreted in reference to the principle of that case, namely, that the benefit was intended for the third person, not for the party himself, though Mr. Justice Buller's observations in his Treatise on *Nisi Prius* would certainly go beyond it.

In a case in bankruptcy (f), Lord Eldon, after stating the law to be that if A. by deed covenanted with B., a party to it, that he, A., would pay a sum of money to C., a stranger to the deed, C. could not, according to the modern doctrine, sue A. upon the covenant at law; held that where A. being a trader took B. as his partner, and a contract by deed was entered into that the debts of A. should be paid by the partnership, the property of A. being assigned so as to form the stock of the new firm, that did not of itself make those creditors joint creditors of A. and B.; adding, that in order that the joint creditors should have the benefit of such an arrangement, it was necessary they should assent so as to make themselves parties, though of this slight evidence would do (g). It is obvious that in this case the partner was

(a) *Bourne v. Mason*, 1 Ventris, 6; 20 & 21 Car. II.

(b) P. 134, where he cites *Dutton v. Poole*, before stated, with approbation.

(c) 27 Geo. III. K. B.

(d) *Comp. of Feltmakers v. Davis*, (1797,) 1 Bos. & P. 102.

(e) Cowp. 443, 16 Geo. III. 1776.

(f) *Ex parte Williams*, Buck, p. 13. In this case *Marchington v. Vernon*, *supra*, was cited.

(g) *Ibid.* and see *Ex parte Jackson*, 1 Ves. J. 132.

stipulating for his own convenience and benefit, and in order to relieve himself, not for the purpose of securing the payment to his creditors for their sakes, but only as such payment would conduce to his own individual advantage; it is like the case of a person making an assignment of his property to trustees in trust to sell and pay his creditors, which, as before observed, does not make the creditors *cestuis que trust* (a); and though Lord Eldon, referring (apparently only from recollection) to the old cases before cited, said that they were not law (b); it will be seen that the principle on which they were decided did not apply to the case before him.

It would seem therefore that, as regards a deed, at law a stranger to the contract and to the consideration cannot take advantage of a covenant in his favour; but where a father or near relative exacts for valuable consideration a promise in favour of his child or other near relation whom it is evident he intended to benefit, and the transaction is not clothed with the formalities of a deed, there is strong authority for contending that the child or other near relative may sue by the equitable action of assumpsit.

It seems that if the promise he made to a person, *not a party* to the consideration, but for whose benefit the stipulation is made, as well as to the party from whom the consideration proceeds, such third person may enforce it. A father intending to make his will and devise an annuity to be charged on his real estate to his younger son, the eldest son promised to *both*, that if the father would forbear to make the devise, he would pay the annuity; the younger son, after the death of the father, brought an action against the elder brother, and recovered (c).

(a) *Vide supra*, *Garrard v. Lord Lauderdale*, &c. *sup.* pp. 59, 60.

(b) In *Ex parte Peele*, 6 Ves. 604, (1802.) Lord Eldon again adverted to the common-law doctrine in regard to a stranger to a covenant not being at liberty to bring an action upon it, and acted upon it, and again denied that the old cases were law; but the party there had not exacted any stipulation in favour of his creditor, Sir Robert Peel, the petitioner: *Phillips v. Bateman*, 16 East, 373, is distinguishable from the cases before cited on the same ground; the stipulation that the creditors should receive payment from the third person was not the motive, otherwise than as such payment would conduce to the convenience of the party himself; besides there was no promise to pay each particular creditor individually so as to give to each a right to sue, *ibid.*

(c) *Rockwood's case*, 1 Leonard, 192, 32 Eliz.; *Eyre*, Ch. Baron, 1 Bos. & P. 102, held that in all cases of a promise to one for the

benefit of a third person, the promise must be laid, in an action, as made to the third person. It may be observed that a promise made to a testator alone, on the faith of which he omits to make a devise, will be enforced in equity, notwithstanding the Statute of Frauds. *Reech v. Kennegal*, 1 Ves. Sen. 123, Ambl. 68, 1 Y. & Coll. C. C. 167; *Sellack v. Harris*, 5 Vin. Abr. 521; *Podmore v. Gunning*, 7 Sim. 649, 655; and see the other cases cited in the argument, p. 649; *Leister v. Fowercroft*, Dom. Proc. cited Gilbert's Eq. R. 11; and see *Whitchurch v. Bevis*, 2 Bro. 565; *Mestair v. Gillespie*, 11 Vesey, 621; *Walker v. Walker*, 2 Atkins, 98; and the cases cited by the Vice-Chancellor, 7 Sim. 655, *et seq.* as to not permitting a person to take fraudulent advantage of an act of Parliament made to suppress fraud, which seem to be to some extent applicable to prevent an improper advantage being attempted to be taken of a rule of law.

As to the *Doctrines of the Court of Chancery* in regard to Strangers to the contract.—The old rule of the Court of Chancery, said Lord Hardwicke, was, that none can come here for a specific performance who does not come under the consideration of the agreement; but, said Lord Hardwicke, as agreements are entire and the several branches might have been in view, the court has in latter cases laid hold of any circumstances to distinguish them out of it, still preserving the rule in general: if therefore there was any kind of consideration the court would support it, as in *Osgoode v. Strode*, (which will be noticed hereafter): the court, continued Lord Hardwicke, has got out of it in another way, as in *Vernon v. Vernon* (after stated), because an action might be brought in the names of the trustees, though there clearly the persons claiming were not within the consideration (a). The general law as to strangers in blood, strangers to the contract, is the same at this day, to this extent at least, that the parties to the contract may at their pleasure abandon the contract, and mutually release each other from its performance (b); still, however, the question

(a) *Stephens v. Trueman*, 1 Ves. 74. *Ib.* 215.

(b) *Colyear v. Mulgrave*, 2 Keen, 98, Lord Langdale. In that case a natural daughter sought to enforce a covenant entered into by a son of her father with her father; there was a valuable consideration as between the contracting parties, but there was in that case the additional circumstance against the contract being enforced that something was to be done by one before the other could be called upon to join in transferring the money in question, and the son died before this was done, leaving his father his executor. Lord Langdale on general principles refused to enforce the covenant; he held that when two have contracted for, amongst other things, a benefit to a mere stranger, that the stranger has not a right to enforce against the two contracting parties a covenant so entered into by them for his benefit; in that case it will be observed the stranger to the contract was in law a stranger in blood. V. C. K. Bruce recognised Lord Langdale's doctrine, as a general rule, in *Davenport v. Bishopp*, 2 Y. & Coll. C. C. 462. In the case of *Hill v. Gomme*, 1 Beavan, 540, (1839,) (affirmed, Dec. 1839, by Lord Cottenham, 9 Law Journal, N. S. 1840, p. 56, 5 My. & Cr. 255,) an indenture was executed between James Dean of the one part, and John Hill of the other part, whereby Dean covenanted to maintain and bring up William Thomas Hill, son of John Hill, as his own son, and at 14 to apprentice him, and that his heirs and executors should convey and assign his real personal estate on his death to William T. Hill: the consideration was stated to be 100*l.*,

though it was evident the money consideration was an after-thought, and there was no sufficient proof of the payment: neither party appears to have acted on the deed, nor did it appear that W. T. Hill had lived with Dean. William Thomas Hill having discovered the deed amongst his father's papers after his death sought to put it in force against Dean's representatives; he was not his father's representative. Lord Langdale held that the two contracting parties must be considered to have abandoned the deed. The case was brought before Lord Cottenham by appeal. "Neither party," said his lordship, "derived from it the benefit which it purported to secure." His lordship considered that this was an arrangement which, if not performed to an extent to alter the condition in life and expectations of the plaintiff (see *Lyons v. Blenkin*, Jacob, 245,)—in which case he thought the court would have compelled the performance of the covenants in his favour (p. 554)—might have been put an end to by an agreement between Dean and Hill, and he thought that the evidence showed that it was put an end to, and that such evidence was not rebutted by the single fact of the deed having been found uncanceled (p. 555). Here it will be observed there was in effect no consideration, so that the case could not be brought within the common-law authorities before cited, though the stranger to the contract was in this case a child of the party exacting the stipulation. The late case of *Gibbs v. Glamis*, 11 Sim. 584, (1841,) may here be noticed: in that case a suit was instituted by one Hill against several defen-

remains whether where one of the parties has contracted for some advantage in favour of a collateral, the party in whose favour it is made may not enforce it against the party making the stipulation as part of the entire agreement, it not having been released by the party exacting it, more especially when to secure the interests of all the contemplated objects, there is a covenant with trustees that the act shall be done which, if enforced, would, as we shall presently see, enure for the benefit of all persons the objects of the covenant, and who may therefore be considered in the light of *cestuis que trust*. If, by reason of the expectations held out to the stranger to the contract, under the contract, his condition in life has been changed, to the knowledge and by the instrumentality of the parties, then the stipulation may be enforced by such stranger: not, however, so much in virtue of any original efficacy in the contract as between the stranger and the contracting parties, but that the stranger would suffer a positive injury if the contract were not performed, so that a direct equity arises as between the two contracting parties and the stranger, by reason of their acts in regard to him (a).

One of the distinctions which has been taken in the Court of Chancery, in favour of strangers, so as to take particular cases out of the general rule, and which is noticed by Lord Hardwicke, will be seen, by reference to the cases at law above cited, to bear a strong analogy to the doctrine which has been held at law (b). It is this, that where a person who has contributed any valuable consideration to an intended settlement, has exacted as part of the contract that certain property shall be so settled as that in the event of the intended limitations to the issue of the marriage failing to take effect, the property, whether belonging to one of the parties or the other, shall go to some near relative, for

dants claiming an interest in the arrears of an expired annuity, and against Gibbs, who was supposed to claim an interest, but who disclaimed. The parties interested by deed, to which Gibbs was not a party, assigned the arrears to trustees in trust to pay the costs, including those of Gibbs, and to pay part of the clear residue to two of the original parties, and the balance after such payments to Lady Glamis. The fund, or a portion of it, was realized, and Gibbs filed a bill against the trustees, and the parties beneficially interested, for the execution of the trust, and payment of his costs provided for by the deed. Lady Glamis demurred, the Vice-Chancellor of England overruled the demurrer, on the ground that it appeared plainly that Gibbs's costs must have been paid by Hill in the first place;

but Lord Lyndhurst reversed that decision, for that Gibbs in his view was only a creditor; that the trust for payment of those costs was equally revocable as an ordinary trust for payment of debts, (*Garrard v. Lord Lauderdale*, *supra*, p. 59.) and Lady Glamis was at liberty to revoke it. This case, it will be seen, does not affect the present question, it was decided on quite a different principle; it was an attempt to enforce the contract, not through, but against one of the authors of the stipulation, which was introduced only for the convenience of that party, not to benefit the creditor.

(a) See the judgments of Lord Langdale and Lord Cottenham in *Hill v. Gomme*, 1 Beav. 540; and 5 Mylne & Cr. 255; *supra*, p. 280, note.

(b) *Supra*, p. 276.

instance, within the degree of a brother, then that the party in whose favour such stipulation has been made, or those claiming under him, shall be entitled to stand in the place of the person who exacted the stipulation in his favour, and to enforce it against the parties to the contract from whom the stipulation was exacted, and against their representatives. But when such a contract has been sought to be enforced by persons claiming through the covenantor against his heir, the court has (at least in some cases) regarded them with so much of favour as first to inquire, whether the arrangement entered into was a reasonable arrangement (a); and Lord Hardwicke seems to have

(a) In *Edwards v. Countess of Warwick*, 2 P. W. 174, before cited, *supra*, p. 262, (1723,) the question arose upon a settlement executed, and the point in dispute was whether the limitations to the collaterals, who were relations of the party at whose instance the stipulation was introduced, could be supported as against a purchaser claiming the benefit of the statute of the 27th of Elizabeth; but the reasoning in that case, which has been adopted in subsequent cases, applies to the point now under consideration. The consideration for the precedent limitations in a marriage settlement, said Lord Macclesfield, has been applied even to subsequent ones (provided the transaction be fair and honest, see the dictum of Lord Kenyon, in *Nunn v. Wilsman*, 8 T. R. 529); as where, in consideration of a marriage and portion, land has been settled on the husband for life, and then to the wife for life, remainder to the children, with remainder to a brother, these considerations have extended to the brother; and the reason is, because it may be very well intended that the husband, or his parents, would not have come into this settlement unless all the parties thereto had agreed to the limitation to the brother: (and see Sugd. V. and P. 932-4, particularly the dictum of Lord Eldon in *Pulvertoft v. Pulvertoft*, 18 Vesey, 92, after stated). In the case of *Osgood v. Strode*, 2 P. W. 245-7, affirmed with some hesitation by Lord King, C. (see note to 2 Eq. Ab. 25, § 26, A.D. 1724,) a father, and his son who was seized in fee subject to certain equitable claims of his father, on the marriage of the son articulated to settle lands on the husband for life, remainder to the wife for life, remainder to the issue male of the marriage, remainder to the nephew of the son (grandchild of the father), in fee. As the father had an equitable interest in the property, it might therefore, said the Lord Chancellor, well be presumed that he would not have joined unless the property had been limited over to the nephew, therefore the nephew could not be considered as a

volunteer; and the Lord C. at the instance of the nephew, decreed a specific performance of the articles against the representatives of the father and the son. There was no question in this case as to creditors or purchasers. Edward the son had so far attempted to repudiate the covenant, that he had devised the estates in a manner inconsistent with the covenant. Lord King, in affirming the decree, was in a great degree influenced by its being a reasonable provision, 2 P. W. 258; see Sir Edward Sugden's observations on this case, V. and P. 932.

In the case of *Vernon v. Vernon*, 2 P. W. 599 (A. D. 1731), by marriage articles, which were executed on the marriage of the son, to which the father was a party, (though he contributed nothing in value, the whole of the money consideration for the covenants on the part of the son having come from the wife,) the son, who appeared to have particular reasons for desiring to favour his brothers, covenanted to purchase and settle lands of certain value upon his issue male, and in the event of no such issue upon his two brothers (the plaintiffs) in succession: the estate was not purchased, and the covenantor died without issue male. Lord King, at the instance of the brothers, enforced a specific execution of this covenant against the wife, who was residuary devisee and legatee and executrix of the son; it was made, said his lordship, on a solemn occasion, and was an agreement which not only his own but his wife's relatives came into; and he would not put the plaintiffs to sue on the covenant in the names of the trustees for the recovery of damages, as that would be an inadequate remedy (*ibid.* 599); holding that even the covenantor himself could not have refused to perform it (that is, at the instance of the father, or of the brothers as standing in his place). Lord Hardwicke, in *Stephens v. Trueman*, 1 Ves. Sen. 73 (1748), as before noticed (p. 280), observes (p. 74), upon this and the preceding case (*Osgood v. Strode*), and other cases which he mentions, that they

thought that the court ought not to interfere to enforce the specific execution of such a contract, at the instance of a person not claiming adversely to the covenantor, if in doing so the heir would be left without a competent provision (a).

show that the court had got out of the strictness of the old rule (*viz.*, that none but parties should have the benefit of marriage articles), where the party plainly stipulating for the volunteer, as father for his daughter, &c., gave any sort of consideration (and small circumstances have been held to constitute a consideration, *Nunn v. Wilmore*, 8 T. R. 529; Lord Kenyon, *Sugd. V. and P.* 936); or where an action might have been brought by the covenantees (trustees) for substantial damages. Lord Hardwicke decided *Stephens v. Trueman*, 1 Ves. 73, partly on this ground; the bill was filed by a collateral heir of the father of the wife, against her heir, *ex parte maternâ*, to have the specific performance of articles; the consideration which the father had given was, that he had secured a sum of 500*l.* to his daughter which before was contingent: the daughter covenanted with the trustees for herself and her heirs, &c., that the real estate to which she was or might become entitled should be settled to uses, namely, to herself for life, then to the issue of the marriage, then to her sister and her issue, and then to the father's right heirs: Lord Hardwicke decided that the covenant ought to be performed; the ground was, the consideration on the part of the father, and that there was a subsisting covenant; *cf. v. Ithell v. Beane*, 1 Ves. 215; 1 Dick. 132.

(a) *Goring v. Nash*, 3 Atk. 186; Reg. Lib. 1743, fo. 666; before Lord Hardwicke (1744). This case, as it appears in the Registrar's Book, arose as follows. By articles executed on the marriage of Sir Robert Fagg's eldest son with Sarah Ward, in consideration of the marriage and of 4000*l.* portion covenanted to be paid by William Ward, father of the intended wife, Sir Robert Fagg and his son covenanted with William Ward, the father, that they or the survivor would, on or before the 1st of February then next, convey to the trustees therein named, a portion of the estates mentioned in the articles, to the use of Robert Fagg, the son, for life, remainder to trustees to preserve, &c. remainder to trustees for 200 years, to secure a jointure of 400*l.* a year to the wife, with remainders over to the use of the issue of Robert Ward, male and female, by his intended wife (all which had become of no effect by the death of Robert Fagg the son without issue). It was further covenanted that another portion of the estates should be settled by them for four years from the marriage to the use of Sir R. Fagg,

and at the expiration of that time to the use of R. Fagg the son for life, with the same remainders as those which were limited in regard to the first-mentioned premises, and that other premises in the counties of Sussex and Kent should be conveyed by them chargeable with the 400*l.* a year jointure, to the use of Sir R. Fagg for life, remainder to trustees for 300 years, for raising portions for the daughters of Sir R. Fagg, so as to make them up, together with what the grandfather had charged on the estates in their favour, to 8000*l.*: then to the use of R. Fagg, the son, for life, remainder to trustees, &c.: then to trustees for 400 years for securing portions for younger children of that marriage, remainder to the use of the first and other sons of the marriage, with certain remainders over, which never took effect, and in default of heirs of the body of Robert Fagg, the son, all the estates comprised in the articles were covenanted to be settled, subject to the 400*l.* per annum jointure to use of the plaintiff, Elizabeth Fagg, daughter of Sir R. Fagg, in tail, unless Sir Robert, the father, should otherwise appoint, with remainders over, the ultimate remainder being to John Fagg, in fee; William Ward, the father, covenanted immediately to pay the 4000*l.* Sir R. Fagg died intestate, whereupon the estates in question descended to the son; the son gave directions that a settlement should be prepared according to the articles, and a draft was prepared, which, as it was alleged, he approved; but before he had executed the settlement he died, intestate and without issue, leaving his wife surviving. The plaintiff and her three sisters were coheirresses-at-law of Robert Fagg, the son, and the plaintiff sought to have the covenant in the articles specifically executed against her sisters: it was objected that all the uses, excepting that for securing the jointure, were voluntary, and to the disinherison of the defendants, and that the articles were a partial and inequitable division in favour of the plaintiff. On the original hearing (1729), Lord Hardwicke referred it to the Master to inquire what were the respective values of the real estates which had descended to the plaintiff and her three sisters, as coheirresses-at-law, and what incumbrances and debts there were affecting them. The Master reported that estates were clearly comprised in the articles, which were of the yearly value of 820*l.* 6*s.*, chargeable (with other estates) with the jointure; that other estates, of the value of 530*l.* a year, were also comprised in the

Lord Northington indeed seems to have thought that, according to the authorities, even where the covenantor was himself the owner of the estate, and the only claim of the third person in the way of consideration was relationship to the covenantor himself, and the covenant was therefore purely voluntary on the part of the covenantor, still it might be enforced against his representatives (*a*), for that it was equally an expression of an intention in favour of the third person, as if the estate had been devised according to corresponding limitations, in

articles; that there were other estates, of the value of 737*l.* per annum, and that it was doubtful whether they were comprised in the articles; that estates, of the value of 804*l.* per annum were not comprised in the articles, and had descended to the plaintiff and her sister; that the widow of Sir R. Fagg, the grandfather, was entitled to dower over all the estates, and that all the estates were charged with the jointure of 400*l.* a year to the widow of the son; and that the incumbrances on the estates descended amounted to 23,849*l.* On the hearing, on further directions, Lord Hardwicke directed that on the circumstances of this case, the plaintiff and her husband (she having married) were entitled to have a specific performance of the articles, as to such uses as were still subsisting; it was referred back to the Master to review his report with regard to those estates which he had not reported, whether they were or were not comprised in the articles, and if he should find that they were comprised in the articles, they were to be settled in the same manner. The Master was to adjust the proportions in which each estate was to bear the jointure of 400*l.* as between themselves, according to their values; and on such jointure being secured, William Ward was ordered to pay the residue of the 4000*l.* remaining unpaid. According to the report in *Atkins*, Lord Hardwicke made his decree on three grounds:—1, that the plaintiff, in respect of a charge she had affecting all the lands, was clearly entitled to a specific performance of the articles *in part* (see *Davenport v. Bishopp*, 1 Phill. 705, *infra*); 2, that the trustees, as covenantees, would have been entitled to recover the whole value of the estate out of the real assets (following in this respect *Vernon v. Vernon*, 2 P. W. 594, *sup.*; and see 1 Phill. 702); 3, that this limitation was part of the provision made by a father for his daughter, (the estate had in fact belonged to him,) 3 Atk. 189: a provision for younger children, said Lord Hardwicke, is always favoured here; they are considered as purchasers, by reason of the natural obligation of parents to provide for their children; hence surrenders are aided for their benefit: and though Lord Hardwicke in this case (*Goring v. Nash*), thought

the Lord Keeper's reasoning in *Watts v. Bullas*, 1 P. W. 60, too large, as taking in too extensive a range of relations, (he had aided a defective conveyance in favour of a brother of the half-blood;) his lordship apparently admitted the reasonableness of the doctrine when confined to a wife or children.

Lord Hardwicke, it will be seen, directed the original inquiry, in order to ascertain whether the provision made by the articles was a reasonable one, having regard to what the other daughters took by descent; see pp. 188, 189, 191 of the report in *Atkins*. The reasonableness of the arrangement had also an influence in *Osgood v. Strode*, *supra*, 2 P. W. 258, as it has had in many other similar cases. *Finch v. Lord Winchelsea*, 1 P. W. 277; *Rodgers v. Marshall*, 17 Ves. 294; and *Cory v. Cory*, 1 Ves. 19; *Glessen v. Ogden*, cited 2 Atk. 258; and see Saunders's note, 3 Atk. 188.

In none of these cases, it will be observed, was there an attempt on the part of a volunteer to enforce a stipulation against the covenantor, solely on the ground of the relationship between the covenantor and himself. In each case the party who had exacted the stipulation was dead, without his having in any manner released the covenantor; the claimants sought to stand in the place of the party who, for a valuable consideration as regards the original settlement, had exacted the stipulation sought to be enforced, and to have the benefit of the covenant, which the covenantees, as it seems to have been admitted, might have enforced at law. The Relationship was made use of to show that it was not only natural but reasonable that the party who had contributed to the consideration on the original settlement should have exacted such a stipulation in favour of the third person, and to show that it was with a view to confer a benefit on such third person that the stipulation was exacted.

(*a*) Not against the covenantor himself, for in *Wycherley v. Wycherley*, 2 Eden, 177, the same learned judge said he knew no instance where a court of equity had compelled a man to execute a mere act of volition; but as regards the representatives, the covenantor himself not having expressed any different intention, it is compelling them to carry his will into effect.

which case the heir would clearly be excluded; it certainly is difficult to find a distinction in principle between the two cases, though in the case of a will the estate is conveyed, in the case of articles there is only a covenant to convey, which however in equity, where there is a contract, is equivalent to a conveyance (a).

The modern authorities have certainly established, as a general rule, that where a contract under which a plaintiff claims is not founded on valuable consideration, this court will not lend its aid to perfect the plaintiff's title (b); and that although the contract may have been entered into between father and son (c). But all these cases (d) appear to relate to the question whether a person can enforce against the contractor a mere agreement entered into with the party himself, or can enforce the completion of an imperfect conveyance or gift made directly by one person to another without any consideration, where the transaction does not amount to a declaration of trust in

(a) See the case of *Hale v. Lamb*, 2 Eden, 295. Lord Chancellor Northington there said, referring to *Osgoode v. Strode*, *Watts v. Bullas*, and *Vernon v. Vernon*, that a settlement made on marriage, with extension to collaterals, if defective in law should be made good in equity for the same collaterals; for the consideration of the marriage and the settling of the estate run through all the limitations, and the authorities confirm the decision. "Nor do I see," said his lordship, "any sound objection to this, for a man's serious disposition by will, as all will admit, supersedes the heir-at-law without injustice" (but there it is to be observed that the estate passes to the devisee), "and these cases," said his lordship, "have nothing to do with the statutes against fraudulent conveyances;" and in that case Lord Northington expressed his opinion to be, that if the covenantor had died without issue male, and the limitations had run out, the uncle would have been entitled to a specific performance.

(b) Vice-Chancellor Wigram, *M'Fadden v. Jenkins*, 1 Hare, 460; for which proposition the learned judge cited *Colman v. Sarel*, 3 Bro. 12, 1 Ves. Jun. 50; *Ellison v. Ellison*, 6 Ves. 656; *Adams v. Claxton*, 6 Ves. 226; *Antrobus v. Smith*, 12 Ves. 39; *Cotteen v. Missing*, 1 Mad. 76; *Pulvertoft v. Pulvertoft*, 18 Ves. 84; *Ex parte Pye*, 18 Ves. 140; *Edwards v. Jones*, 1 My. & Cr. 226, (which has been followed in the late case of *Searle v. Law*, 15 Sim. 99,) and *Dillon v. Coppin*, 4 My. & Cr. 647; *Consitt v. Bell*, 1 Yo. & C., C. C. 577.

(c) *Holloway v. Headington*, 8 Sim. 324; *Jefferys v. Jefferys*, 1 Cr. & Phillips, 138; *Dillon v. Coppin*, 4 My. & Cr. 647; which cases may be considered as having overruled Sir E. Sugden's decision in *Ellis v. Nimmo*,

Lloyd & J. temp. Sugd. p. 333. "My impression," said Lord Cottenham, in *Jefferys v. Jefferys*, 1 Cr. & P. 141, "is that the principle of the court to withhold its assistance from a volunteer applies equally, whether he seeks to have the benefit of a contract, a covenant, or a settlement."

(d) And see *Hale v. Lambe*, 2 Eden, 294; *Fursaker v. Robinson*, Pr. Ch. 475, which was the case of a grandchild seeking to have a surrender supplied under a covenant for further assurance; *Evelyn v. Templar*, 2 Bro. C. C. 148; *Malcolm v. Scott*, 3 Hare, 39; *Walburn v. Ingilby*, 1 My. & K. 61, and *Ward v. Audland*, 8 Sim. 571, 8 Beav. 201. It may here be observed, that the court will not supply a surrender, excepting in favour of those who can rely on a legal or moral obligation, as creditors, *bonâ fide* purchasers or mortgagees as regards the former, and a wife and legitimate children as regards the latter; v. *int. alia* *Bradley v. Bradley*, 2 Vern. 164; *Wardell v. Wardell*, 3 Bro. 116, 12 Ves. 216; *Goodwyn v. Goodwyn*, 1 Ves. 228; *Byas v. Byas*, 2 Ves. 164; *Keitle v. Townsend*, 1 Salk. 187; *Smith v. Baker*, 1 Atk. 386; *Fielding v. Winwood*, 16 Ves. 90; *Sampson v. Sampson*, 2 Ves. & B. 337; and not even in favour of the latter, if the heir be not to some extent provided for by settlement or otherwise; *Hawkins v. Leigh*, 1 Atk. 388, (but see on this point, *Hills v. Downton*, 5 Ves. 557, 564). It will not be supplied in favour of a grandchild, especially where the father is living; *Elton v. Elton*, 3 Atk. 508; *Crickett v. Dolby*, *infra*; nor of a natural daughter against the heir under the ancestor's covenant for further assurance; *Fursaker v. Robinson*, Prec. Ch. 475; *Gilb. Eq. R.* 139; *Crickett v. Dolby*, 3 Ves. 12.

favour of such person (a). There is not, as it is believed, any decision which controverts the several cases before referred to, so far as they establish that a third person, particularly if a relation, may enforce in equity a legal existing stipulation exacted from *another* in his favour, and for which the party exacting it has given a valuable consideration plainly with a view to benefitting such third person, though such third person, as regards each of the contracting parties, may be a volunteer; some of the decisions on the subject of the operation of the statute of the 27th of Eliz. (which will presently be mentioned), seem to confirm them (b): in the case of *Sutton v. Chetwynd*, before Sir Wm. Grant, which might appear to be at variance with those cases, the party who sought to enforce the covenant in the articles was not a relation, nor could it be supposed that any favour towards him or the person whom he represented could have influenced any of the parties to the articles (c) in the stipulations which they entered into one with another (d).

Where money has been deposited in the hands of trustees, or lands have been conveyed to them with a view to an investment, or a settlement upon the proposed trusts, the case is stronger in favour of the parties who claim under the alleged voluntary limitations, for the legal title to the property being in the trustees, the court *must* interfere for some one, in order that the money or the land may be obtained from the trustees; and the specified object of the trust, whether it be a designated person, or those who claim under him, or the heir, or the personal representative, would appear in such case, under the limitations in their favour, clearly to have the preferable claim to all others.

There are instances where a third person has been expressly allowed to treat the party exacting the stipulation as his trustee, though such third person was a mere stranger to the parties. In the case of *Gregory v. Williams* (e), one Parker, who was in possession of a farm belonging to the defendant Williams, was considerably indebted to Williams, he also owed a large debt to one Gregory; Parker, as Williams knew, was under apprehensions that Gregory would arrest him; Williams,

(a) See *Searle v. Law*, 15 Sim. 100; *et v. sup.* p. 57.

(b) V. p. 291, *infra*.

(c) And see Lord Cottenham's observations on this case, 1 Phill. 704, and Lord Eldon's, Turn. & R. 296.

(d) *Sutton v. Chetwynd*, 3 Mer. 249, affirmed in the House of Lords, see Turn. & R. 296, and the note to *Davenport v. Bishopp*, 2 Y. & Coll. C. C. 456; and see *Ellis v. Nimmo*, Lloyd & G. temp. Sugd. 343. The Vice-Chancellor K. Bruce, in reference to another point,

on which Lord Hardwicke partly proceeded in *Goring v. Nash*, *supra*, p. 284, namely, that where articles are to be carried into effect in part, they must be carried into effect *in toto*, remarked that if Sir R. Sutton had been a defendant, and some one within the consideration had sought to enforce the contract, the result might have been different, 2 Y. & Coll. C. C. 462; and see *Jenkyns v. Kemys*, 1 Lev. 150, 237; 1 Ch. Ca. 105.

(e) 3 Meriv. 582.

the landlord, and Parker, the tenant, entered into an agreement, in writing, to which Gregory, the creditor, was neither a party nor privy, to the following effect, namely, that if Parker would make over to Williams all his stock and effects of every kind, he would pay the debt due to Gregory. Gregory subsequently was informed of this arrangement, and he and Parker filed the bill against Williams to enforce it: the stock and effects assigned to Williams by Parker had been sold at a loss. It was insisted by Williams, that if Gregory had any remedy it was at law; Sir Wm. Grant considered that it was at least doubtful whether Gregory could recover at law, for the engagement of Williams was not made directly to Gregory but to Parker only, and the consideration was furnished by Parker only, for he alone did the acts which constituted the consideration, Gregory was not a party to the contract; however that learned judge supported Gregory's right to sue *in equity*, saying, Parker acts as *his trustee*, and Gregory may derive *an equitable right* through the medium of Parker's agreement, though it was at *least questionable* whether he could have maintained *an action at law*; it was like the case (a) where a man promised the widow that if she would allow his name to be joined with hers in the administration, he would make up the deficiency of the assets for the payment of the intestate's debts; which promise was held to be binding in favour of the creditors, though they could not sue at law, as the promise was not made to them; so here Gregory had a right to insist upon the benefit of the promise made to Parker, to the extent of 900*l.*, which Parker represented to be the amount of the debt (b).

Where there are a series of limitations, some of which are in favour of persons who are parties to the contract or to the consideration, and others in favour of strangers to both; and any one of the parties who is within the consideration files a bill to have the articles carried into execution, the court will not carry into effect those provisions which are in favour of the parties to the contract or consideration, and stop there, but it will carry them into execution *in toto*, whatever it might do if the stranger sought to have the contract enforced (c).

(a) *Tomlinson v. Gill*, Ambl. 330.

(b) 1 Meriv. 590: so in *Hook v. Kinnear*. Kinnear and Sir John Phillips were tenants in common of some lands; Kinnear had taken a lease from Sir John Phillips of his moiety, at a rent. The rent being in arrear, Kinnear entered into an agreement with Sir John Phillips, by which he bound himself to join in executing to the plaintiff such lease as the plaintiff and Sir John Phillips should agree upon. Sir John to receive the rent till the

arrears due from Kinnear were paid. Sir John performed his part by executing a lease of his moiety to the plaintiff. The Lord Chancellor considered that Sir John had contracted on behalf of himself and the plaintiff (which made him a *quasi* party), and decreed a specific performance of this agreement against Kinnear. *Hook v. Kinnear*, 3 Swanst. 417, n. (no date).

(c) *Davenport v. Bishopp*, 2 Y. & Coll. C. C. 456, confirmed on appeal, 1 Phillips, p. 698;

An agreement entered into to secure the peace of a family, though resting on contract, will be supported and enforced at the instance of any one of the persons who are to take a benefit under the arrangement and those claiming under him, though the party seeking to enforce it may not have contributed any portion of the consideration; the doctrine as to volunteers is not applied to such cases (a).

The doctrine in regard to the rights of purchasers and creditors, to avoid voluntary provisions by way of settlement, has been adverted to as bearing upon this subject. I have therefore here introduced the general heads of that doctrine.

By rather a forced construction of the stat. 27 Eliz. c. 4 (b), it has been held that a voluntary settlement in favour of a wife and children is void against a subsequent *bonâ fide* purchaser for valuable consideration even with notice (c); and a specific performance of a contract for sale of the estate so settled entered into by the settlor, will be decreed at the instance of the purchaser even after the death of the settlor (d). It is held that the purchaser can in no way be affected by the settlement; it matters not that he takes with notice from a person who by reason of the settlement is a trustee of the estate; the statute annuls the deed as against the purchaser, he cannot therefore be affected with the trusts of the deed so destroyed (e). As against the party himself the settlement is valid; but though this is admitted, the court, with some degree of inconsistency, will not interfere to prevent a sale, by which the settlor seeks, by taking advantage of the provisions of

and see the Vice-Chancellor's remarks on *Sutton v. Chetwynd*, and *Goring v. Nash*, *supra*, p. 283, note.

(a) *Stapilton v. Stapilton*, 1 Atk. 10, (1739). In that case an agreement by deed had been entered into by a father, his eldest son (then treated as legitimate, but who afterwards turned out to be illegitimate), and the second son (legitimate). Lord Hardwicke decreed that it should be carried into execution at the instance of the son of the illegitimate son, chiefly on the ground that it was entered into to establish the peace of a family (p. 11). It is to be observed that the real heir, the eldest son, took a portion of the estates under the agreement so carried into execution. This case was followed by Lord Langdale, in *Neale v. Neale*, 1 Keen, 68, though the agreement was by *parol* only, and related to lands, but there had been long possession in conformity; this case was affirmed on appeal.

(b) *Supra*, vol. i. p. 172.

(c) *Smith v. Garland*, 2 Meriv. 127; *Doe dem. Olley v. Manning*, 9 East, 59; *Cotterel*

v. Homer, 13 Sim. 506.

(d) Sir Wm. Grant, in *Buckle v. Mitchell*, 18 Ves. 100, followed the doctrine which he found settled, but he doubted whether, on principle, the statute of the 27th Eliz. ought to have been applied to cases where the purchaser had notice; as the purchaser, knowing of the settlement, cannot be said to be defrauded, *ibid.* p. 110. In *Lister v. Turner*, 5 Hare, 291, Vice-Chancellor Wigram considered that that case had established that an equitable interest in land entitles a purchaser *by contract* to clothe it with the legal title; he therefore felt himself bound to hold that an equitable mortgagee was entitled to avoid a voluntary conveyance. Copyholds are within the statute, *Doe dem. Tunstall v. Bottrill*, 5 Barn. & Adol. 131.

(e) *Currie v. Nind*, 1 My. & Cr. 25. There the property belonged to a married woman, and the settlement was made during coverture, but that did not prevent the operation of the statute; *Goodright v. Moses*, 1 Blackst. 1019, *ibid.*

the statute, to get rid of the settlement (*a*). The parties in whose favour a constituted trust is created by voluntary settlement may indeed file a bill to have the trust carried into execution; but the pendency of the suit will not prevent the settlor from selling the property, or the purchaser from filing a bill to enforce his rights under the contract (*b*). There is a difference in this respect in favour of Charity: a purchaser with notice of a gift to a charitable use takes subject to the charitable use, but if he had no notice, he will have the same protection as in an ordinary *bonâ fide* purchaser without notice (*c*).

If the settlor has reserved a power to sell, and has covenanted that in case he shall sell, the purchase money shall be laid out in the purchase of land to the same uses, that does not so far bind the money as that the purchaser is bound to see to the application; he may safely pay to his vendor (*d*). In the case of a sale of an estate settled on volunteers the court will neither impede nor assist: it will not interfere in any manner as against the settlor in respect of a voluntary settlement (*e*), nor will the court give its aid to the settlor to enable him to complete a contract for sale against a purchaser (*f*).

A voluntary settlement is with greater reason held to be void under

(*a*) *Pulvertoft v. Pulvertoft*, 18 Ves. 93. Lord Eldon's first impression had been different, he had granted an injunction.

(*b*) *Pulvertoft v. Pulvertoft*, *ubi sup.*; *Metcalfe v. Pulvertoft*, 1 Ves. & B. 180; 2 Ves. & B. 200; *Sugden, V. and P.* 941.

(*c*) *Sugd. V. and P.* 944-5.

(*d*) *Evelyn v. Templar*, 2 Bro. 148. Lord Lord Eldon, in *Pulvertoft v. Pulvertoft*, 18 Ves. 93, says of *Evelyn v. Templar*: "But if Lord Thurlow did not think himself authorized to lay hold of the money in *Evelyn v. Templar*, where there was notice and an express covenant to lay out the money to the same uses, I must take his opinion to have been, as I believe it was, that with a mere voluntary settlement this court has nothing to do." From this statement of *Evelyn v. Templar*, it might be supposed, that it arose on an attempt to intercept the money, so that it might not be paid to the settlor, and that the settlor was a party. But, in fact, the bill was against the representative of the purchaser only, and it sought to compel him to pay the purchase money over again out of the assets of the purchaser, on the ground that the money was bound by the uses of the settlement; it being insisted that the settlement, which the statute made void, was good for that purpose, which it clearly could not be as against the purchaser. But that case does not

decide that the money in the hands of the settlor would not have been bound, though it has been so considered; that case, therefore, may stand with *Williamson v. Codrington*, 1 Ves. 516, in which case the covenant was in favour of natural children, and therefore not so strong as in the case of a wife and legitimate children: besides Lord Thurlow's expressions, two years afterwards, in *Colman v. Saftel*, 1 Ves. J. 54-5, a case of a mere stranger (*v. supra*, p. 57, note), are, "Whenever you come into equity to raise an interest by way of trust, you must have a valuable or, at least, a meritorious consideration; nothing less will do"—having in his mind, as it would seem, Lord Hardwicke's doctrines as to the consideration as between parent and child; see particularly *Wright v. Wright*, 1 Ves. Sen. 411, 412; and see *Parry v. Corwarden*, 2 Dick. 544, as stated 18 Ves. 92, note (*b*): so that all that Lord Eldon meant, possibly, was, that as against the purchaser this court would have nothing to do with a voluntary settlement, which was all that the case before him called for. But this note rather belongs to another place, where it will be referred to.

(*e*) Sir Wm. Grant, *Smith v. Garland*, 2 Meriv. 127, (*et v.* 18 Ves. 93); *Buckle v. Mitchell*, 18 Ves. 112.

(*f*) *Smith v. Garland*, *ubi sup.*

the stat. 13 Eliz. c. 5 (a). But there is this difference between the stat. 27 Eliz. and the stat. 13 Eliz. If, said Lord Hardwicke, as reported, there is a voluntary conveyance of real estate or a chattel interest by one not indebted at the time, though he afterwards become indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors, that will be good; but if any mark of fraud, collusion, or intent to deceive subsequent creditors appear, that will make it void, otherwise not, but it will stand, though afterwards he becomes indebted (b): under the 27 Eliz., the settlement is absolutely void as against a purchaser, whatever may have been the circumstances of the settlor at the time.

The courts will anxiously endeavour to support a fair settlement even as against the claims of a purchaser or creditors, and in the absence of fraud nearly any *bonâ fide* consideration will be sufficient for that purpose. Therefore if a person, whose concurrence the parties think essential, join in a settlement, his concurrence will be deemed a valuable consideration, although he did not substantially part with anything (c): arrears due on a voluntary bond are a valuable consideration (d).

If on a marriage, and in consideration of that marriage, an estate is limited to the husband and the issue by other persons who are of the family, and therefore may be considered as making a provision for the persons claiming under that settlement, the husband may set up a claim as purchaser for a valuable consideration, not with a view to his own enjoyment simply, but because his enjoyment of that estate is part of the inducement to the marriage itself. If a father in consideration of the marriage of his son were to convey an estate in fee to the son, the son would be a purchaser for a valuable consideration, though no consideration had passed to the father but the marriage. All the provisions made for the husband, as well as for the wife and issue by a marriage settlement, are to be taken as for valuable consideration (e).

(a) *Sup.* vol. i. p. 185. As to some questions as to frame of the suit for taking advantage of the statute, and the capacity of the creditor, particularly whether he must obtain a judgment at law; see *Lister v. Turner*, 5 Hare, 281.

(b) Lord Hardwicke, *Lord Townsend v. Windham*, 2 Ves. 10, 11; *et v. Walker v. Burrows*, 1 Atk. 93; *Cutten v. Sanger*, 2 Gl. & J. 459; and *Richardson v. Horton*, 7 Beav. 112.

(c) Sir E. Sugd. V. and P. 936, *Roe v. Mitton*, 2 Wils. 356, and other cases there cited: all reasonable transactions of this kind are favoured, *Cory v. Cory*, 1 Ves. 19; *Glissen v. Ogden*, cited 2 Atk. 258; Lord Kenyon, *Nunn v. Wilshire*, 8 T. R. 529; *Dewey v. Bayntun*, 6 East, 273.

(d) *Tanner v. Byne*, 1 Simons, 160.

(e) Lord Redesdale, *O'Gorman v. Comyn*, 2 Sch. & Lef. 148.

Where a settlement is actually executed, and a limitation to a collateral is inserted, whether the parties claiming under such a limitation can prevail as against a purchaser has lately been the subject of much discussion (a).

Lord Macclesfield was of opinion that, as a general rule, the marriage portion did not go beyond the limitations to the husband and wife and issue, so as to affect *creditors* or *purchasers*, even where the property was actually conveyed upon the trusts stated. However, Lord Eldon observed, as has been before noticed (b), that in the case of a father, tenant for life, with remainder to his son in tail, they may agree, upon the marriage of the son, to settle not only upon his issue, but upon the brothers and uncles of that son; and the question would be, whether they, though not within the consideration of the marriage, are not within the *contract* between the father and the son, both having a right to insist upon a provident provision for uncles, brothers, sisters, and other relations, and to say to each other "I will not agree, unless you will so settle." The court, he added, has held such a claim not to be that of a mere volunteer, but as falling within the range of the consideration, and therefore, said his Lordship, these statutes would not bear upon it (c). Very small considerations, said Lord Kenyon, have been holden sufficient to give validity to a deed; where, in framing family settlements, limitations are made in favour of distant branches of the family, such remainders are not considered as voluntary if the object of the parties in making the settlement was fair and honest (d).

In *Johnson v. Legard* (e), the point was expressly put to the judges of the Court of King's Bench, in a case from the Court of Chancery. The wife had only a rent-charge, and therefore, as Sir E. Sugden observes (f), it might be supposed that she stipulated for the settlement of the estate in remainder on her husband's brothers (it was the husband's estate (g)), in order that the family dignity might be maintained, and her annuity be regularly paid; but the Court of King's Bench (1818), composed of Lord Ellenborough, Mr. Justice Bailey, Mr. Justice Abbott, and Mr. Justice Holroyd, unanimously certified their opinion that none of the limitations to the collaterals were good or valid limitations; the Vice-Chancellor, Sir J. Leach, expressed his entire concurrence with the certificate, and decreed accordingly (h).

(a) It might perhaps be sufficient here to refer to Sir E. Sugden's ample treatise, p. 932, *et seq.*

(b) And see Sugden, V. and P. 932.

(c) *Pulvertoft v. Pulvertoft*, 18 Ves. 92, *supra*, and *v. Ithell v. Beane*, 1 Ves. 215; 1 Dick. 132.

(d) Lord Kenyon, *Nunn v. Wilsmore*, 8 T. R. 529.

(e) See the case stated, Sugd. V. and P. 940.

(f) V. and P. 934.

(g) S. C. 3 Mad. 297.

(h) 3 Mad. 302. Lord Eldon also appears

Sir E. Sugden, in the case of *Stackpoole v. Stackpoole* (1843), observed upon *Johnson v. Legard*, that it went beyond what the law authorized, "but," said that learned and very able judge, "the authorities on the whole are, I think, in favour of the courts acting in such cases; so also is the current of opinion, to which I always pay great attention—and I believe it is generally considered that a contract for valuable consideration will bind in this court those having merely voluntary interests, and I am therefore prepared, when called upon, so to decide" (a). It is to be presumed therefore that, as regards purchasers and creditors, the law on this subject is settled: but these cases are governed by positive acts of parliament; they do not necessarily determine that a collateral relation may not enforce a stipulation in his favour, as against the party who has contracted with another for valuable consideration, that he shall have the benefit which he is seeking to obtain: or that he shall not have the benefit of a provision, unrevoked, which a person has voluntarily made for him, as against the representatives of the person making the provision. In the former case, as between himself and the party exacting the stipulation he is a volunteer, but standing in the place of the party who exacted the stipulation, as against the other parties, he claims the benefit of the consideration given by such party; and though according to the decisions lastly above adverted to, the collateral may not be able to claim even under an executed settlement, as against purchasers and creditors, by reason of the provisions of the acts in favour of creditors and purchasers, those decisions do not necessarily stamp the character of volunteer upon the collateral, so as to prevent his coming to the court to enforce even a contract in his favour as against the parties to the contract who have bound themselves that property shall be settled or applied in a manner which the collateral seeks to have carried out, or against their representatives. In the latter case, namely, where the provision made is entirely voluntary, if specific property be actually settled in favour of a collateral, it is a constituted trust (b), in respect of which, it is presumed, no question can arise: if the matter rests in contract and that contract affects specific property, it is presumed, at least if the covenantor does nothing in his lifetime indicative of a

to have approved the certificate, *S. C. Turner & R.* 295. Yet it was not quite in conformity with his doctrine in *Pulvertoft v. Pulvertoft*, unless that doctrine is to be confined to contracts as to the property of a stranger.

(a) *Stackpoole v. Stackpoole*, 2 Conn. & L. 508, and see p. 507. "It admits of no doubt that the collateral relations are not

within the marriage consideration," i.e. as regards purchasers and creditors, "and nothing appears on this instrument to take it out of the general rule of law, which is too well settled to admit of discussion," *S. C.* 4 Dru. & War. 320; and see *Cotterell v. Homer*, 13 Sim. 506.

(b) *V. supra*, pp. 52, 149.

change of intention, the property will be bound as against all volunteers claiming under the covenantor, and consequently the covenant may be enforced as against his representatives, if, on the whole, the transaction, looking to the circumstances as regards the different members of the family at the time, does not appear to have been an unreasonable one: the strict measure, says Lord Hardwicke, in *Goring v. Nash*, which governs the court in a question between persons who come to carry articles into execution and purchasers, is not the rule of this court between families, for between families the court has considered whether a superior or inferior equity arises on the part of the person who comes for a specific performance; it is one consideration, he adds, how far the court will support agreements of this kind against relations in a family, and another against purchasers and creditors (*a*). But where the matter rests on contract merely, as where there is a covenant that a certain sum, or that land of a certain value, not specifying any particular fund or any particular lands to give, shall be settled, so as to give to the claimant, he not being a party to the contract or to the consideration, an interest in the property to be settled; this seems to be a case in which the Court of Chancery will not, at his instance, in any way interfere (*b*).

(*a*) Cited by Lord Cottenham in *Davenport v. Bishopp*, 1 Phillips, 705; so a family arrangement will not readily be disturbed as founded on error; *Clifton v. Cockburn*, 3 My.

& K. 100-1; *et v. sup.* p. 290, n. (*c*).

(*b*) *V. supra*, p. 285, *et v. infra*, "Voluntary Conveyances of Equitable Estates and Interests."

ADDITIONAL NOTES.

In addition to the cases, p. 257-8, in which it has been held that the directions in a will amounted to an absolute conversion, see *Flint v. Warren*, ix. Jur. 420, 14 Sim. 554; and *Ward v. Arch*, 16 Law J., N. S. 66.

P. 271. Trustees held real estate in trust to sell and invest the proceeds, and to stand possessed of the proceeds for the absolute benefit of a person named. That person obtained possession of the title deeds from his solicitor; it was held that this amounted to a declaration of intention that the fund should be considered as real estate; *Davies v. Ashford*, ix. Jur. 612.

**SECTION V.—Miscellaneous Instances of Implied, Presumptive,
Constructive, and Transferred or Continuing Trusts.**

Court of Chancery more liberal than Courts of Law in putting a Construction on Devises in Trust, so as to carry out the Intent of the Testator.

The Courts of Law also governed by the Intent in determining what Estate the Devisee in Trust takes.

Stat. 1 Vict. c. 26, §§ 30, 31, as to the Estate of Trustees.

But the Cases here to be considered are those where the Legal Interest is clearly in some Third Person.

Heir a Trustee where there is a Direction to Sell.

Trustee for Sale to pay Debts constructively a Trustee for the Creditors.

Implied or Constructive Trusts may be raised by the Acts of the Parties—Consignee who is directed to pay an Annuity to a Third Person a Trustee for such Third Person.

Heir of Mortgagee in Fee Trustee for the Personal Representatives.

Executor, Trustee of a Debt due from himself to his Testator.

Legatees who have been paid before Debts satisfied, Trustees for the Creditors—One

Legatee also may in some cases compel another who has been paid to refund.

When the Legatee must refund with Interest, and when not.

Person taking Property from Executor in Breach of Trust, as for Payment of a Private Debt, is himself a Trustee.

Assignees of Broker, Trustees of Price of Goods sold, if in Specie, for the Principal.

Trustee, Executor, or Agent, or Person having a Limited Interest in an Estate, obtaining a Renewal of a Lease, is a Trustee of such Renewed Interest,

Executor of Mortgagee purchasing Equity of Redemption, a Trustee for the Mortgagor's Estate.

Annuitant whose Annuity is charged on a Leasehold Interest, or whose Annuity is charged by Will on a Leasehold Interest, entitled to the Benefit of a Renewal.

Moody v. Matthew, 7 Ves., before Sir W. Grant.

Annuitant under a Will must contribute to the Fines.

Proportions in which Tenant for Life and Remainderman must contribute to Fines paid on Renewals.

Whether where a Person having a Limited Interest purchases the Reversion he shall be held as a Trustee.

Randall v. Russell, 3 Meriv., before Sir W. Grant.

The Person so converted into a Trustee entitled to an Allowance for Repairs and lasting Improvements.

The Right to convert such Person into a Trustee may be lost by Laches or Acquiescence. Tenant for Life committing Equitable Waste Trustee of the Produce.

Trust in favour of Wife on a Mortgage of her Estate for Payment of her Husband's Debts.

Trust in favour of Person having a Limited Estate paying off Incumbrances.

Generally the Person who has the Legal Right in Personal Property may of himself sue for the Property though liable to a Trust for others.

Jones v. Goodchild, 3 P. W., before Lord C. King.

Exceptions.

Loy v. Duckett, 1 Cr. & Phill., before Lord Cottenham.

The Bank of England not affected by Notice of a Trust—Ordinary Banker not a Trustee.

It may be observed that as regards the estate and the powers of trustees under devises by way of trust, (which the Court of Chancery is bound to carry into execution according to the intent of the testator) a greater latitude has been allowed than at law in the construction, to make it agree with the intent of the testator (a); though even at law, in construction, the intention is taken as the governing principle; thus, as we have seen (b), before the late act 1 Vict. c. 26, § 30, 31, where it was necessary, for the purpose of a trust created by will, that the trustees, under a devise to them, should take the inheritance, it was held that by construction of law the inheritance should pass. In case of a devise to trustees for sale before the late act above referred to (c), though only a part of the inheritance was required to be sold, yet the court would not make fractions and consider them as trustees for only a part of the inheritance, but of the whole; the possibility that the whole might be required, would make them trustees throughout, and whoever would be entitled on the contingency that the whole might not be required had to take a legal conveyance from them (d). But where the purposes of the trust might be answered by a less estate than the fee, no greater estate would pass to the trustee by implication (e). As regards the parties beneficially interested, where the trust is to pay the rents, after deducting rates, taxes, and repairs, or to deal with the property in such manner as to require that the donee should have the dominion over the estate, the donee, as was noticed in the former volume (f), will retain the legal estate in order to enable him to perform the trusts reposed in him (g). But the

(a) See *Bagshaw v. Spencer*, 2 Atk. 581.

(b) *Supra*, p. 36, *Shaw v. Weigh*, 1 Eq. Ab. 185: as to effect of the act, see also *Ackland v. Pring*, 3 Scott, N. S. 297; *Doe v. Davies*, 1 Ad. & Ell. N. S. 430, referred to in the Index to 2 Jarm. 798.

(c) *Shaw v. Weigh*, 1 Eq. Ab. 185.

(d) Lord Hardw. *Gibson v. Rogers*, Amb. 93.

(e) *Doe v. Simpson*, 5 East, 162; *Doe v. Nicholls*, 1 Barn. & C. 343, Blunt's note: and a devise in trust to sell may be so con-

finied as not to give the inheritance, *Doe v. Harris*, 2 Dow. & R. 36; Jarman, i. 200; and see *Heardson v. Williamson*, 1 Keen, 41.

(f) *Supra*, vol. i. p. 466.

(g) *Shapland v. Smith*, 1 Bro. 74; Jarman, i. p. 201-2-3; *Harton v. Harton*, 7 T. R. 652: a trust to permit a feme covert to receive the rents for her separate use (v. *supra*, vol. i. 496; *supra*, p. 2): see Lord Eldon's strictures on this case, *Hawkins v. Luscombe*, 2 Swanst. 391.

cases more immediately belonging to our present inquiry are those where the legal estate is clearly in one person, and though no trust is expressly declared or assumed by him, the property which he holds by descent or acquisition is subjected in his hands to a trust in favour of others.

In the case of a mere direction to sell, the person through whose hands the money is to pass will, generally speaking, be held to be constituted the person who is to effect the sale; and if the legal estate be not disposed of expressly or by implication, and it be not outstanding, the heir, on whom it shall descend, will be constructively a trustee of the legal estate for the purposes of the trust (a).

A trust by implication of law may arise from the dealings and conduct of the parties (b): where a consignee is directed to pay an annuity to a third person, and he does so for a time, he will be considered as a trustee for such third person of the consignments he may have received (c). Where property is conveyed to trustees in trust to sell for payment of debts, this is an express trust only as between the grantor and the trustees; but the grantee, if he accept and act upon the trust towards the creditors, will also become, by construction, trustee for the creditors, though not parties to the deed, if the trust shall not have been revoked by the grantor whilst he has the power so to do (d); and in that case the creditors being, by construction, *cestuis que trust*, may enforce the performance of the provisions of the deed against the grantee (e).

Where a person has a mortgage in fee which he has not foreclosed, the legal estate in the mortgaged premises descends to his heir; but by construction of equity he is trustee for the personal representatives, and through them for the persons entitled to the personal estate of the mortgagor (f).

A debt due from an executor is in effect extinguished at law, for by the rules of law there is no remedy for it; but as an intention to extinguish the debt is not to be presumed from the mere appointment to the office, the debt is preserved in equity; the executor is

(a) *Bentham v. Wiltshire*, 4 Mad. 44; *Tylden v. Hyde*, 2 Sim. & St. 238.

(b) See *Henderson v. Eason*, x. Jur. 822; *Simond v. Hibbert*, 1 Russ. & M. 727-8.

(c) *Fitzgerald v. Stewart*, 2 Russ. & M. 460; *S. C.* on orig. hearing, 2 Sim. 333: if the agent refuse to recognise the arrangement it is different, *ibid.* 458-9; *Williams v. Eve-*

rett, 14 East. 582; *et v. sup.* p. 58, n.(e).

(d) *V. supra*, p. 58-9.

(e) See *King v. Denison*, 1 Ves. & B. 276; *et v. infra*.

(f) *Ellis v. Guavas*, 2 Ch. C. 50; *Winn v. Littleton*, 2 Ch. C. 2 Ventr. 351, 2 Fonbl. 283.

converted into a trustee of the debt for the parties interested in the estate, including the residuary legatee and next of kin of the testator (a).

A constructive, in the nature of a continuing trust, arises where an executor distributes the assets of a testator to the legatees without having paid the whole of the debts of his testator, more especially where it is done in ignorance of the existence of the debts (b); as the legatees in such case have no beneficial interest till the debts are paid, they are considered in equity as trustees of the portion of assets received by them, and the creditors may follow the assets so as to make the legatees answerable personally for what they have received—in effect they have received so much money belonging to others by mistake (c). Where some of the legatees have been paid under an order of the court in a suit for the administration of the estate, and a part of the fund has been carried to the account of infants or other unpaid legatees, and a creditor is afterwards let in by reason of such portion of the fund yet remaining in court, the legatees who have not been paid, as between themselves and the creditor not coming in sooner, are not liable to pay him wholly out of what is so carried to their account; but only to pay him a due proportion of the debt, and he must seek payment of the rest of his debt in proportions against those who have been actually paid (d). In effect the original trust is continued in respect of the assets which have come to the hands of the legatees; but care is taken that no legatee shall be prejudiced by the delay of the creditor in prosecuting his claim (e). If the executor be insolvent the creditors have the same right, though the assets were originally sufficient for payment of the debts and the legacies (f), and it makes no difference whether the legacies were paid to the legatees voluntarily or by compulsion (g); the same principle will apply where an administrator has distributed the assets amongst the next of kin without paying the debts. Whether an unpaid

(a) *Brown v. Selwyn*, Forrest. 240; *S. C.* 3 Bro. P. C. 607, *sup.* vol. i. p. 570; *Carey v. Goodinge*, 3 Bro. 111; *Berry v. Usher*, 11 Ves. 87; *Simmons v. Gutteridge*, 12 Ves. 262, 264.

(b) *Hodges v. Waddington*, 2 Ventr. 360; *March v. Russell*, 3 My. & Cr. 41, there had been a considerable lapse of time in that case.

(c) *March v. Russell*, 3 My. & Cr. 41. In the Ecclesiastical Court the legatees were compelled to give security to refund if necessary.

(d) See *Gillespie v. Alexander*, *ubi infra*; *Roper on Leg.* p. 459.

(e) *Anon.* 1 Vern. 162, *Newman v. Barton*, *ubi sup.*; *Noel v. Robinson*, 1 Vernon, 94;

Gillespie v. Alexander, 3 Russell, p. 136-7; *March v. Russell*, 3 My. & Cr. 31. Where the payments have been made under an order of the court, the trustee is protected so that he has no right to interfere to enforce the claims of creditors in such case; *Underwood v. Hatton*, 5 Beav. 39; *Gillespie v. Alexander*, *ubi supra*.

(f) "A creditor shall follow the assets in equity into whosoever hands they come," *Newman v. Barton*, 2 Vernon, 205; *Anon.* 1 Vernon, 162; and see *Williams on Executors*, 1146.

(g) See the cases in the last note.

legatee can compel a legatee who has been paid his legacy to refund, (the executor being insolvent,) depends upon whether the assets were originally sufficient for the payment of the legacies in full (a). If the deficiency has been occasioned by debts which have turned up since the payment of the legacy, it is clear that the legatee must refund (b).

As regards the question of Interest, Lord Eldon said, "If a legacy has been erroneously paid to a legatee who has no further property in the estate, in recalling that payment I apprehend that the rule of the court is not to charge interest; but if the legatee is entitled to another fund making interest in the hands of the court, justice must be done out of his share" (c).

A person who deals with an executor in respect of property which he knows to be part of the assets of the testator, and which he knows is parted with only to answer the private purposes of the executor, cannot hold property so possessed against creditors or legatees under the will; the trust originally affecting the property is continued in the hands of persons so acquiring it: but the executor, having an absolute power of disposal, may, in general, confer a complete and indefeasible title to personal estate on a person who has no notice that the transaction is a breach of trust (d).

If a broker or commission merchant sells goods consigned to him for sale, and takes bills or promissory notes for the purchase money, in case of his bankruptcy those bills or notes, if remaining in specie and unnegotiated, will not pass to his assignees beneficially, but will belong to his principal; the trust is continued in the person of the assignees (e); so if the broker should die before payment his executor will be trustee of the purchase money for the principal or his estate (f).

It has been already (g) incidentally noticed, in speaking of renewals of leases being partnership property, by one of the partners, that if a trustee or executor, or any agent employed by such trustee or

(a) *Anon.* 1 P. W. 495; and *Walcot v. Hall*, in the note; *Noel v. Robinson*, 1 Vern. 94, and Raithby's note; Bell's note to *Orr v. Kaines*, 2 Ves. 193; Williams on Executors, 1146-7; Roper on Leg. 459.

(b) *Nelthrop v. Hill*, 1 Ch. Ca. 136; in *Gillespie v. Alexander*, 3 Russ. 130, the payments had been made to the legatees under an order of the court. In *Newman v. Barton*, *ubi sup.* a distinction is taken between a voluntary and a compulsory payment by the executor, where it is the executor who calls on the legatee to refund; Roper on Leg. 456; and see *Conolly v. Farrel*, 10 Beav. 142, as to

contribution, as between specific legatees.

(c) *Gittins v. Steele*, 1 Swanst. 200.

(d) *Hill v. Simpson*, 7 Ves. 152; *M'Leod v. Drummond*, on Appeal, 17 Ves. 152; *Keane v. Roberts*, 4 Mad. 333; *Watkins v. Cheek*, 2 Sim. & S. 205; *Wilson v. Moore*, 1 My. & K. 146-7; *et v. infra*.

(e) *Ex parte Dumas*, 1 Atk. 232, 234; *Ex parte Ousell*, Amb. 298.

(f) *Burdett v. Willett*, 2 Vernon, 638; and see *Paul v. Birch*, 2 Atk. 623. See on the general subject *Grigg v. Cocks*, 4 Sim. 438; and *Wilkins v. Stevens*, 1 Y. & Coll. C. C. 431.

(g) *Supra*, p. 208.

executor (*a*) (the rule may apply even to a person who meddles with the assets, though not an executor otherwise than as executor *de son tort* (*b*),) or other person having the control of the property of another, in a fiduciary character (*c*); or if any person having a partial interest in property held for a term—for instance, as tenant for life—obtain an additional beneficial interest in the property, such trustee, executor or other person is considered by the Court of Chancery constructively as a trustee of the beneficial increase so acquired for the persons interested in the property as it stood (*d*). If a term or interest in land, however short, is bequeathed to various persons in succession, and the tenant for life renew, it must be as well for the benefit of the persons to take afterwards as for himself (*e*); whether the new lease is granted to the same person or to any other, if the lessee in the new, takes in right of him who was the owner of the old lease, he must take subject to all the equities to which the original lease was liable (*f*).

The principle of these decisions as regards trustees and executors and persons in fiduciary situations, is, that where property in which others are interested is committed to the charge of any person, his first duty is to make the most of the property committed to his charge for the benefit of those who are beneficially interested in it; and the principle is carried to this extent, that an executor or other trustee is not entitled to an allowance for his time and trouble, even though it appears that he has employed himself for the benefit of the trust to the prejudice of his own private concerns (*g*); and if he neglect to make an investment according to the duty imposed on him, he is held to be liable to make good the loss which may be occasioned by his neglect (*h*). Nor is it necessary that the property should be expressly committed to the charge of such person, it is sufficient that he holds the property so as to be constructively trustee for other persons. If a

(*a*) See *James v. Dean*, 11 Ves. 392; *Griffin v. Griffin*, 1 Scho. & Lef. 353.

(*b*) *Mulvany v. Dillon*, 1 Bal. & B. 409, q. v.

(*c*) *East India Company v. Henchman*, 1 Ves. Jun., 287; *S. C.* 8 Bro. P. C. 85; *Fawcett v. Whitehouse*, 1 R. & M. 132; *Hichins v. Congreve*, *ibid.* 150.

(*d*) *Palmer v. Young*, 1 Vern. 276; 2 Foub. 118; *Featherstonhaugh v. Fenwick*, 17 Ves. 298. Mr. Lewin, p. 171 to 176, has collected the cases establishing the general rule and the exceptions to it: and see 2 Yo. & Coll. 251, and *Wood v. Marquis of Londonderry* (Rolls, June, 1848), xii. Jurist, 735, which was decided partly upon the principle stated in the text, the circumstances however are special.

(*e*) *James v. Dean*, 11 Ves. 396; 15 Ves.

236, on rehearing; *Randall v. Russell*, 3 Meriv. 190, *et v. Hardman v. Johnson*, *ibid.* 347. And see *Webb v. Lugar*, 2 Y. & Col. 247, *inf. add. note.*

(*f*) Lord Hardwicke, *Edwards v. Lewis*, 3 Atk. 538, *et v. ib.* vol. i. p. 480, note (2).

(*g*) *Robinson v. Pett*, 3 P. W. 249; and see, on the general principle, *Gould v. Fleetwood*, and the other cases cited in the note, 3 P. W. 251; *Cuthbert v. Peacock*, 1 Salk. 155; *Scattergood v. Harrison*, Mos. 128; *Brocksopp v. Barnes*, 5 Madd. 90.

(*h*) *Byrchall v. Bradford*, 6 Mad. 13; *S. C.* *ibid.* p. 235; *Lord Montford v. Lord Cadogan*, 17 Ves. 485; 2 Meriv. 3, omission to renew; *Holmes v. Dring*, 2 Cox, 1; and see *Pride v. Fooks*, 2 Beav. 430.

person so circumstanced were permitted in any way to deal with the property with reference to his own individual interests, not only would it be contrary to the design under which he has obtained or has been permitted to retain the control over the property, but he would be placed in such a situation as that his interests might, in reference to the conduct of the trust, by possibility come into conflict with those of his *cestui que trust*; and in such a conflict the personal interest of the trustee would in all probability prevail, against which the court will in all cases endeavour to provide (a): and, such being the principle, *the circumstances* of the particular case, generally speaking, can have no influence on the decision; and therefore it has been held that where the lessor has refused to grant a renewal of the lease to the *cestui que trust*, still the *cestui que trust* will be entitled to the benefit of any renewal which the trustee may have obtained (b). It is on the same principle that it is held that a trustee or particular agent, if the relation of trustee or agent has not been got rid of (c), is not to be allowed as against his *cestuis que trust* to become a purchaser from his *cestuis que trust* of that which he holds in trust or to deal with it in any way so as to derive for himself any benefit; he will be a trustee of any interest or profit that he may so acquire (d); if any advantage is gained by a person in a fiduciary character in respect of the trust property that advantage belongs to the trust (e). The transaction may have been perfectly *bonâ fide* and such that in truth no advantage was gained by the trustee at least at the time; but advantage or no advantage would not be a satisfactory principle on which to determine the question on which the validity of such transactions should depend; it would be difficult in all cases, and

(a) *Holt v. Holt*, 1 Ch. Ca. 191; 2 Fonbl. 189; *Passingham v. Sherborn*, 9 Beav. 424, 427, 436. This was a strong case, for the testator himself had placed the trustee in the incompatible situations.

(b) *Fitzgibbon v. Scanlan*, 1 Dow. 269; *Keech v. Sandford*, Sel. Ca. in Ch. 61, is the leading case on this subject; *Griffin v. Griffin*, 1 Scho. & Lef. 353; and see *Blewett v. Millett*, 7 Bro. P. C. 367; and *Giddings v. Giddings*, *infra*.

(c) *V. int. al. Medicott v. O'Donel*, 1 Ball & B. 156.

(d) *Campbell v. Walker*, 5 Ves. 679, where, p. 682, *Whelpdale v. Cookson* (1 Vesey, 9) is stated from the Registrar's Book; *Morret v. Paske*, 2 Atk. 54; *Whichcote v. Lawrence*, 3 Ves. 740; *Lister v. Lister*, 6 Ves. 631; *Attorney-General v. Mayor of Plymouth*, 15 Law J. 109, M. R.: *et vide supra*, vol. i. p. 512. The rule, as regards purchases from third persons, is extended—to the heir-at-law

as between himself and subsequent incumbancers, where he purchases a prior incumbance (*Brathwaite v. Brathwaite*, 1 Vern. 334; *Williams v. Springfield*, *ib.* 476; *Morret v. Parke*, *ubi supra*; *Lancaster v. Evors*, 10 Beav. 154; 1 Phillips, 354); to a surety who buys in the original debt (*supra*, p. 208, n.); indeed, as it would seem, to all persons who acquire the means of obtaining the renewed interest by reason of their particular interest; and, generally, to all cases where the accident which gave the person the opportunity of acquiring such additional interest has happened whilst he had a particular interest connected with interests in others; *infra*, p. 303.

(e) See the cases in the preceding notes, and *int. al. Anon.* 2 Ch. Ca. 208; *Forbes v. Ross*, 2 Bro. 430; *Littlehales v. Gascayne*, 3 Bro. 73; *Lees v. Nuttall*, 1 Russ. & M. 53; *Carter v. Palmer*, 11 Bli. 418-9; *Fosbrooke v. Balyun*, 1 My. & K. 226.

impossible in some, to determine whether any advantage had really been obtained or not; the rule therefore is general—the *cestuis que trust* have the option of taking to or repudiating the transaction, as may appear to them best to serve their own interests (a). It is to be observed, that it was formerly held that if a trustee purchased lands out of the profits of the trust estate and took the conveyance in his own name, though the land might be sequestered for the payment of the trust money with interest if the trustee were insolvent, the *cestui que trust* would no more be entitled to the estate than would a person from whom the purchaser had borrowed the money (b); but this doctrine, which proceeded upon the obligatory nature of the Statute of Frauds in excluding parol evidence, has been subverted by more modern decisions (c). A person may indeed, if he choose, grant a beneficial interest to his agent, yet the agent must show that the dealing with his employer was fair (d); if the employer chooses he may make him a present, but the agent must show that the principal had the same knowledge as he had (e). If an attorney gives advice to his client, who acts upon it, and the attorney by that means gains an advantage, though the advice may have been given with quite a different view, the transaction will be held to be null and void as far as the attorney is concerned (f); but this subject will be again considered under the head of “Constructive Fraud,” in the next division. Where the executor of a mortgagee purchased the equity of redemption of the mortgaged estate in his own name with the money due on the mortgage and a small advance beyond it, it was held that he was a trustee of the purchase for the benefit of the testator’s estate (g).

The principle on which persons who having limited interests in property acquire an additional interest in the property, are considered as

(a) See *Campbell v. Walker*, 5 Ves. 681; *Ex parte James*, 8 Ves. 348; *Ex parte Bennett*, 10 Ves. 385, 393; *Lane v. Dighton*, Amb. 409; but see *Savage v. Carroll*, 1 Ball & B. 284; and *Lewis v. Madocks*, 8 Ves. 150, 17 Ves. 57, 58, as to the case of a person who is no otherwise trustee than that he has obtained trust money and employed it in the purchase, and the case of money liable to a trust, traced as having been applied in part purchase of an estate.

(b) *Kirk v. Webb*, Prec. Ch. 84, affirmed in the House of Lords, followed in *Heron v. Heron*, Prec. Ch. 163, a stronger case; and *Kinder v. Miller*, Prec. Ch. 172; 1 Eq. Ca. Abr. 743-4, pl. 1, 2, 4.

(c) The authorities are collected by Mr. Lewin, p. 156, note (b), v. *supra*; and see 1 John. U. S. Rep. 582; Story on Equity, § 1201, note.

(d) *Lord Selsey v. Rhoades*, 2 Sim. & S. 41; 3 Bli. 1; see *Thomas v. Phillips*, xi. Jur. 80.

(e) Lord Chancellor Sugden, *Ker v. Lord Dungannon*, 1 Dru. & War. 542; a bare trustee to preserve contingent remainders may purchase, *Parker v. White*, 11 Ves. 226.

(f) *Bulkley v. Wilford*, 2 Cl. & Fin. 177; 8 Bli. N. S. 111; *Tanner v. Elworthy*, 4 Beav. 490.

(g) *Fosbrooke v. Balguy*, 1 Mylne & K. 226.

trustees for the other persons interested, is somewhat similar to the above; it is in respect of such limited interest, at least in most cases, that the person in the enjoyment of it is enabled to acquire such additional interest, which is an advantage beside the purpose for which such limited interest was conferred; if accident puts in the way of the person actually in the enjoyment of such limited interest the means of enlarging the beneficial interest in the thing to be enjoyed by himself and others, it is not he alone that ought to have the benefit of such an accident; therefore, where the lease is renewed by a person so circumstanced, in equity the renewal will be considered as the same lease, or, as it is sometimes expressed, a graft upon the old one (a). The addition of other property in the renewed lease does not interfere with or impair the rights of those in remainder; nor does it alter the case if the renewed lease be taken not from the immediate lessor, but from a superior lessor (b).

An annuitant having a charge upon premises held on lease will, generally speaking, be entitled to a charge on the renewed lease. The husband of a wife, who if single would have been bound to renew in favour of some third person, stands in her place, and any renewal he may obtain after her death will be equally liable to the claims of such third person as if it had been obtained by the wife (c). The same

(a) Sir W. Grant, *Moody v. Matthews*, 7 Ves. 183; *Nesbitt v. Tredennick*, 1 Ball & B. 29; *Winslow v. Tighe*, 2 Ball & B. 205; *Tanner v. Elworthy*, 4 Beav. 490.

(b) *Giddings v. Giddings*, 3 Russ. 251-7, 258; v. *infra*.

(c) *Ibid*. In that case one Mary Price sold an annuity to John Moody for his life, out of certain tithes held by Mary Price, held by her under a lease from the Dean of St. Asaph for a term of years, and she covenanted that the tithes should remain as security for the annuity during the life of Moody. After the sale Mary Price surrendered the lease and obtained a new one for seven years, which by assignment she made a security for 300*l.* borrowed of one Ruddock; she then married John Matthews and afterwards died; her husband took out letters of administration to her. After her death Matthews renewed at various times, paying the fine; the annuitant claimed to be entitled to the benefit of the renewed lease and to have the lease renewed from time to time out of the estate of Mary Matthews; the defendant, the surviving husband, contended that he was only bound to pay the annuity during the term the lease had to run, when he acquired it in right of his wife. Sir W. Grant felt considerable difficulty in deciding this case,

which had not been the subject of previous decision: he at length determined that the annuity was a charge upon the renewed term, and that the grantee was not even bound to contribute to the expence of the renewal. Sir Wm. Grant, in giving judgment, said, "If Mrs. Matthews had continued unmarried there can be no doubt the annuity would be as much a charge upon the renewed as upon the original lease; indeed she would have been bound to keep up the lease on account of the annuity. The plaintiff (the annuitant) acquired an interest in the lease for his life; not a lease in present existence to last so long, but with a capacity to be extended by renewals; and the charge would always attach upon each renewed lease, the grantor being bound to keep it up for his benefit. Her husband could derive no other interest in her right than she had; the lease and right of renewal could pass to him only in the same plight and condition as she held them, and therefore subject to every equity that would attach upon her. *The husband taking by marital right is not esteemed a purchaser for valuable consideration*, he stands precisely in the place of his wife: that is laid down in *Fitzgerald v. Lord Fauconberg*, Fitzgibbon, 207;" (1 Eq. Abr. 745, pl. 11;) "notice is therefore immaterial. The husband's obli-

principle has been held to apply to other persons having a partial or particular interest in a subject, who have acquired a private or individual interest not contemplated on the occasion of such partial or particular interest being conferred or acquired, as in the instance of a mortgagee who procures a renewal of a lease (a), and a surety who purchases the original debt (b).

Sir William Grant, as will be seen by reference to his judgment in *Moody v. Matthews*, gave a sanction to the doctrine in *Maxwell v. Ashe*, that an annuitant under a will was not bound to contribute towards the fines on renewal, but Lord Manners, after having these cases called to his attention, decided that the annuitant was bound to contribute in proportion to his interest in the property; "for all the legatees," he said, "appear to have been equally the objects of the testator's favour: could it have been his intention that one of them should alone bear the expense of the renewal, and that the others should receive the full amount of their annuities without any deduction?" (c).

It would seem that the rule, that where a person having a limited interest in leaseholds enlarges that interest by obtaining a new lease, he shall be a trustee for the other parties interested, has not, at least as a general rule, been extended to a purchase of the reversion; though in doing so, as Sir W. Grant observed, he thereby makes use of his situation to intercept future renewals, and thus to prejudice the interests of those who stand behind him, so that such a purchase would appear to be equally within the principle as where a renewal merely is obtained (d). A testator seised in fee of a moiety of an estate at L., and in possession of the other moiety as tenant from year to year to St. John's College, his lease from the College having expired, gave to his wife

gation to renew is different from that of the wife; after the dissolution of the marriage he is not bound by her personal covenants; but when the lease is renewed the equity attaches upon it, for the renewed lease is considered in equity the same lease. The plaintiff is not bound to contribute to the fines of renewal, that would be to make him pay the consideration twice. The case of *Maxwell v. Ashe*, at the Rolls, 17 Dec. 1742, 1 Bro. 444, note," (which his Honour stated from the Registrar's Book, 7 Ves. p. 184,) "is decisive, the only difference between the cases was in favour of the present plaintiff; in *Maxwell v. Ashe* the question was between two volunteers, the annuitant under a will and the representatives of a devisee, subject to the annuity; yet it was held that the annuitant was not bound to contribute to the annuity."

His Honour declared that the annuity claimed by the plaintiff was a charge upon the renewed lease of the tithes, and that the arrears must be paid, and the annuity must be continued to be paid, out of the renewed lease; 7 Ves. 186; and see 2 Y. & Coll. 251; 4 Bli. N. S. 421.

(a) See *Nesbitt v. Tredennick*, 1 Ball & B. 29, 46-7.

(b) *Supra*, p. 208, and 300, n. (d). But a prior creditor who buys in a puisne incumbrance is entitled to claim the full amount against the debtor, though he did not give the full value; *Morrel v. Paske*, 2 Atk. 54; v. *Williams v. Springfield*, 1 Vern. 476; *ib.* 336.

(c) *Stubbs v. Roth*, 2 Ball & B. 548.

(d) See *Randall v. Russel*, 3 Meriv. 197; and *Hardman v. Johnson*, *ibid.* 347, 3 Russ. 253; also *Norris v. Le Nere*, 3 Atk. 37, 38; and *Acheson v. Pair*, 3 Drury & War. 524, q. v.

during her widowhood all that his messuage or tenement at L., (describing it,) and all his estate and interest therein, she paying the rent reserved to St. John's College. The widow, after his death, obtained a new lease, and subsequently purchased the reversion of one to whom it had been conveyed by the College, under an Act of Parliament. It was held that the renewed lease must be considered as subject to the trusts of the will; and those in remainder were directed to contribute to the fines paid by the widow, in proportions to be settled by the master (a); but as regards the purchase of the reversion, which was obtained not from the College but from the person to whom it had been conveyed by the College, it was held, under the circumstances, that the purchase was not to be taken as subject to the trusts of the will (b).

The *cestui que trust* is entitled to the same relief against all volunteers claiming under the original trustee, executor or tenant for life, and purchasers from them with notice, express or implied, as he would have had against the original party (c).

The person so converted into a trustee of a renewed lease, is entitled to the costs and expenses of the renewal, with interest, and to compensation for repairing, building, and lasting improvements, and, as it seems, though made pending the suit; and he may retain the renewed lease to secure the payment (d). As regards allowances for repairs in the cases before referred to, it has not been, generally speaking, on the ground that the making of repairs and improvements of itself constitutes a lien that they have been allowed (e), but rather on the

(a) It may here be observed that the proportions in which the tenant for life and remaindermen are to contribute to the fines and expenses of renewal, have very lately been the subject of discussion before the Vice-Chancellor Wigram, in the case of *Jones v. Jones*, 5 Hare, 440. His Honour laid down in that case that where the testator directs that the leases are from time to time to be renewed, the fines and expenses of renewal are to be borne by the tenant for life and remaindermen, or parties successively entitled, in proportion to their actual enjoyment of the estate, and that there is no difference in the rule whether the leases are for lives or for years. Some other important points connected with this subject are discussed in that case.

(b) *Randall v. Russell*, 3 Meriv. 190; and see *Fosbrooke v. Balguy*, 1 My. & K. 226, *supra*.

(c) *Bowles v. Stewart*, 1 Scho. & Lef. 209; a fine levied by the tenant for life keeping possession of the deeds was no bar, *ibid.*; see the other authorities, Lewin, p. 178.

(d) *Holt v. Holt*, 1 Ch. Ca. 190; *Rawe v.*

Chichester, Amb. 720; *James v. Dean*, 15 Ves. 236, though there was direction for the computation of interest in that case; *Walley v. Walley*, 1 Vernon, 487, though the improvements made pending the suit are not specifically mentioned in the decree, Raithby's note, nor is interest directed to be computed. See the other cases, cited Lewin, p. 175-6. An allowance for improvements with interest, is made to a trustee whose purchase of the trust estate is set aside, Sugd. V. and P. 897, 898; *York Building Comp. v. Mackenzie*, 8 Bro. P. C. 42; *Trevelyan v. White*, 1 Beav. 588; *Ex parte Hughes*, 6 Ves. 617, 624; *Ex parte Bennet*, 10 Ves. 381; *Williamson v. Seaber*, 3 Yo. & Coll. 717, there cited; and see *Robinson v. Ridley*, 6 Mad. 2; *Shine v. Gough*, 1 Ball & B. 444; *Attorney-General v. Baliol College*, 9 Mod. 411.

(e) See *Swan v. Swan*, 8 Price, 518; and see Sugd. V. and P. 1028, 1029; but where, in the case of a joint purchase, one lays out a considerable sum in repairs and improvements (v. *sup.* p. 206), the lien appears to be positive. See Sugd. V. and P. p. 902.

ground that he who requires equity must do equity (a). Where a tenant in common applies to equity for a partition, he is compelled to make an allowance for repairs and improvements. Where a person in possession of an estate not his own, founds his claim on the ground that the real owner has stood by and seen the improvements going on, there also, if the owner apply to the Court of Chancery to recover the estate, he will be compelled to make a like compensation: but if the real owner, on whom no imputation rests, can recover his estate at law, the Court of Chancery, generally speaking, will not interfere (b).

In all such cases the right to turn the purchaser, or person acquiring a benefit under the circumstances above alluded to, into a trustee, being founded on equitable principles only, the party having the right, being *sui juris*, must assert his claim within a reasonable time; such a delay as may be considered as amounting to acquiescence or a renunciation of any claim to the property, will be a bar to this as to every other merely equitable title (c); it would obviously be unjust that, after a person has been induced by the conduct of those who might have asserted a claim to the property to treat and consider the property for years absolutely as his own, they should afterwards be permitted to deprive him of the property (d).

Another instance of a constructive trust created by the acts of a person having a limited interest arises upon the tenant for life committing what is called equitable waste, that is, cutting down ornamental timber. "The restraint upon the legal owner as to equitable waste," said Sir John Leach, "is to be considered as founded on a breach of that trust and confidence which the deviser reposed in the tenant for life, that he would use his legal estate only for the purpose of fair enjoyment: it is a trust implied in equity from the subsequent limitations and from the presumed intention of the testator that he meant an equal benefit to all in succession" (e).

(a) This makes the equity of the party to depend upon whether he stands on the record as a plaintiff or as a defendant, a doctrine which, as will be seen in the Chapter on Mortgages, the V. C. Wigram does not approve.

(b) Sugd. V. and P. 10th ed. iii. p. 436-7; 11th ed. page 1029. Mr. Justice Story, On Equity, vol. ii. p. 669, *et seq.* has collected the authorities from the Roman law on this subject, which the student may usefully refer to.

(c) *Pryce v. Burn*, cited 5 Ves. 680, referred to with approbation by Lord Alvanley, in *Campbell v. Walker*, 5 Ves. 680; (and *v. id.* 681); *Gregory v. Gregory*, G. Coop. R. 201, a leading case—relief was refused after the lapse of eighteen years; affirmed on appeal, Jac. 631; *Champion v. Rigby*, 1 Russ. & M.

539; and see *Lewin*, p. 178, n. (i); *Roberts v. Tunstall*, 257, where the Vice-Chancellor Wigram, p. 267, 269, enters into the consideration of poverty and other circumstances, which may be material ingredients in the consideration of the question of acquiescence; and see, on the same subject, *Wood v. Downes*, 18 Ves. 120; and *Edwards v. Meyrick*, 2 Hare, 60. These cases apply to transactions originally affected with what is considered as a fraud in equity; the principle of them will apply with greater force to cases founded on general principles of policy and convenience; and see *Gwynne v. Edwards*, 9 Beav. 36, 37.

(d) *V. sup.* p. 61; and *Lewin*, p. 178, 619-21.

(e) *Marquis of Ormonde v. Kynersley*, 5 Mad. 369; S. C. 2 S. & S. 15.

Another instance of implied trusts arises upon the common case of a mortgage of the wife's lands for the debt of the husband. The general rule is, that where a mortgage is made the equity of redemption follows the original right (*a*). Where the wife joins with the husband in effecting a mortgage upon her own estate, if there be no recital, and no special circumstances, her interest will not be changed, or the equity of redemption taken from her, by a mere reservation of the equity of redemption to the husband and his heirs (*b*); for the mere limitation of the equity of redemption is something *ultra* the only purpose that is apparent upon the face of the deed, namely, the creation of an incumbrance on the wife's estate (*c*). The same principle applies where the wife joins in respect of a charge by way of jointure or of her dower (*d*); but where the declaration of uses of the deed shows an intention (unconnected with the purposes of the mortgage) to make a new settlement of the wife's estate, and there is no evidence of mistake or improper contrivance, that intention, so to be collected, will prevail (*e*).

Where the property of the wife consists of chattels, or of choses in action, and they are mortgaged or pledged by the husband and wife, or the husband alone, the equity of redemption being reserved to the husband, the wife will be entitled to redeem; nothing short of an

(*a*) See *Jackson v. Innes*, 1 Bli. 104; *Corbett v. Barker*, 1 Anst. 138; 3 Anst. 755; *Ravald v. Russell*, 1 Younge, 9; 1 Bli. 125; *Brond v. Brond*, 2 Ch. Ca. 98, affirmed on rehearing, 1 Vern. 213, though there was a special agreement on the part of the husband in that case; and see the cases in the subsequent notes.

(*b*) *Ruscomb v. Hare*, 6 Dow. P. C. 1, 20, 21; *S. C.* 2 Bli. N. S., 192, (there were special directions as to the amount to be paid); *Jackson v. Innes*, 1 Bli. P. C. 104, 114, 126; *Clark v. Burgh*, 2 Coll. 227; *Brond v. Brond*, 2 Ch. Ca. 98; *S. C.*, on rehearing, 1 Vern. 213; *Cotton v. Cotton*, 2 Ch. Rep. 72; and see 1 Bli. P. C. 117; but there the husband had promised that it should be no detriment to the wife.

(*c*) See *Anson v. Lee*, 4 Sim. 378; *Clark v. Burgh*, 2 Coll. 227; *Lord Huntington v. Lady Huntington*, 2 Vern. 437.

(*d*) *Cotton v. Cotton*, 2 Ch. Rep. 72; *Brond v. Brond*, or *Broad v. Broad*, 1 Vern. 213; 1 Eq. Ca. Ab. 62; *Jackson v. Parker*, Ambl. 687.

(*e*) *Innes v. Jackson*, 1 Bli. P. C. 126-7-8, overruling Lord Eldon's decision (16 Ves. 356), with his concurrence, 1 Bli. 136; there the term by which the mortgage was created and the fee were kept distinct by the deed, 1 Bli. 127, 132. Lord Eldon's decision had proceeded upon the opinion of Lord Thurlow,

that it was not sufficient to collect the intention from the limitations of the estate, there must be an express declaration of intention, by recital or otherwise: and see *Rowel v. Whalley*, 1 Ch. Rep. 116, which is the leading case on this subject, (1 Bli. 128); *Reeve v. Hicks*, 2 Sim. & Stu. 408; and *Barnett v. Wilson*, 2 Yo. & Coll. C. C. 407, 417, 418, where the doctrine as to changing the destination of property by an instrument not ostensibly executed for that purpose was much discussed; the Vice-Chancellor held that on the true construction of the deeds executed by a wife, by which, under a power, she executed three successive appointments, by way of mortgage, the power was exhausted. "I think," said his Honour, "that the safer and better course under the circumstances of the present case, is to abide by the actual language of the instruments;" though he thought it probable that the appointor was not aware that such would be the effect of the instruments she had executed; *ib.* p. 417. No agreement of a married woman that is not perfected by fine, or now by deed acknowledged according to the Act for Abolishing Fines and Recoveries (*supra*, vol. i. pp. 166-7), or by the due exercise of her power where she has one, will of course bind her or those who claim under her; *Martin v. Mitchell*, 2 Jac. & W. 425.

actual reduction into possession will deprive the wife of that right (a). Where the estate belonged to the husband, and the wife joined in the mortgage by fine, and the redemption was reserved to the husband and wife and their heirs, but in the latter part of the deed declaring the uses of the fine, there was a clause which declared the uses of the fine to the husband, his heirs and assigns, it was held that the wife had only a power of redemption to secure her dower (b).

A similar doctrine prevails where a mortgage is made under a power of appointment (c); it will be considered as an appointment *pro tanto* only, unless there be upon the face of the instrument an indication of ulterior intention inconsistent with a future exercise of the power; and the right of redemption will remain in the persons entitled to the estate in default of appointment (d).

An instance of an administrator being held to be constructively a trustee for the persons entitled under the Statute of Distributions, occurs in the following case. By a marriage settlement the ultimate trust declared of copyhold lands the property of the husband, was limited to his executors and administrators, and a similar trust was declared with respect to the executors and administrators of the wife as to a copyhold estate belonging to her; the wife survived, and took out administration to her husband; it was held that she was not entitled to the former estate for the benefit of herself only, but of herself and the husband's next of kin (e).

Where money charged on an estate is paid off by an individual not having an absolute permanent interest in the premises, a constructive trust in his favour may arise. In all these cases the court looks at the

(a) *Bates v. Dandy*, 2 Atk. 207; *Pitt v. Pitt*, Turn. & Russ. 180; *Clark v. Burgh*, 2 Coll. 221, 229. In this case the proviso for redemption in the last of the mortgages in which the wife, the trustee, and the husband joined, was that upon payment by the husband and wife, or either of them or their, his or her executors, &c. the property should be assigned not to the husband only, but to the husband and wife, or either of them; there was also a power of sale, and the clear surplus, if any, was to be paid to the husband and wife, or either of them, their heirs, &c. according to their respective interests; but the V. C.'s decision appears to have been founded on the general principle. "It does not appear to me," said his Honour, "that the wife's rights in equity are more prejudiced than if a mere deposit of the deeds had been made" (as in *Bates v. Dandy*) "by the husband for securing the money," *ibid.* p. 230.

See the note, 1 Russ. 33, and 3 Russ. p. 72, and 2 Roper, Husb. and Wife, Jacob's note, p. 512, and 9 Mod. 102, as to whether the right of the wife, in *Bates v. Dandy*, was in any way affected; and see 9 Sim. 147.

(b) *Jackson v. Parker*, Amb. 687; 1 Bli. P. C. 123-4.

(c) *Innes v. Jackson*, 16 Ves. 367; but see next note, as to this case.

(d) Coote on Mortgage, p. 62; *Thorne v. Thorne*, 1 Vernon, 141; *Innes v. Jackson*, 16 Ves. 356, 367, there cited; but this case was reversed, 1 Bli. 104.

(e) *Wilman v. Bowring*, 3 Sim. p. 328. *Goodere v. Lloyd*, *ibid.* 538, is also a case of implied trust: 700l. was appointed to trustees by will, but no express trust was declared. the 700l. was directed to be raised and applied in the same manner as the testator's personal estate was directed to be applied.

intention; for instance, where a tenant in tail pays off an incumbrance, *primâ facie*, he is considered as disencumbering the estate, but still the court thinks itself at liberty to look at the intention; thus, if the tenant in tail pay off a charge upon the estate and take no assignment, and there is nothing distinctly to show any intention on his part to keep alive the charge; yet if it appear that he had considered the estate as his own, the court will direct that his estate shall be reimbursed (a).

It may here be observed that, generally speaking, the person who has the legal right is entitled to sue for and recover personal property, though the beneficial interest may be in others, without joining the persons beneficially interested as parties, and it follows that the person who holds trust property may safely pay over the trust property to the actual trustee having the legal interest in the property (b). Thus the mother of a bastard child by her will gave all her personal estate to the child and made B. and C. her executors, in order to take care of her child and do it justice; the mother died, and within a short time after the bastard died intestate without wife or issue. One of the executors filed a bill against the mother of her who was the mother of the bastard, who had in her hands the portion belonging to the bastard, praying an account of the same: the defendant demurred, because neither the administrator of the bastard or the Attorney-General in right of the Crown were parties. Lord King overruled the demurrer; he said that the executor of the bastard's mother was legally entitled to the personal estate of the testatrix, and though this might be a trust for the bastard, yet as the executor had the legal title he could give a good discharge to the defendant (c). But if the property has been appropriated to the *cestui que trust* (d) so that he has a direct title to the specific property it is different: for instance, if the executor has assented to a legacy given in trust for a person, his receipt will be necessary to give the holder an effectual discharge (e); and although the party might recover at law, it does not follow that in this court

(a) *Kirkham v. Smith*, 1 Ves. 258; *Pitt v. Pitt*, 1 Turn. & R. 183, the wife there was permitted to redeem on payment of what her husband had paid in discharge of the mortgage on her estate, *ib.* p. 184; a covenant to pay is not decisive, *ibid.*; *Bagot v. Oughton*, 1 P. W. 347; *et v. Burrell v. Egremont*, 7 Beav. 232.

(b) This may be considered as one of the qualifications of the rule stated *supra*, pp. 194-5.

(c) *Jones v. Goodchild*, 3 P. W. 32.

(d) See *Philippo v. Munnings*, 2 My. & Cr. 314, *sup.* p. 62.

(e) See *Loy v. Duckett*, 1 Cr. & P. 312, where Lord Cottenham approved of Sir J. Leach's view in *Gutteridge v. Stihwell*, 1 My. & K. 486, as being more correct than Lord Brougham's. On the question as to what shall be an Assent to a legacy, and for whom it shall enure, see Roper on Leg. 847-854; and *Trail v. Bull*, 1 Coll. 352, 359; it is not essential to the efficacy of the assent that it should confer the legal title, *ibid.*

the party will in all cases obtain possession of the property in the absence of the parties beneficially interested. Where a person beneficially entitled to one fourth of a fund which belonged to the estate of a testator who had been dead 150 years had obtained letters of administration, *de bonis non*, to the testator, and then filed a bill for an account and payment to himself of the whole fund, it appearing that no part of the fund was required for the payment of debts, but that the other three fourths had passed under the residuary bequest in his will, and had belonged to the estates of several persons successively who were named in the proceedings but were not parties to the suit, Lord Cottenham ordered that one fourth only should be paid to the plaintiff, and although the plaintiff did not require it, that the other three fourths should be paid into court, with liberty for any person interested to apply, giving notice to the Attorney-General (a).

The inconveniences would have been so great of affecting the Bank of England with notice of trusts of stock in the public funds transferable at the bank, that it has been established that the bank is only bound to recognize the person who has the legal title to the stock, whether as regards the payment of dividends or transfer of the capital; the bank cannot refuse to allow the executor of the testator to transfer on the ground that the stock is specifically bequeathed (b). Where a judge's order under the 1 & 2 Vict. c. 110, s. 14, has been obtained, by which the interest of a debtor in a sum of stock held in trust is charged with the debt; the Bank of England is still bound to pay the dividends to the legal hand to receive them (c). An ordinary banker is not expressly or constructively a trustee in respect of the deposits made in the regular course of business; the balance may be recovered at law; and unless under special circumstances the customer cannot sue his banker for an account (d).

Though the subject of the interest acquired by a vendor is reserved for future discussion, it may here be observed that although the pur-

(a) *Loy v. Duckett*, 1 Cr. & Phillips, 314; and see *Orrok v. Binney*, Jac. 523, a case of infants; *Ex parte Ram*, 3 My. & Cr. 25. The case of *Ex parte Nicholl*, Turn. & R. 119, depends upon the particular provisions of the act in regard to unclaimed dividends, 1 Cr. & P. 314.

(b) *Hartga v. Bk. of Eng.* 3 Ves. 58; *Bk. of Eng. v. Parsons*, 5 Ves. 669; *Austin v. Bk. of Eng.* 8 Ves. 522, 525; *Bk. of Eng. v. Lunn*, 15 Ves. 569, 583; *Franklin v. Bk. of England*, 1 Russ. 582 *et seq.*; the decree was made against the Bank *with costs*; an appeal was presented, but I have not learned

the result. But see *Humberstone v. Chace*, 2 Y. & Coll. 209.

(c) *Churchill v. Gov. and Co. of Bk. of Eng.* 11 Mees. & W. p. 323; and see *Fowler v. Churchhill*, *ibid.* 57; *Bristed v. Wilkins*, 3 Hare, 235. As regards this statute, a receiver will not be appointed at the instance of a judgment creditor until the year has expired, nor, under the general law, until an *elegit* has been sued out, *Smith v. Hurst*, 1 Coll. 706, V. C. K. B.: as to chattels the case is different, the writ of *fiery facias* binds the property, *ibid.*

(d) *Foley v. Hill*, MS., Hill on Tr. 148.

chaser has neither a legal or an absolute equitable right as against the seller until he pays the purchase-money; yet for all the purposes of disposition the equitable title which the purchaser has obtained under the contract for sale is subject to his control; and in the event of the purchase being completed, the vendor will be a trustee for those who have acquired interests in the estate under the purchaser. If the vendor should again sell the estate, of which by reason of the first contract he is only seised in trust, he will be considered as selling it for the benefit of that person for whom by the first contract he became trustee, and therefore liable to account (a). Other instances of constructive or implied trusts might be produced; one is where a person holds money which in conscience he cannot retain, as where it has been paid to him by mistake (b); but those which have been produced will suffice to illustrate the principles on which persons having the legal interest in property are held, by the Court of Chancery, on equitable grounds, to be trustees for the benefit of others; we now proceed to the consideration of the particular trusts which are usually to be found in Trust Deeds and Wills.

(a) Lord C. Sugden, *Baldwin v. Belcher*, 1 Jo. & Lat. 26; Lord Eldon, *Daniels v. Davison*, 16 Ves. 255.

(b) See 2 Fonbl. 4, 5; v. *supra*, p. 296; *infra*, "Mistake."

• ADDITIONAL NOTE.—*Supra*, p. 299.

A testator being seised in fee of a farm in the parish of A., and being also possessed of a lease for lives of the rectorial tithes of that parish, devised the farm to his nephews in tail male, and the lease to his brother J., his executors, administrators, and assigns, upon condition that his said brother J., his executors, administrators, and assigns, owners or occupiers of the said parsonage tithes and premises, should at all times after his decease free and discharge his said farm from all manner of tithes which should be payable out of the same to the said owner or occupier of the parsonage and tithes aforesaid. J. survived the testator, and devised his interest in the lease to his four sons, who took several renewals, and in 1782 assigned the existing lease, for a valuable consideration, to A. B. with notice of the trusts of the will: It was held, that a party to whom the tithes were bequeathed by the will of A. B., and who took a renewal of the lease in 1817, held the renewed lease upon the trusts of the will; consequently that he had no title to the tithes of the farm, and that the owner of the farm was not bound to contribute to the renewal fines; *Webb v. Lugar*, 2 Yo. & Coll. (Exchequer), p. 247.

CHAPTER VII.

OF THE TRUSTS WHICH ARE USUALLY INTRODUCED INTO WILLS AND SETTLEMENTS.

SECTION I.—*Charges of Debts by Will, in Reference to the Statutes 1 Will. IV. c. 47, and 3 & 4 Will. IV. c. 104.—What amounts to a Charge of Debts.*

Liability of Heir for Payment of Debts.

Trusts for Payment of Debts and Legacies—Consequences of.

Doctrine of Equitable Assets based on Power which Testators had before Statute of Fraudulent Devises to disappoint their Creditors.

3 & 4 Will. & M. c. 14.

1 Will. IV. c. 47.

If no Devise of Real Estates for Payment of Debts, Specialty Creditors may enforce their Claim according to Legal Priority.

If a Devise within the meaning of the Statute, Devise ceases to be Fraudulent, and no Creditor can claim except under such Disposition.

At Common Law Specialty Creditors had no Lien on Land before Judgment, and Simple Contract Creditors had no Rights against Real Estates.

Rule while 3 & 4 Will. & M. c. 14, was in operation.

As 5th Section of 1 Will. IV. c. 47, is the same, same Rule must still prevail.

And as the Estate can only be reached through the Court of Chancery all Creditors will be entitled to share in Proportion to the Amount of their Debts.

If a Creditor institutes a Suit to obtain the Benefit of the Trust, Decree must be such that all other Creditors may come in.

Devise for Payment of Simple Contract Creditors before Specialty satisfies the Words of 5th Sect. of Statute and is therefore good.

But Devise must be for Payment of all Debts.

Deg v. Deg, 2 P. & W.

Lands devised to an Executor to sell are Equitable Assets.

Power given to Executors to sell, Proceeds are Equitable Assets.

Lands charged with Debts which descend to the Heir are Equitable Assets.

If Mode prescribed for Payment of Debts be inconvenient, it will not take the case out of Statute.

Where Trust is created for the Purpose of raising Money out of Rents and Profits, if the Trusts of the Will require a Gross Sum to be raised, generally the Trustees are to raise it by Sale or Mortgage.

If a Person selects Part only of his Estate, which is insufficient for Payment of Debts, Devise is Fraudulent against Specialty Creditors.

Rule, that the Estate when realized shall be Equitable Assets, is liable to be controverted by the apparent Intention.

Soames v. Robinson, 1 M. & K., in note.

Devise to Executors as Trustees makes the Assets Equitable.

Creditors who have been paid Part out of Personalty not entitled to have Remainder paid out of Realty until Creditors who have received none have been paid in equal Proportions out of Realty.

Creditors having Security not affected by the Rule of Distribution.

Provisions of 3 & 4 Will. IV. c. 104.

Statute does not apply where there is a Disposition of Real Estate for Payment of Debts.

Great Importance to ascertain whether a Charge of Debts has been created or not.

Leigh v. Earl of Warrington.

Words sufficient to create a Charge.

General Charge of Debts includes all Debts Testator may contract during Life.

A Direction to pay Debts and a Gift of Property to same Person, the Property (unless contrary Intention appear) will be considered to be charged with Payment of Debts.

But a Direction to Executors to pay and a Devise of Real Estate to another will not operate as a Charge.

Nor a Devise to a Person (after a Direction to Executors to pay Debts) who happens to be afterwards named an Executor.

If there be a general Charge by Implication under the preliminary Direction, it becomes a Question on the Effect of subsequent Devises whether that Intention has been altered.

But where there is an Express Charge of Debts on Testator's Real Estate, it is not liable to be defeated by subsequent Devises and Directions.

Coxe v. Basset.

Trust or Charge for Payment of Debts may also materially affect Real Representatives of Testator by Devise and Intestacy.

Example.

Charge of Debts by a Married Woman, by Will upon her Separate Estate.

I now proceed to take a general view of the doctrines of the Court of Chancery in reference to some of the most usual Trusts which are found in Wills and Settlements.

One of the most usual trusts in wills is a trust, express or implied (*a*), for the payment of debts, or for the payment of legacies or annuities, or of all of them united. Such a trust must, as regards legacies, always have important consequences with respect to those who take the real and personal estate of the testator; and it may have a material effect as regards the rights of specialty creditors, by the estate being turned into equitable instead of legal assets. These subjects will now be considered in their general features: and first as regards Creditors.

The heir being named in the obligation is considered to be himself a debtor, not indeed a debtor liable to pay the debt under all circumstances, but liable to the extent of the lands descended, and he is not

(*a*) A charge, as will be seen, partakes of an express and an implied trust; the trust, so far as the heir or devisee may be considered as a

trustee, arises by implication, but the trusts themselves are express.

restrained from alienation; but after alienation he is personally liable to pay his ancestor's debts to the amount of the value of the estate he has alienated (a). It is established, that, in the absence of special circumstances, the land, after an alienation by an heir for a valuable consideration as that of marriage, is not itself liable to the specialty debts of the ancestor (b).

It may be here observed, that the general rule in the Court of Chancery is, that a judgment creditor, who—as regards land as well as chattels, is not a purchaser, he not having any right to anything specific (c),—can only take in execution that which belongs to his debtor, and not property of other persons, though it may be in the possession of the debtor as trustee; the court, having established that the equitable ownership may be in one person and the legal ownership in another, must interpose, where it is necessary, to protect the equitable ownership (d): this principle is applied as regards personal chattels as well as real estate (e).

The doctrine of Equitable Assets is based on the power which testators had, before the Statute of Fraudulent Devises, to disappoint their creditors of all resort to their freehold estate by devising it (f). By the original statute, which was passed to protect creditors from fraudulent devises made by their debtors (3 & 4 Will. & M. c. 14), provision was made for rendering all devises void against specialty creditors, where the heirs were bound, unless there were a provision in the will for the payment of debts (g): that statute has been re-enacted with modifications by the 1 Will. IV. c. 47. By this statute the devisee is placed in the same situation, substantially and for all practical purposes (excepting as regards the mode and order of administration, as after noticed,) as the heir (h). The question therefore—whether in any will by which real estates are devised, there is a provision for the payment of debts within the meaning of the statute—becomes a matter of serious importance to specialty creditors; if there be not such a provision, though the simple-contract creditors may come in under the act 3 & 4 Will. IV. c. 104, before noticed (i), which renders real estates liable for simple-contract debts, yet the specialty creditors may enforce their claims according to their legal priorities;

(a) See *Richardson v. Horton*, 7 Beav. 124.

(b) *Matthews v. Jones*, 2 Anstr. p. 506; *Richardson v. Horton*, 7 Beav. 124.

(c) *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; so that land afterwards purchased may be extended on the judgment.

(d) *Langton v. Horton*, 1 Hare, 560.

(e) *Newlands v. Paynter*, 4 My. & Cr. 408,

case as to furniture; *Lodge v. Lyseley*, 4 Sim. 75, case of real estate.

(f) Vice-Chancellor K. Bruce, *Lyon v. Colvile*, 1 Coll. Rep. 472.

(g) Vol. i. p. 174.

(h) Lord Langdale, *Richardson v. Horton*, 7 Beav. 121; v. *infra*, as to this case.

(i) *Et v. inf.* p. 319.

but if there be a sufficient provision for payment of debts within the meaning of the statute, then the devise ceases to be fraudulent or void, and none of the creditors can claim excepting under such disposition (a).

The rule was, whilst the statute 3 & 4 Will. & M. c. 14, continued in operation, that a provision by will, effectual in law or in equity (b), for payment of creditors, was not fraudulent within the intent of the statute. As the fifth section of the 11 Geo. IV. & 1 Will. IV. c. 47, is in similar terms to the fourth section of the statute 3 & 4 Will. & M., the same rule must now prevail; therefore, as the devise is not fraudulent against creditors under the act, and the estate can only be reached by the creditors under the devise—which must be either in the way of an express or implied trust, and the trust in either case can only be made effectual through the medium of the Court of Chancery—the proceeds of the estate, when realized, will be equitable assets, and by consequence they must be distributed according to the principle of equity which the Court of Chancery has adopted, that all debts are equally due in conscience (c); and all the creditors will be entitled to share in proportion to the amount of their debts (d): and as all the creditors are to be paid in proportion, where any creditor institutes a suit to obtain the benefit of the trust, the decree must be such that all other creditors may come in under it, and thus the proper proportion of each may be ascertained (e). A testator devised his real estate to trustees and their heirs upon trust to sell, and after declaring his will to be that the clear money arising from such sale should sink into and become part of his personal estate, he gave and bequeathed the same, and all his stock, crops, goods and effects whatsoever, to the same trustees, their executors and administrators, upon trust, after converting the same into money and paying all his debts, funeral and testamentary expenses, to pay legacies and dispose of the residue as there directed. It was held that this was substantially a devise for payment

(a) *V. infra*. It will be remembered that by the common law specialty creditors had no lien on the land of their debtor before judgment, and simple-contract creditors as such had no rights whatever against the real estate of their debtor for payment of their debts, *supra*, vol. i. pp. 173-4, *et sup.* 313; *Lyon v. Colville*, 1 Coll. Rep. 472, *et seq.* where the doctrine as to the operation of a devise as affecting lands in Jamaica is considered.

(b) Lord Eldon, *Bailey v. Ekins*, 7 Ves. 323.

(c) *Supra*, vol. i. p. 421; *Lex Prætor.* 316; Lord Nottingham, 2 Ch. Ca. 54.

(d) *Soames v. Robinson*, 1 My. & K. 504. The M. R. in the case last referred to expressed a doubt as to whether the same effect would result from a devise to sell, and a direction that the proceeds should form *part of his personal estate*, as it might be inferred that the testator in such case intended that the proceeds should be administered in the same way as his personal estate would by law be administered; *et v. infra*, sect. iv.: and see *Barker v. May*, 9 Barn. & C. 489; and *Lex Prætor.* 319.

(e) *Hamilton v. Houghton*, 2 Bli. 185, 187, 193.

of debts within the fourth section of the Statute of Fraudulent Devises : that the produce of the real estate, therefore, was equitable assets, and that, the speciality creditors having exhausted the personal estate, the simple-contract creditors were entitled to have so much of the proceeds of the real estate paid to them, before the specialty creditors were let in to any participation (a).

If the devise be for payment of simple-contract creditors before specialty creditors, it satisfies the words of the fifth section of the statute, and is therefore good (b). The parties claiming the benefit of a trust on this as on other occasions must be content with what is given to them by the instrument creating the trust (c).

But the devise or charge must be for payment of *all* debts ; the exception of one will be sufficient to make the devise fraudulent and void (d) ; and if a person, having two estates, devises one of them, charged with one fifth only of his debts, the other charged with the other four fifths only, that is not a sufficient charge within the statute (e).

It was formerly held that lands devised to an executor to sell were legal assets (f) ; but it is now settled that they are equitable assets (g). It is also settled that where a power is given to executors to sell lands—whether that power be naked or coupled with an interest—whether it be reserved to them and their heirs, or merely to them *quasi* exe-

(a) *Soames v. Robinson*, 1833, 1 Myl. & K. 500. *sup.* p. 314.

(b) *Millar v. Horton*, G. Coop. 45. This case was of course decided in the 4th sect. 3 Will. III. but the 5th sect. 11 Geo. IV. & 1 Will. IV. is in the same words ; and see 1 Coll. R. 474.

(c) See *Boazman v. Johnston* (stated *infra*), 3 Sim. 382.

(d) *Vernon v. Vaudrey*, Barnardist. 304 : there a debt which the testator owed as surety was excepted ; the words however in both statutes are of “any real or just debt or debts.” It is said by Lord King in *Deg v. Deg*, 2 P. W. 418, a man may give his *equitable assets* (the case itself arose upon a devise of an estate which would have been legal assets) in what manner and upon what terms he pleases, for instance, he may dispose of them in trust to pay simple-contract debts only ;—that these equitable assets being entirely within his power, he may let in the specialty creditors for a satisfaction thereout upon what terms he shall think proper. The latter proposition in the large and comprehensive manner in which it is laid down, is perhaps doubtful, but it is presumed that the first proposition cannot be sustained ; see

Vernon v. Vaudrey, Barnardist. 304, *supra* ; though the words of the Statute of Fraudulent Devises would originally have justified such a construction ; and Ch. J. Willes, in *Gott v. Atkinson*, Willes’s R. 524, actually put that construction upon them. Lord Langdale, in *Richardson v. Horton*, 7 Beav. 123, refers to this doctrine ; but see the remarks on this subject in the *Jurist*, vol. xi. part ii. p. 112.

(e) *Lyon v. Colville*, 1 Coll. R., Vice-Chancellor K. Bruce, 473-4. The Vice-Chancellor considered this to be a case of some difficulty and doubt, looking to the decision in *Millar v. Horton* (Sir Geo. Coop. R. 45), see p. 474.

(f) *Blatch v. Wilder*, 1 Atk. 420, and the other cases cited in Mr. Raithby’s note ; *Silk v. Prime*, 1 Brown, 139, note. Two rules are obtained from the cases, said Lord Camden, (*Silk v. Prime*, *ibid.* 140, note) : It is a good rule of expounding wills to make them speak in favour of equitable assets, if it may be done. 2. That if you can lodge the assets in the hands of trustees, the court will never put them in the hands of the executors, and when one person is invested with both characters the trustee shall be preferred.

(g) *Newton v. Bennet*, 1 Bro. 135-38 ; *Silk v. Prime*, *ibid.* 139-40 ; *infra*, p. 317.

cutors—the lands subject to such power will be considered as affected by a trust—the executors are trustees—and the moneys arising by the sale are equitable assets (*a*); and though it was also formerly held that where lands charged with debts descended to the heir-at-law, and were legal assets, because the descent was not broken as it would be on a devise to a stranger (*b*), they are now equitable assets: “a devise to an heir to sell,” said Lord Thurlow, “would make the produce equitable assets, and a charge is a devise *pro tanto*” (*c*); whether in fact in such case the descent is broken or not, the rule is established (*d*).

If the mode prescribed be inconvenient only, that will not take the case out of the saving of the statute (*e*). As the trust has not unfrequently been created in the way of a direction to raise the debts out of rents and profits, it may be well to observe that it is a settled rule that where a trust is created by term or otherwise, for the purpose of raising money out of rents and profits, if the trusts of the will require that a gross sum should be raised, the expression “rents and profits” will not confine the power to the mere annual rents, but the trustees are to raise it out of the estate itself by sale or mortgage, though there may by probability be sufficient to convince any man out of a court of justice that the testator meant annual profits only (*f*). But where a testatrix devised freeholds of inheritance to trustees for 500 years, and subject to that term to the use of various persons successively for their respective lives, with remainder to the first and other sons of such persons successively in tail general with remainders over; and the trusts of the term were declared to be that the trustees of the term should out of the rents, &c. of the hereditaments comprised therein pay the several annuities given by the will and subject thereto, and should out of the residue of the rents and profits raise such sums not exceeding 8000*l.* as should be necessary to pay such debts as might be owing by her husband and herself, all which she directed the trustees to pay out of the said rents and profits as they should think fit, and as soon as convenient after her death; and subject to the several

(*a*) See the cases, Raithby's note, 1 Atk. 420.

(*b*) *Freemoult v. Dedire*, 1 P.W. 430; *et v. Plunket v. Penson*, 2 Atk. 293.

(*c*) *Hargrave v. Tindal*, 1 Bro. 136, note; *Batson v. Lindegren*, 2 Bro. 94; Raithby's note, 1 Atk. 420.

(*d*) *Bailey v. Elkins*, 7 Ves. 319, 322; *Shiphard v. Lutwidge*, 8 Ves. 26.

(*e*) Lord Thurlow, *Hughes v. Doulbin*, 2 Cox, 170; *S. C.* 2 Bro. 614.

(*f*) Lord Eldon, *Bootle v. Blundell*, 1 Meriv. 232; *v. infra*, sect. v. *Portions*. A general gift

of the income of property indefinitely is a gift of the property itself, and it makes no difference whether the income be given to the legatee directly, or through the intervention of trustees; *Page v. Leapingwell*, 18 Ves. 463; *Haig v. Swiney*, 1 Sim. & S. 487; *Elton v. Shephard*, 1 Bro. C. C. 532. In the last two cases the direction was that the trustees should pay the dividends of stock to a person for her sole and separate use; this was held to be an unlimited gift of the stock.

trusts of the said term upon trust to pay the residue of the net rents, &c. of the premises comprised therein, unto the person who for the time being should be next entitled to the reversion or remainder of the premises expectant thereon under the preceding limitations: it was held that the testatrix did not intend that the debts should be raised out of the corpus of the estate, but only that they should be discharged out of the annual rents and profits (a).

If a person selects a part only of his estates, and those are insufficient for the payment of the debts, then, according to the construction which has been put upon the statute, the devise is fraudulent and of no avail against specialty creditors (b).

The general rule that the estate when realized shall be equitable assets is liable to be controlled by the apparent intention. It was formerly considered that a direction that the money when raised should be applied by the executors, together with the personal estate, was an indication of an intention that the rule of law should be followed (c). Lord Chief Baron Gilbert states generally, that if lands be devised to executors to be sold, or a power be given to them to sell, there the money arising from the sale is assets and shall be distributed according to the course of administration, and then a bond creditor shall be preferred to a simple-contract creditor, because it being only the intention of the testator to make the lands personal assets, equity must follow the intention of the testator, and distribute them in a course of administration (d); but this doctrine has been exploded (e). At a later time, however, (1833,) Sir John Leach expressed an opinion, that when a testator devises his real estate to be sold, and declares his wish that the produce of such sale shall become part of his personal estate, and there stops, the argument in favour of the specialty creditors, that there was no intention on the part of the testator to deprive them of the legal priority to which they are entitled in the distribution of the personal estate would be extremely forcible; but as the testator in the case before him proceeded to direct that the produce should be applied in payment of debts, his Honour held that it was clearly a devise within the fourth section of the stat. 3 & 4 Will. & M., and that the proceeds were equitable assets (f); and it is now fully settled, as before stated, that where the devise is to the trustees, who are also made executors, the assets will be equitable, not legal (g).

(a) *Heneage v. Lord Andover*, 3 Yo. & J. 360; *et v. infra*.

(b) *Hughes v. Doulbin*, *ubi supra*.

(c) See the cases cited in *Barker v. May*, 9 Barn. & C. 491, and in Mr. Cox's note to *Deg v. Deg*, 2 P. W. 416, n. (2), *et sup.* 315.

(d) *Lex Prætor*. 319.

(e) See *Barker v. May*, 9 Barn. & Cr. 492-3.

(f) *Soames v. Robinson* (stated *sup.*), 1 My. & K. 504; *Barker v. May* was cited.

(g) *Lewin v. Okeley*, 2 Atkins, 50; Lord Hardw. *Silk v. Prime*, 1 Bro. 138, n.; 1 Dick.

Although in these cases the creditors shall be paid according to priority out of the personal estate, which must be distributed in a course of administration (a), and the executor may retain to satisfy himself; yet neither he nor any other creditor who has been paid in part out of the personal estate, can come in with the creditors who have received no part of their debts, to be paid the residue of their debts on an average out of the real estate, until such unpaid creditors shall have been first satisfied out of the real estate, in proportion to what has been received out of the personal estate by the other creditors (b).

According to Lord Harcourt, the court will not marshal assets on the death of the grantor who in his lifetime has created a trust for the payment of his debts, so as to compel bond creditors, who have recovered against the personal estate, to waive their preference against the personal estate before letting them in under the trust term. "The law," said Lord Harcourt, "gave the creditors the fund of the personal estate, and the party gave them the fund arising from the trust term;" "and the clause," said his lordship, "that no debts should have preference, must be intended only with regard to their satisfaction out of the trust term" (c). Lord Harcourt's decree as reported, which does not agree with the Registrar's Book as regards the question of interest decided in that case, was questioned by Lord Hardwicke in two several cases, so far as it gave interest on simple-contract debts (d), and it cannot perhaps be depended upon on the main question. Mr. Hill (e) considers that it is supported by the late case of *Boazman v. Johnston* before the Vice-Chancellor of England. That case was as follows:—Husband and wife, being lessees of a rectory, assigned it to trustees in trust to sell and to pay certain bond debts of the husband, and certain debts due on mortgages on his freehold estates; and by deed of even date the husband, in consideration of his wife having joined in the assignment, conveyed his freehold estates in trust for himself and his wife for their lives, and after their deaths to be sold for the benefit of their children. The produce of the lease of the rectory was not sufficient to pay in full both the bonds and the mortgages: it was held that the bond creditors had no right as against the children to

p. 384, Lord Camden; *Newton v. Bennet*, 1 Bro. 134, Lord Thurlow; *et v. supra*, p. 315, note (g).

(a) And so must the real estate under the provision of the legislature giving simple-contract creditors a remedy against the real estate, *v. infra*, p. 319; 3 & 4 Will. IV. c. 104.

(b) *Baily v. Ploughman*, Mosely, 95, Lord

C. King; *Soames v. Robinson*, *sup.* p. 315.

(c) *Car v. Countess of Burlington*, 1 P. W. 228.

(d) *Barwell v. Parker*, 2 Vesey, 364; *Lloyd v. Williams*, 2 Atk. 110; and see Mr. Cox's note.

(e) On Trustees, p. 334.

throw the mortgagees upon the produce of the freeholds (a). The principle on which the Vice-Chancellor proceeded in that case appears to have been this—that the bond creditors were only entitled, as regards the beneficial lease so assigned by the husband and the wife, to what was given to them under the trusts of the trust deed; what was given under that deed was, that they should share the proceeds rateably with the mortgagees, according to the amount of their debts; to have allowed them to throw the mortgagees first upon the property mortgaged would have given them more than a rateable proportion with the mortgagees (b), so that this case appears to depend on a different principle.

Where the creditor has a security which affects the lands of his testator, either at law or in equity, as a mortgage or an equitable lien, and where he is a creditor by judgment duly entered up and registered (c), there of course he will not be affected by the rule of distribution which has just been noticed, he has a direct lien on the land (d).

The statute 3 & 4 Will. IV. c. 104, mentioned in a preceding page (e), has provided that after the 29th of August, 1833, when any person shall die seised of or entitled to any real estate, freehold or copyhold, which he shall *not* by his last will *have charged* with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity, for the payment of the just debts of such person, as well debts due on simple contract as on specialty, and that the heir and devisees shall be liable to all the same suits in equity at the suit of any creditors, whether by simple contract or by specialty, as the heir-at-law or devisees were theretofore liable (in respect of freehold estates) at the suit of creditors by specialty in which the heirs were bound; but the creditors by specialty in which the heirs are bound are to be paid before creditors by simple contract or by specialty where the heirs are not bound.

If therefore there be any disposition of the real estate for payment

(a) *Boazman v. Johnston*, (1830,) 3 Sim. 377.

(b) See *L. v. G. temp. Sugd.*, p. 257; and see *Buck v. Shippman*, 1 Phill. 694, *inf.* 360.

(c) The new law, as regards judgments, under the act 1 & 2 Vict. c. 110 (as to which see vol. i. p. 295), and the subsequent statutes, is fully stated in Sir E. Sugden's *Vend. and Pur.* 11th ed. 662-3. By that statute a judgment is made a charge on all lands, tenements, &c. of or to which the debtor was en-

titled or interested in, at law or in equity, at the time of entering up the judgment.

(d) See *Wolestoncroft v. Long*, 1 Ch. Ca. 32; *Anon.* 2 Ch. Ca. 54; *Child v. Stephens*, 1 Vern. 101, 103. The creditors of a *feme covert* having a separate estate all come in *pari passu*, even those who may have bond or mortgage, as a *feme covert* cannot by law make a mortgage or enter into a bond; Lord King, *Anon.* Mos. 328; v. *infra*, p. 324.

(e) *Supra*, p. 313.

of debts, or a charge for that purpose, the statute does not apply (a); and the creditors can only claim by force of the devise or charge, and the proceeds of the estate will be distributable as equitable not legal assets (b): hence it becomes, in all cases where the trusts of a will have to be carried into execution and the estate of the testator to be administered, a matter of serious importance in reference to this statute, as well as the Statute against Fraudulent Devises before referred to, to ascertain (c) whether in point of fact a charge of debts within the meaning of the statute has been created (d). "Courts of Equity," said Lord Lyndhurst, "have always been desirous of sustaining charges by implication for payment of debts, and the presumption in favour of them is not to be repelled by anything short of clear and manifest evidence (from the will) of a contrary intention" (e); the *main reason* for this astuteness in sustaining doubtful charges, as will have been seen, no longer exists, but the decisions will no doubt still be followed, lest the law should become unsettled. One of the leading cases on the subject is *Legh v. Earl of Warrington* (f). There the testator commenced his will thus: "As to my worldly estate, which it hath pleased God to bestow upon me, I give and dispose thereof in manner following, that is to say:—*Imprimis*, I will that all my debts which I shall owe at the time of my death, be discharged and paid out of my estate;" and he then disposed of his real and personal estate, *expressly charging the real estate with an annuity*. The House of Lords, affirming Lord King's decree, held, that a general direction so made was a sufficient indication of intention

(a) See *Mirehouse v. Scaife*, 2 My. & Cr. 708; corrected, 4 My. & Cr. 269.

(b) See vol. i. p. 421, 584; and *supra*, p. 313.

(c) It is to be observed that most of the cases were decided before real estates were liable to debts by simple contract, excepting under a devise or charge, and when such a construction was put upon wills as tended to do justice to creditors, and when therefore all wills, especially in the Court of Chancery, received a most liberal construction in favour of creditors; see Lord Hardwicke's judgment, *Godolphin v. Penneck*, 2 Ves. Sen. 272; *Thomas v. Britnell*, 2 Ves. Sen. 313.

(d) Mr. Jarman on Wills, ii. 511, *et seq.*, has minutely examined the leading cases on this subject, and to his very able work I beg to refer the reader.

(e) *Price v. North*, 1 Phillips, 87; the Lord Chancellor refers to and distinguishes the case before him—where he reversed the

decree of the Lord Chief Baron (see 4 Y. & Coll. 509)—from *Thomas v. Britnell*, 2 Ves. Sen. 313; and *Douce v. Lady Torrington*, 2 My. & K. 600 (1 Keen, 567), 2 My. & K. 606, (which the Vice-Chancellor of England, in *Graves v. Graves*, 8 Sim. 56, did not seem to approve, see below, next note); and *Palmer v. Graves*, 1 Keen, 545, where the specific charge was held to cut down the general charge; and see *Earl Godolphin v. Penneck*, 2 Ves. 272.

(f) 1 Bro. Par. C. 511; and Belt's Supp. to Ves. Sen. 341; and see *Clifford v. Lewis*, 6 Mad. 33; and *Thomas v. Bretnell*, *ubi supra*, (1 Keen, 567). The Vice-Chancellor of England seems to have considered that *Douce v. Lady Torrington*, *ubi sup.* was decided without much consideration, *Graves v. Graves*, 8 Sim. 56: and see the reporter's note explanatory of this case, *Shaw v. Borrer*, 1 Keen, 567.

that the real estate should be charged generally with debts. Other authorities (*a*) have decided that the words "I direct, in the first place, all my debts to be paid," will create a charge (*b*): and it may now be considered as settled that where there is a direction that all the testator's debts shall be paid, and then there is a devise of the real estate, the debts will be charged on the real estate (*c*); and where a person gives his freehold, copyhold and leasehold estates and the residue of his personal estate, after payment of his debts and funeral expenses, that also has been held to amount to a charge on the real estate (*d*). Independently of the operation of the late statute as to wills, a general charge of debts includes all the debts the testator may contract during his whole life (*e*).

It may be taken as a general rule, that where there is a direction to a person, for instance to the executor, to pay the testator's debts, and property is given by will to the same person, the property so given (unless on the context an intention to the contrary shall appear) will be considered to be charged with the payment of the debts (*f*); but where there is a mere direction to the executors to pay the testator's debts and legacies, and the real estate is specifically devised to other persons, such a direction will not operate as a charge (*g*), there being nothing in such a case from which an intention to that effect can be collected; and where the estate is specially devised to a person who happens to be one of the executors, after a general direction to the executors to pay debts and legacies, it will not be considered for that reason as given to the executors and charged with the payment of

(*a*) See *Parker v. Marchant*, 1 Y. & Coll. C. C. 290.

(*b*) *Harding v. Grady*, 1 Dru. & War. 430.

(*c*) *Clifford v. Lewis*, 6 Mad. 33; *Ball v. Harris*, 8 Sim. 485; 4 My. & Cr. 264; *Mirehouse v. Scaife*, 2 My. & Cr. 707, and the cases there cited; *Shaw v. Borrer*, 1 Keen, 559; *Graves v. Graves*, 8 Sim. 55; Jarman on Wills, ii. 519, note; in *Clifford v. Lewis*, Sir J. Leach held that if on the context the testator has in fact directed his debts to be paid in the first place, it is immaterial whether he uses those words or not.

(*d*) *Withers v. Kennedy*, 2 My. & K. 607.

(*e*) *Brudenell v. Boughton*, 2 Atk. 274; *Bridgman v. Dove*, 3 Atk. 201; "I have contracted," must be construed or "shall contract;" *et v. infra*, section iv.

(*f*) *Powell v. Robins*, 7 Ves. 209; (2 Dr. & W. 62;) *Henvell v. Whitaker*, 3 Russ. 343; *Finch v. Hattersley*, *ibid.* p. 345, n., approved by Vice-Chancellor of England, *Dover v. Gre-*

gory (stated *infra*), 10 Sim. 396, 399; that case was decided in accordance with *Henvell v. Whitaker*, the Vice-Chancellor stating that it was a question of intention, and that the whole will must in this as in other cases be taken into consideration; *Barker v. The Duke of Devonshire*, 3 Meriv. 311; *Nyssen v. Gretton*, 2 Y. & Coll. 231-2, where Lord Abinger states the rule—the reason of the rule—and the exceptions: and see *Aubrey v. Middleton*, Vin. Abr. Charge, D. 15; 2 Eq. Abr. 497, where the same rule is applied to legacies.

(*g*) *Brydges v. Landen*, cited 3 Ves. J. 550; *Powell v. Robins*, 7 Vesey, 210; *Keeling v. Brown*, 5 Ves. 359; and see 2 Jarm. on Wills, 525, *et seq.* If the direction be general, as that the testator's debts be paid, without saying by whom, and there be no devise of the real estate, Mr. Jarman seems to think that the real estate would be held to be charged, as against the heir, ii. 520.

debts and legacies (a). Even where the executors are also devisees, a mere general introductory direction to the executors will not operate as a charge, if in reference to the context and general scheme of the will, it appears to have been introduced by the testator as a matter of mere form, without any view to the regulation of the enjoyment or the distribution of his property (b).

As Mr. Justice Story has observed, if a testator directs a particular person to pay, it is natural to presume, in the absence of all other circumstances, that the testator intended him to pay out of the funds with which he is intrusted, and not out of other funds over which he has no control; and if the executor is pointed out as the person to pay, that excludes any presumption that other persons not named are to pay (c).

If there be a general charge by implication by virtue of the preliminary direction or otherwise, then it becomes a question to be determined upon the effect of the subsequent devises and directions, whether that intention has been altered (d), or whether the implication arising from the general words is or is not repelled. But where there is a clear and *express* charge of debts upon the testator's real estate, though it may of course be confined by express words, it is not liable to be defeated by such subsequent devises and directions as might operate to that effect in the case of an *implied* charge; in the latter case, as the whole must be taken together, according to the ordinary rules of construction, the implication may be repelled (e). Thus, if a particular estate is in a subsequent part of the will specifically directed to be sold for payment of debts, this will vary the order in which the property is to be applied, but will not annul the general lien or charge (f).

(a) *Warren v. Davies*, 2 My. & K. 51, which was followed in *Braithwaite v. Britain*, 1 Keen, 219, as regards debts.

(b) *Symons v. James*, 2 Y. & Coll. C. C. 310; and see *Parker v. Fearnley*, 2 Sim. & S. 592: there the testatrix directed her executor, after named, to pay the legacies given by her at particular times, and she next devised a real estate to her son, by name; then she gave him the residue of her personal estate, after payment of her debts and legacies; it was held that the legacies were not charged on the real estate.

(c) Story on Equity, § 1247; see *Hennell v. Whitaker*, 3 Russ. 343; *Warren v. Davies*, 2 My. & K. 49; but see *Graves v. Graves*, 8 Sim. 54-56.

(d) *Palmer v. Graves*, 1 Keen, 550; *Thomas v. Britnell*, 2 Ves. Sen. 313; *Graves v. Graves*, 8 Sim. 43, 56; the devotion of a par-

ticular estate for the payment of debts was not considered as of itself conclusive; see p. 59, note. In *Douce v. Lady Torrington*, 2 My. & K. 606, the appropriation of a particular estate for that purpose by a subsequent codicil was considered as sufficient to control the general words. In this case Sir J. Leach laid stress upon the words "in the first place," being wanting, though in *Clifford v. Lewis*, *supra*, he considered this circumstance as immaterial; the Vice-Chancellor of England, as before mentioned, seems to consider that this case was hastily decided.

(e) See *Thomas v. Britnell*, 2 Ves. Sen. 315, *et v. supra*, vol. i. p. 527-9.

(f) *Coxe v. Basset*, 3 Ves. J. 161; *Crallan v. Oulton*, 3 Beav. 8; *Graves v. Graves*, 8 Simons, 56, 59; *Jones v. Williams*, 1 Coll. 160.

A testator by his will directed all his debts, legacies, and personal charges to be paid as soon as conveniently might be after his death; afterwards he devoted a particular estate to the payment of his debts, legacies, and personal charges, in aid of his personal estate, and he devised the residue of his estate in strict settlement: it was held by the V. Ch. of England that the preliminary words charged all his real estate, and that the subsequent words did not cut down the charge so as to make the particular estate only liable, but that all the real estate would be liable, if the specific estate should prove not to be sufficient to pay all the debts, legacies, and personal charges (a).

Where a testator directs his real estate to be sold, and that the proceeds shall form part of his residuary estate, so that the real and personal estate are to form one common fund, and there is a direction to pay the debts and legacies and to secure annuities out of that common fund, this will not be altered or affected by the common direction at the beginning of the will for payment of the debts out of the personal estate (b).

Where the testator has contracted to grant an annuity, and by his will he charges his real estate with the payment of all his debts, whether by bond or mortgage or due on simple contract, in exoneration of his real estate therefrom, a just construction of those words requires the court to hold an annuity to be within their influence and operation, as the annuitant would have been in a situation to sue the testator's executor for a debt in respect of the annuity from time to time (c).

A trust or charge for payment of debts and legacies, may also materially affect the real representatives of the testator by devise and intestacy, as regards the order in which the estates are to be applied for the payment of the debts.

The general rule, without reference to any trust or charge for payment of debts, in the administration of real assets is, that the de-

(a) *Dover v. Gregory*, 10 Sim. 393; *Henvell v. Whitaker*, 3 Russ. 343, where, and in 10 Sim. 395, the principal authorities on the subject are cited; and see *Graves v. Graves*, 8 Sim. 54-56, and 2 Powell on Devises, by Jarman, 644-653, where the cases are collected and discussed.

(b) *Hopkinson v. Ellis*, 10 Beav. 169, 174; 2 Real Prop. and Conv. Ca. 435; and see *Attorney-General v. Southgate*, 12 Sim. 77, on appeal. *ibid.* 83; *Roberts v. Walker*, 1 Russ. & M. 752.

(c) *Money Penny v. Mascal*, 2 Coll. 220. It was decided in *Bulwer v. Astley*, 1 Phillips, 422, reversing Sir J. Leach's decision, that the value of certain annuities which had been granted by the testator, as it was held by way of security only, was a charge upon the corpus of the testator's estates, under a charge in his will for payment of debts, and that the tenant for life was only bound to keep down the interest on such value, not the growing payments of the annuities.

scended estates must be first applied and then the estates devised (a); but if the devised estate is selected and *appropriated* to, not merely *charged* with, the payment of debts, it will be applied before the residue of the real estate which descends to the heir on intestacy; but the descended estates are applied before lands merely charged with payment of debts (b).

As regards a charge of debts by a Married Woman the doctrine is very clearly expounded by Lord Cottenham, in the late case of *Owens v. Dickinson* (c). In that case a married woman having a separate estate under a settlement, with a power of appointment by will or deed or other instrument in writing attested by one witness, having by her mark put her signature to a document which recognised the 210*l.* claimed by the plaintiff as a debt which in certain circumstances she was to be liable to pay to the plaintiff, she made her will, and by her will charged all her debts on property she had power to dispose of. The document alone, as Lord Cottenham observed, within the authority of decided cases (d), would have been operative upon her separate estate, not however by way of the execution of a Power, although that expression has been sometimes used, and very incorrectly used, in cases where the court has enforced the contracts of married women against their separate estate. It cannot be an execution of a power, because it neither refers to the power nor to the subject-matter of the power; nor indeed in many cases has there been any power existing at all. Besides, added his lordship, as it was argued in the case of *Murray v. Barlee*, if a married woman enters into several engagements of this sort, and all the parties come to have satisfaction out of her separate estate, they are paid *pari passu* (e); whereas, if the instruments took effect as appointments under a power, they would rank according to the priorities of their dates. It is quite clear therefore that there is nothing in such a transaction which has any resemblance to the execution of a power: what it is, it is not easy to define. The view taken of the matter, added Lord Cottenham, by Lord Thurlow in *Hulme v. Tenant* (f) is more correct. According to that view the separate property of a married woman being a creature of equity, it follows that if she has the power to deal with it, she has the other

(a) *Galton v. Hancock*, 2 Atk. 430; *Powis v. Corbet*, 3 Atk. 556; *Chaplin v. Chaplin*, 3 P. W. 367; *Davies v. Topp*, 2 Bro. 259, n.; *Williams v. Chitty*, 3 Ves. J. 545; *Phillips v. Eastwood*, Lloyd & G. temp. Sugd. 295.

(b) *Ibid.*; *Harmood v. Oylander*, 8 Ves. 124-5; *Donne v. Lewis*, 2 Bro. 257.

(c) Cr. & Phill. 52.

(d) *Murray v. Barlee*, 3 My. & K. 209; *Healley v. Thomas*, 15 Ves. 596; and *Bullpin v. Clarke*, 17 Ves. 365; *et v. sup.* p. 319.

(e) But see the *quære* of the Vice-Chancellor K. Bruce, in *Callow v. Howle*, xi. Jur. 985 b.

(f) 1 Bro. p. 21, *supra*, vol. i. p. 507, n. (e).

power incident to property in general, namely, the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a Court of Equity takes upon itself to give effect to them, not as personal liabilities but by laying hold of the separate property as the only means by which they can be satisfied. "In this case," said Lord Cottenham, "the debt is proved: by her will she has charged her separate property with the payment of this, at least amongst other debts; and therefore I think that under the will the liability of the separate estate to pay this debt is established. But by her will she appoints her separate property to pay her debts generally, and therefore there must be an inquiry as to the other debts, and the result of that inquiry may give rise to some further questions which it is not necessary at present to anticipate, because the authorities are very vague as to what are to be considered debts in this sense." "I observe that, in *Clinton v. Willes*" (a), continued his lordship, "Sir Thomas Plumer suggested a doubt whether it was necessary they should be secured by writing; it certainly seems strange that there should be any difference between a contract in writing when no statute requires it to be in writing, and a verbal promise to pay; it is an artificial distinction not recognised in any other case:" on that point, however, his lordship would not then give a decided opinion. It was referred to the Master to inquire what debts there were to be paid under the provisions of the will, with liberty to state special circumstances.

Interest may be given to creditors, where they are entitled to interest, on further directions, though the question of interest was not reserved by the original decree (b).

(a) Sugd. on Powers, 208, n.

(b) *Creuze v. Hunter*, 2 Ves. J. 164. On the subject of interest see *Lloyd v. Williams*, 2 Atk. 110; *Barwell v. Parker*, *ubi infra*; *Creuze v. Hunter*, 2 Ves. J. 157, 4 Bro. C. C. 316; and *Shirt v. Westby*, 16 Ves. 393, where as in *Lloyd v. Williams* the charge was treated as a legacy, and therefore to carry interest at 4 per cent. from the death of the testator only; *Car v. Countess of Burlington*, 1 P. W. 228, appears to have been overruled.

Simple-contract debts may be turned into specialty debts by the terms of the deed, *Barwell v. Parker*, 2 Ves. 363. Whether interest is due or not, is, generally speaking, a legal question, but interest may be given in suits in equity when it is not due at law. As to interest, *v. infra*, sect. iv. p. 355, 3 & 4 Will. IV. c. 28; and some other matters relating to trusts and charges for payment of debts, will be noticed hereafter.

ADDITIONAL NOTE.—*Supra*, p. 313, Note (d).

A judgment creditor can only take such interest as his debtor has in the land which he seeks to affect by his judgment; if the debtor has entered into a binding engagement to charge his land, the judgment is subject to such charge. *Gilbert's Forum Rom.* 228-9. *Whitworth v. Gaugain*, 3 Hare, 429, *ibid.* 1 Phillips, 732-3. The recent statute 1 & 2 Vict., 110, has not given the creditor any additional rights in this respect, *ibid.*

SECTION II.—Charges of Legacies.

Legatees being Volunteers and taking from the Bounty of their Testator, cannot claim in Competition with Creditors, though the Testator himself may not have made any Distinction between them.

Creditors have Rights by Operation of Law. Legatee can only claim his Legacy in Manner and Form given by the Will.

If one part of the Estates is charged, that circumstance is generally considered as a Discharge of the Rest.

If the Legacy be given generally, the Legatee must resort to the Personal Estate only.

Lord Alvanley's Opinion as to a General Charge of Debts and of Legacies.

Kightley v. Kightley, 2 Ves. J.

Lord Rosslyn's Opinion—Williams v. Chitty, 3 Ves. J.

Spong v. Spong, 3 Bli.

Whether Legacies are charged on Real Estates or not is a Question of Intention, to be ascertained upon the whole Context.

Instances.

Annuity charged on Rents and Profits.

Clear Intention necessary to give one Legatee a Preference over the others.

Abatement of Annuities.

Effect of the Statutes against Fraudulent Devises, and of the Statute making Real Estate liable to Simple-contract Debts, on the Condition of Legatees.

As has been already mentioned, a trust or charge of debts by will very frequently embraces also a charge of legacies; but although, in such case, at least until the late act in favour of creditors by simple contract, those creditors as well as the legatees could only claim under the will and under an act of bounty on the part of the testator, it was settled at an early period, that a legatee, whose right rests solely on the bounty of the testator, could not claim in competition with creditors who had also a claim on the justice of the testator, though the testator himself might not have made any distinction between them^(a): devises for payment of Portions in pursuance of articles before marriage are protected, as the testator is there under an antecedent obligation. Debts and legacies stand upon a very different footing. Creditors have certain rights by operation of law, liable indeed, as we have seen, to be varied as between themselves by the act of the testator, but the legatee has no antecedent right, he can only claim his legacy under the will, and in the manner and form in which

(a) *Foley's case*, 2 Freeman, 49; *ibid.* 121; *Shallcross v. Finden*, 3 Ves. J. 739; *Kidney v. Coussmaker*, 12 Ves. 154. Of the vesting of legacies, *v. supra*, 94, 184; *et infra*, Legacies.

it is given by the will (a); the intention alone governs in the case of a legacy (b); if it is given out of the real estate only, by that all parties must abide, and if one part is charged with the legacies, that as regards legatees, generally speaking, is a discharge or rather an exclusion of the rest of the property, for the legatees can only take what is given and in the way it is given (c). If the legacy is given generally the legatee must resort to the personal estate only (d).

Lord Alvanley considered that there was a wide difference between the effect of a general charge for payment of debts and one for payment of legacies, so far as regards devisees of particular estates; he contended that the testator must be taken equally to have meant that the specific devisee should have his estate as that the legatee should have his legacy (e). Lord Rosslyn however disputed this doctrine; he seems to have considered that a general charge—at least if preceding the specific devises—must be considered as affecting all the estates, and that any specific devise must be taken to be subject to this general charge, equally in the case of legacies as of debts (f); Lord Alvanley however still adhered to his opinion (g). It has since been decided that if there be first a specific devise and then a charge of legacies on the testator's real estate and afterwards a residuary devise, the land specifically devised is not affected by the charge, and therefore is not liable to the payment of any part of the legacies (h).

(a) See 1 Meriv. 233, and *Jones v. Bruce*, 11 Sim. 227-8; *Lamphier v. Despard*, 2 Dru. & W. 63.

(b) See *Noel v. Lord Henley*, 7 Price, 262.

(c) *Brydges v. Phillips*, 6 Ves. p. 571; *White v. Vitty*, 2 Russell, 491, 495; *Spurway v. Glynn*, 9 Ves. p. 483, where such a legacy was held not to be included in a direction that the legacies should be paid out of the personal estate, to the exoneration of the real; *Lamphier v. Despard*, 2 Dr. & War. 59, where on the construction of the will certain woods and timber directed to be cut were held to be the primary fund for payment of legacies, auxiliary only for payment of debts, *ib.* pp. 64, 65; *Dickin v. Edwards*, 4 Hare, 276-7.

(d) *V. supra*, vol. i. p. 193-4, 581.

(e) *Kightley v. Kightley*, 2 Ves. Jun. 330, approved by Lord Manners, *Spong v. Spong*, Dom. Proc. 1 Bli. 107, "A pecuniary legatee shall never charge a specific devisee of lands, even though the lands were specifically devised to the heir-at-law," Lord Macclesfield, *Chitton v. Burt*, Prec. Ch. 540; therefore it has been held that a pecuniary legatee has no right to stand in the place of a bond creditor as against a real estate devised, although he has such right as against a real estate descended, it being considered that a devisee is

not to be deprived of any part of the real estate which the testator has given him, because it happens that the testator's intention of bounty towards the pecuniary legatee fails for want of that fund which ought legally to supply the legacy; *S. C.* under the name of *Clifton v. Burt*, 1 P. W. 678; Sir J. Leach, *Wythe v. Henniker*, 2 My. & K. 645, "A specific devisee or a specific legatee shall not make good a pecuniary legacy;" Lord Manners, *Spong v. Spong*, 3 Bli. N. S. 109. On the subject of the liability of specific devisees to contribute with specific legatees to the payment of specialty debts, *v. infra*, *Of Marshalling Assets*.

(f) *Williams v. Chitty*, 3 Ves. J. 551; Sir E. Sugden, in *Spong v. Spong*, 3 Bli. N. S. 106, contended that such would be the effect; but Lord Manners dissented, *ibid.* 107.

(g) *Shallcross v. Finden*, 3 Ves. J. 739; *Keeling v. Brown*, 5 Ves. J. 361. It will be remembered that in the interpretation of wills, favour to creditors has been an acknowledged principle of construction.

(h) *Spong v. Spong*, 3 Bli. N. S. 102, 110, 1 Dow. N. S. 377-9; *Joy v. Campbell*, 3 Bli. N. S. 117. In many of these cases, the general rule that the last clause of a will shall prevail, is abandoned, to carry out the clear intention, *v. supra*, vol. i. p. 527, &c.

Where the general charge comes first, and then there are specific devises of real estates, *i. e.* by name or description, and also a residuary devise, in such case Lord Alvanley's doctrine is capable of application as regards the estates so particularly devised; but if each of the testator's real estates is specifically devised, or if the whole is given under one general devise there seems to be no means of giving any effect to a general charge, but by treating the particular devises in the one case or the general devise in the other as subject to that charge (*a*). The question so raised by Lord Alvanley is noticed by Lord Cottenham, in a late case (*b*), but I do not find that it has yet been set at rest, unless the case of *Spong v. Spong*, before referred to, is to be considered as affirming Lord Alvanley's doctrine.

It is hardly necessary to say that whether the legacies are charged on the real estate or not is also a question of intention to be determined upon a view of the whole of the testamentary instruments: some definite rules however may, in this instance, be extracted from the cases.

The circumstance that the testator leaves the whole of his real and personal estate embodied in one bequest to one individual, is not sufficient of itself for the court to determine that legacies left afterwards are to come out of the real estate (*c*). But where the testator is making a provision in the same clause for the payment of debts and legacies together, the natural inference is that he intends both to be paid in the same way, and if the debts are payable out of such mixed fund so will be the legacies (*d*). And it has been held, that if a testator gives all his real and personal estate together to one person for life, blending them together, for his use, and after his death he gives certain pecuniary legacies, and then gives the *residue* of his real and personal estate to some third person, that will be a sufficient indication of intention that the fund should continue as one fund after the enjoyment of it by the tenant for life, and that the legacies should be paid out of that consolidated fund (*e*).

It is also settled that a bequest of legacies followed by a gift of all the *residue* of the testator's real and personal estates will operate as a charge upon the entire property, real and personal, included in such gift, in favour of the legatees; the word *residue* as applied to the personal estate must mean after payment of the legacies, and it is natural

(*a*) See the cases cited, 2 Jarman, 532-3.

(*b*) *Mirehouse v. Scaife*, 2 My. & C. 708.

(*c*) Lord Abinger, *Nyssen v. Gretton*, 2 Y. & Coll. 232.

(*d*) Lord Eldon, *Bootle v. Blundell*, 1 Meriv. 233.

(*e*) *Bench v. Biles*, 4 Mad. 188; and see *Aubrey v. Middleton*, *supra*.

to suppose that the testator used those words in the same sense as applied to the real estate (a).

If a man devises lands for payment of debts and legacies, and the overplus to the heir or to the heir and a stranger, there the personal estate shall not be applied to exonerate the real so devised, as it is called in Chancery, out and out—for the overplus is devised in such case as a pecuniary legacy, and not as real estate, and then the *quantum* of such pecuniary legacy is to be ascertained in such case according to the intention of the testator, and that can only be by taking the debts and legacies out of the price or value of the lands, and therefore it would be at variance with the intention of the testator to cast in the personal estate by way of exoneration (b): this depends upon the principle, so often referred to, that a devisee or legatee is only entitled, as such, to that which is given to him.

Where a testator charges his executors with the payment of his legacies, and then devises to them the residue of his real and personal estate, the real estate is charged, though an annuity be in another part of the will expressly charged on such residuary estate (c).

If a man devise his real estate in trust to pay his debts and legacies, and one of the legatees dies in his lifetime, if the fund be insufficient for the payment of the legacies, including the one given to the deceased legatee, the legatees do not abate, but the whole fund is a trust for the other legatees if necessary (d); and it is the same if the gift of the legacy fails in any other manner, as by having been given to a charity (e).

If there be in the first instance the gift of an Annuity, and a charge of it upon the estate and then a direction to the trustees to pay it out of the rents, or if the trust simply be to receive the rents and

(a) *Cole v. Turner*, 4 Russ. 376. There, after giving some legacies and annuities, but without any devise of any part of his real estate, the testator gave all the residue of his freehold, copyhold, and leasehold estates, his stock, &c. and the rest of his real and personal property to his executors, on certain trusts. Sir J. Leach held that the testator had only given what would remain after some prior purposes were satisfied, and those could only be the annuity and legacies previously given; *Mirehouse v. Scaife*, 2 My. & C. 695: the words were, "It is my will that all my debts, and all the above legacies be paid and discharged within six months after my decease, and all the rest and residue of my estate, both real and personal, lands, messuages, and tenements, I give," &c.: the testator had first

specifically devised one field, but that was not sought to be affected, and the devisee of that field was not a party, p. 696; and see *Hassell v. Hassell*, 2 Dick. 526, and 2 Jarman on Wills, 532-3. It will be remembered that by the stat. 1 Vict. 26—the new Statute of Wills,—every devise, whether of a residue or not, speaks as if it had been executed immediately before the death of the testator.

(b) *Lex Prætoria*, p. 313; *Wainwright v. Bendlovs*, Pr. Ch. 451.

(c) *Cross v. Kennington*, 15 Law J., N.S. p. 157, 169; but see *Parker v. Fearnley*, 2 Sim. & Stu. 592, where the residuary gift was confined to the personal estate only.

(d) Lord Eldon, *Currie v. Pye*, 17 Ves. 466.

(e) *Ibid.* 468.

profits of the estates when and as they shall become due and payable, and thereout to pay to a certain person an annuity for his life, this will be a charge upon the rents, &c., until the whole amount of the annuity with the arrears shall be paid: but where the trustees are directed immediately on the death of the annuitant to convey the estates to other persons, a new trust arises, and if the trustees should perform their trust as they are bound to do, they would be disabled from applying the subsequent rents to the discharge of the arrears; therefore in such a case the arrears are not a charge on the subsequent rents (a).

Primâ facie the testator must be presumed to have intended that all his legatees shall be paid in equal proportions; the testator may give a preference, but the onus is on those who contend for a priority to show that the testator intended to give a preference to a particular legatee (b): a direction in the *first* place to pay what may be due on the testator's covenant to D., *then* to set apart sufficient to pay certain annuities given by the will, and in the *next place*, after making such investments, to pay the legacies given by the will, is not sufficient to give a preference to the annuitants over the legatees (c).

Where the assets in money applicable to the payment of general Legacies and Annuities are insufficient to pay both, the annuity ought to be valued, and the annuitant is entitled *at once* to the amount of the valuation, subject to an abatement in proportion to the abatement of the pecuniary legatees, and that, although the annuitant may have died before the payment of the annuity in full would have equalled the amount of the valuation (d).

It may be well here to observe that although the Statute of Fraudulent Devises and the statute making real estates liable for debts by simple contract (3 & 4 Will. IV. c. 104,) may, as the Vice-Chancellor K. Bruce observed in a late case, be admitted to have been intended for the benefit of creditors merely, and not to improve the condition of legatees, still it may be of material importance in its consequences to

(a) *Foster v. Smith*, 1 Phillips, 631-3. The Vice-Chancellor K. Bruce, 2 Y. & Coll. C. C. 193, had declared, hesitatingly, that the arrears were a charge on the subsequent rents.

(b) *Brown v. Brown*, 1 Keen, 275, 277; See *Pepper v. Bloomfield*, 2 Con. & L. 198, *infra*, p. 331.

(c) *Thwaites v. Foreman*, x. Jurist, 483, confirming the decision of the V. C. K. Bruce.

(d) *Wroughton v. Colquhoun*, 1 De G. & Sma. 36, 357, and *Long v. Hughes*, Rolls,

1824, 1829, 1831, *ibid.* p. 364. It had been contended, on the authority of other cases cited, that the annuity ought to be valued, then that a proportionate abatement should be made in the amount of the valuation, that the abated amount should be invested, and that the dividends and a competent part of the capital to make up the whole annuity, should be paid to the annuitant, giving the remaining principal of the fund, if any, after paying the pecuniary legatees in full, to the residuary legatee at the death of the annuitant.

legatees. A charge of debts on freehold estate by a will may be supposed generally to be intended in fact for the benefit of creditors merely, but its consequences to others are admitted and obvious. A mortgagee's lien is generally intended only for the benefit of the mortgagee, but has often ulterior effects; but this subject will be more particularly adverted to when we are treating of the Marshalling of Assets (a).

(a) *Tombs v. Rock*, 2 Coll. 498.

ADDITIONAL NOTE.

The following is an abstract of the case of *Pepper v. Bloomfield*, 2 Conn. & L. 198, referred to *supra*, p. 330. The interest of a sum of £5000 (no rate being specified) was bequeathed to the testator's wife, for life, in such terms as, in the opinion of the Court, to give her priority over all the other legatees; the wife's jointure, which the testator had covenanted to pay, exhausted the interest of the whole fund which could have been applied in payment of legacies, and was received by the wife during her life. It was held that the wife's representative was entitled, in priority to the other legacies, to all the arrears of interest, (computed at the rate of 5 per cent.) which accrued during the wife's life. But it seems it would have been otherwise, if it had appeared that the other legatees had been intended to take the £5000 by way of remainder depending on the wife's life estate.

SECTION III.—*General Doctrines as to Charges of Debts and Legacies by Will—Exemption and Exoneration of Personal Estate.*

General Rule that Personal Estate first Fund for Payment of Debts.

And also of Legacies, if no other Fund specified.

Debts secured by Mortgage within the Rule, so that on a Devise or Descent of a Mortgaged Estate, the Personal Estate must be applied to exonerate the Land from the Mortgage.

But where the Real Estate was the original Debtor, and came to its Possessor as such, it must bear the burthen.

And though the Owner may have given Collateral Security, still the Mortgaged Estate must be first resorted to.

Otherwise if he has made the Debt his own by a new Contract, &c.

Where Mortgaged Debt was created by another, the Estate must bear the burthen, although the Owner has charged other Property with Payment of all his Debts.

Where there is a Simple Charge the Real Estate can be applied only in case of Necessity.

But every one is at liberty to throw the Payment of his Debts and Legacies on his Real Estate exclusively, in Exoneration of his Personal Estate.

What amounts to Exoneration is to be determined on the Wording of each particular Will. No Extrinsic Evidence admitted.

Originally Express Words were necessary to exempt the Personal Estate, but the Rule was afterwards relaxed.

Now a Question of Intention.

Difficulty in defining what Expressions are sufficient.

Lord Thurlow's Definition.

Lord Alvanley's—"Irresistible Inference."

Lord Eldon's—"Evident Demonstration," "Plain Intention," "Necessary Implication."

Bootle v. Blundell, 1 Meriv.

It must appear that Testator intended so to charge the Real Estate as to discharge the Personal.

If Testator merely directs his Debts and Legacies to be a Charge on the Real Estate that only makes it applicable in aid of the Personalty.

Other Instances.

Where the Persons appointed Executors are the same to whom Real Estate had been given as Trustees.

Where Testator has made the Real Estate liable to the Costs both of Trustees and Executors in regard to Matters which would ordinarily fall on Personal Estate—Mr. Jarman's Opinion.

If the whole of the Personalty is specifically bequeathed and another Fund supplied for Payment of Debts—that exonerates.

Or if Testator has used Words shewing his Desire to preserve the Personal Estate entire for any given Purpose.

But generally, if the Executor is the Individual to whom the Personal Estate is given, it will not be exonerated.

Intention to exonerate may also be found in the Mode in which Real Estate is given.

Where nothing is given to the Legatee but a Sum to be raised out of Real Estate.

Or if a Portion of Real Estate is severed and directed to be the Fund for Payment of Legacies, the Personal Estate is exonerated.

And Real Estate may be so appropriated to the Payment of a particular Debt as to shew an Intention that it shall not be a Burthen on any other Fund.

Even though the Personal Estate should be given subject to Debts.

Decisions on one Will, not easily applicable to another.

If a particular Portion of Personal Estate is bequeathed, subject to Debts and Legacies, such Property must be first applied.

Not where there is no Gift of Residue.

Exoneration of Specific Legacies, as between General and Specific Legatees.

Exemption of Personalty in favour of Legatee does not necessarily extend to Next of Kin.

Exoneration of Real Estate by Payments on the part of Persons having a Partial Interest in the Estate.

Tenant for Life paying off Charge and merging the Security primâ facie puts an end to it.

But a simple Payment of the Charge would entitle the Tenant for Life to have it raised out of the Estate for his own Benefit.

Burthen of Proof as to Intention to exonerate the Estate lies on those claiming Exoneration.

If Tenant in Tail or in Fee pays off Charge, it is presumed to be in favour of the Estate. It is the same whether he take an Assignment or not.

But the Presumption may be rebutted by Evidence.

Where a Person pays off a Charge under an erroneous impression as to his Liability, it is not Evidence of intended Exoneration.

Person becoming entitled to an Estate subject to a Charge may keep it up for his own Benefit.

Courts of Equity not always governed by Rules of Law on this subject.

HAVING shortly considered what will amount to a charge of debts and of legacies, and how creditors and devisees may be affected by a charge of debts, I proceed to take a general view of an important consequence that may arise from a charge of debts and legacies as affecting the rights and interests of those who take the real and personal estates of the testator as between one another; namely, by the exemption or exoneration of the personal estate from its natural charges (a); this is a very important subject in reference to the administration of assets (b). The question of Exoneration has arisen on so many wills, has presented itself in such a variety of forms and circumstances, and

(a) 2 Jarm. 587.

(b) V. *supra*, vol. i. pp. 192-7.

is so ancient and so familiar a head of jurisdiction, that authority upon it is abundant. The accumulation of cases with the different views taken by different judges of the nature and effect of particular phrases and provisions has tended of necessity to embarrass the subject. On the whole, however, some principles of interpretation have been finally recognized and established (a).

It will be remembered that the general rule of Law and Equity, as administered in the Court of Chancery, is, that the personal estate is the first fund for payment of Debts; and as to Proper Legacies, that is where they are given without any directions out of what fund they are to be paid, or any words indicative of any intention to charge the real estate, the personal estate is considered to be the only fund for the payment of the legacies, both in the Ecclesiastical Court and in the Court of Chancery (b): debts secured by mortgage on the real estate, unless the estate be devised *cum onere* (c), are equally within the rule as debts not secured; the loan creates a debt, and in the view of the Court of Chancery the land mortgaged is a pledge only for the money borrowed; so that if a man mortgages his lands and then devises his real estate or suffers it to descend, the personal estate must be applied to exonerate the land from the mortgage, though the rule was qualified by the doctrine of Marshalling, which will be treated of hereafter, so that it might not wholly defeat simple-contract creditors, who could formerly only resort to the personal estate (d).

The rule does not apply solely to cases where the personal estate has been directly *increased* by reason of the creation of the mortgage, but generally to all cases where a debt is contracted, and a mortgage is given collaterally to secure its payment. The rule does not apply

(a) See *Collis v. Robins*, Vice-Chancellor K. Bruce, xi. Jurist, 364, 1 De Gex & Smale, 139, 141. In this case the Vice-Chancellor K. Bruce said (p. 136) it had occurred to him to doubt whether the statute 3 & 4 Will. IV. c. 104, which relieved our law from a great discredit, ought not to have some influence so as possibly to render a decision, since the act, in favour of the personal estate against the real estate right, which before that act would have been erroneous. There is now, perhaps, it is to be observed, less reason for holding the real estate to be charged on doubtful words, as men no longer "sin in their graves" (see *Thomas v. Britnell*, 2 Ves. 314; 2 Powell on Devises by Jarman, 1653) by not themselves charging their real estates with their debts; but on the clear intention the law must remain the same; v. *int. alia*, *Price v. North*, 1 Phillips, 87, *et v. supra*, p. 320.

(b) V. *supra*, vol. i. p. 193; 2 Freeman,

265; Ram on Assets, 121; Roper on Leg. 695, 709, 744.

(c) See *Lockhart v. Hardy*, 9 Beav. 379, *infra*, add. note No. 1.

(d) Gilbert, *Lex Prætoria*, 311-12; but it is there said, where the devise is with remainder over the rule is different, the devisees must take the estate *cum onere*, *ibid.*; *Bartholomew v. May*, 1 Atk. 487. The cases on this subject are numerous, and there are some important distinctions to be attended to, for which I would refer the reader to Ram on Assets, ch. xxix. p. 437, *et seq.*, and Mr. Cox's note to *Howel v. Price*, 1 P. W. 294, and *Tombs v. Roch*, 2 Coll. 497, before referred to, a very important case, which is stated *infra*, Section Of *Marshalling Assets*. As to the condition of a mortgagee who has foreclosed, and then seeks to prove his debt, see *Lockhart v. Hardy*, *infra*, additional note, No. 2.

where the obligation was in its primary constitution not intended as a debt but as a charge, or where the obligation affecting the personal estate was subsidiary or given as a security for the performance of the obligation (a): thus where a person covenants that he will settle or secure a portion out of particular lands, or that he will settle particular lands, (in which case, as before observed, he is trustee of the lands for the purpose of the settlement,) though he enters into a bond for the performance of his covenants, his personal estate as between the real and personal representatives, will not be liable to exonerate his real estate in respect of such covenants if broken; and even, in the case of a covenant to secure the portion, if there be also a covenant to pay it (b). A father having agreed to secure a marriage-portion for his daughter, mortgaged part of his real estate for that purpose, which mortgage contained a covenant for payment of the money; by his will he declared that his debts should be paid, first out of the residue of his personal estate, then out of his money in the funds, and lastly, out of his real estate: it was held that the mortgaged estate was not to be exonerated from the portion out of the personal estate (c).

The rule only applies to those debts which were properly the debts of the testator: in all cases where the real estate was the original debtor, and came to its possessor as such, it must continue to bear the burthen: even though the testator when he purchased the estate entered into a collateral contract or covenant or gave a security for payment of the debt, the estate burthened must first be resorted to (d): but it is

(a) See the note to *Evelyn v. Evelyn*, 2 P. W. 664.

(b) In *Edwards v. Freeman*, 2 P. W. 437, Sir J. Jekyl expressly referred to there being no covenant to pay the portion; but he added that if there had been a covenant to pay, the party entitled to the portion ought to come upon the land first, and to resort to the personal estate only in case of a deficiency.

(c) *Graves v. Hicks*, 6 Sim. 398.

(d) *Basset v. Percival*, *Mattheson v. Hardwicke*, and the other cases cited in Cox's note to *Evelyn v. Evelyn*, 2 P. W. 665, and the case itself, *ib.* 664. Many other cases have been decided on this principle, as *Lewis v. Nangle*, Amb. 151, where the husband had covenanted to pay a sum of money charged on the wife's estate for the wife's purposes; and see the cases cited in Mr. Belt's note to *Billinghurst v. Walker*, 2 Bro. 608; *Tweedell v. Tweedell*, 2 Bro. 101, 153, which is the leading case in regard to the purchase of an estate subject to a mortgage; *Lord Tankerville v. Fawcett*, 1 Cox, 239, where the doctrine is extended to a mortgage made by the heir to secure the an-

cestor's debts; *Basset v. Percival*, 1 Cox, 268; and see the other cases cited in the note, 2 Brown, p. 153; *Barham v. Lord Thanel*, 3 Mylne & K. 607, 624; *Noel v. Noel*, Dom. Proc. 12 Price, 303, Lord Redesdale; 323, Lord Eldon: Lord Eldon instances a case of a mortgage by a grandfather called in by the mortgagee during the life of the son, and the son in consequence having to join in a transfer of the mortgage with a personal covenant for payment of the mortgage money; this is not taking the debt or interest on himself, though the interest may be increased from 4 to 5 per cent., *et v. ib.* 328. The case of *Noel v. Noel* itself, ultimately resolves itself into a simple case of construction of a settlement and other instruments coupled with the will, under which it was plain that Lord Wentworth clearly meant that his personal estate should never be liable for the 20,000*l.* which had upon general principles been charged upon it by the Court of Exchequer, 12 Price, 328-30; and see *Earl of Ilchester v. Lord Carnarvon*, 1 Beav. 222, which arose on a question as to the liability to exonerate a mortgaged estate; and the late

different if he has done any thing which raises a new contract between him and the mortgagee or other incumbrancer or he has in any other way made the debt his own (*a*). Where the mortgage debt has not been made the testator's own debt, the estate must bear the burthen, though the testator, the owner of the equity of redemption, has charged other parts of his property with the payment of all his debts (*b*).

These are cases of Exemption independently of any act or expression of intention on the part of the testator rather than of exoneration, which implies that some act should be done in order to effect it. What will amount to an Exoneration will now be shortly considered.

Where real estate is actually charged, it may be taken as a general rule, that unless there are words to alter the ordinary course of administration, the real estate will not be held to be charged primarily or *pari passu* with the personalty not specifically bequeathed, but will only be held liable in case of necessity in its usual rank and order; that is after the general personal estate is exhausted (*c*).

It is incident to the right which every one has as between himself and the persons claiming under him to dispose of his property as he pleases, that he should be at liberty to alter the ordinary course of law, and being master of both funds, to throw his debts and legacies or either of them upon the real estate exclusively, and thus to *exonerate* the personal estate (*d*). Not that a man can take from creditors their right of resorting to the personal estate (*e*), but he

case of *Earl of Clarendon v. Barham*, before Vice-Chancellor K. Bruce, 1 Y. & Coll. C. C. 710-12, where the leading cases on this subject are observed upon; and *Butler v. Butler*, 5 Ves. 537.

(*a*) Dict. Lord Hardwicke, *Parsons v. Freeman*, Amb. 115, case of purchase of the equity of redemption of an estate; Lord Thurlow, *Billinghurst v. Walker*, 2 Bro. 608; *Earl of Oxford v. Rodney*, 14 Ves. 424-5; and the other cases cited in Lord Henley's note, 1 Bro. 153; *Scott v. Beecher*, 5 Mad. 96; *Earl of Clarendon v. Barham*, 1 Y. & Coll. C. C. 688; *Barham v. Lord Thanet*, 3 My. & K. 623. That the rule will not apply where the debt has constructively become his own, see *Lord Clarendon v. Barham*, *ubi sup.* 710-712; *Lord Ilchester v. Lord Carnarvon*, 1 Beavan, 222; Roper on Leg. 739, 743; but see *Cope v. Cope*, Gilb. Lex Praetoria, 315.

(*b*) See *Earl of Ilchester v. Earl of Carnarvon*, 1 Beavan, 222; and *Hamilton v. Worley*, 2 Ves. J. 62, 4 Bro. 199, Lord Loughborough; one ground there was, that it might have interfered with the interests of the other creditors.

(*c*) V. *int. al. Parker v. Marchant*, 1 Y. & Coll. C. C. 304; *Tombs v. Roch*, 2 Coll. 497: these are very important cases on many points connected with the administration of assets and the construction of wills, particularly as to Marshalling Assets, and as to what will pass by the words "ready money," "debts due," &c.: the former was confirmed on appeal, 1 Phillips, 356.

(*d*) *Lord Inchiquin v. French*, before Lord Hardwicke, Amb. 37, and *The Duke of Ancaster v. Mayer*, 1 Bro. 459, are leading cases on the subject of exoneration of personal estate from debts and legacies, on which we are about to enter. The cases are collected in Roper on Legacies, i. 596, *et seq.*, and the general principles are stated and the leading cases collected, 2 Fonbl. 286-9, to which I would beg to refer.

(*e*) It has already been mentioned that the real estate also is now liable to simple-contract debts, by 3 & 4 Will. IV. c. 104, amended by 2 & 3 Vict. c. 69, *supra*, vol. i. pp. 174, 295, and see *Collis v. Robins*, 1 De Gex & Smale, 136, 138, *supra*.

may charge and appropriate which fund he will as between his representatives (a). What will amount to an exoneration is a question of intention to be extracted from the wording of each particular will (b): as a general rule no extrinsic evidence can be admitted to ascertain the intention (c).

Originally express words were necessary in order to exempt the personal estate (d), and almost every judge has lamented that that rule has not been adhered to (e). But in Lord Hardwicke's time the rule had been relaxed, in conformity with the general rule for construing wills according to the intent to be collected from the whole context (f). It need not be by express words, said his Lordship, where without them the intention of the testator will plainly appear (g); and it makes no difference how the debts are charged upon the estate, whether charged generally or with directions to sell out and out; there are instances in both these ways where the real estate has been taken in aid of the personal, and where the personal estate has been held to be exempt (h).

In this, as in every case where it is left to the judge to collect the intention from the whole scope and context of the will, there must necessarily be great difficulty in any attempt to define what expressions and what kinds of dispositions as affecting the real and personal estate

(a) *Lex Prætor.* 311; and see *Ambl.* 37; 1 Cox, 5; 2 Atk. 624.

(b) Lord Thurlow, 1 Bro. 459; *Stapleton v. Colville*, Forrest. 208, and the note p. 210.

(c) It is established by the more modern authorities—see the note to 1 Eden, 43 (confirming the dictum of Lord Holt, cited in *Lord Inchiquin v. French*, Ambler, 40)—that the circumstances of the testator, and the amount of his personal estate or of his debts, cannot be taken into consideration in determining what is the testator's intention on this subject; Lord Northington, *Stephenson v. Heathcote*, 1 Eden, 43, 44; *Lord Inchiquin v. French*, *ubi sup.* and 1 Cox, 9; Lord Eldon, *Bootle v. Blundell*, 1 Mer. 220-2, as to which case see 1 De G. & Smale, 140; *Aldridge v. Wallscourt*, 1 Ball & B. 314; though Lord Hardwicke appears to have allowed the consideration of the amount of the debt and of the value of the property to influence him in one important case, *Bridgman v. Dove*, 3 Atk. 201, notwithstanding his declared opinion in *Inchiquin v. French*, *supra*; and see *Gray v. Minnethorpe*, 3 Ves. 103, before Lord Loughborough; and in *Stapleton v. Colville*, Forrest. 208, Lord Talbot was willing to have admitted it: where parol evidence may be received in the construction of a will has been noticed in the former volume, p. 556, *et seq.*, and see the

cases in the note, 1 Eden, 39.

(d) Lord Cowper so states the rule, *Dolman v. Smith*, Prec. Ch. 458; Gilbert, Eq. R. 129; but yet he decided that case on the construction of the whole will, which he considered not to afford evidence of an intention to exempt; and see *Fereyes v. Robertson*, Bunb. 301, 1 Bro. 462.

(e) *V. int. al.* 11 Ves. 186, Sir W. Grant.

(f) *Greene v. Greene*, 4 Mad. 148.

(g) *Daves v. Scott*, 5 Russ. 34, is one amongst many instances that might be cited; see Jarm. on Wills, 587, *et seq.*

(h) Lord Hardwicke, *Ambl.* 38; Lord Thurlow, *Inchiquin v. French*, 1 Cox, 5; *Tait v. Lord Northwick*, 4 Ves. 816; *Hancox v. Abbey*, Sir W. Grant, 11 Ves. 186; 2 Jarman on Wills, 565; *Noel v. Henley*, 7 Price, 264. Whether the direction is to sell to pay particular debts, or a charge; and whether it is to be sold out and out for the payment of debts, or in aid, it seems to be the same thing; Lord C. B. 7 Price, 264; and see 2 Jarman, 565. Mr. Jarman, it is to be observed, considers that Sir W. Grant's decision in *Hancock v. Abbey* was inconsistent with the principle of the decision in the last-cited case, so far as regards a charge of particular debts; *v. ibid.* p. 595.

shall be considered as amounting to an exoneration of the personal estate; however some of our most distinguished judges, feeling the great importance of fixing the rules of property, have, as is before mentioned, made the attempt.

Lord Thurlow thus laid down the rule: "Where there is a declaration plain that shall stand in lieu of express words"—"if there be a declaration plain or manifestation clear, so that it is apparent upon the face of the will that there is such a plain intention, the rule then is, not to disappoint, but to carry such intent into execution" (a).

Sometimes the terms "irresistible inference" have been used, in respect of which Lord Alvanley observed, "The inference must be such as to leave no doubt upon the mind of the judge who is to decide it"—"it must be irresistible to his mind (b), it need not be such that no man alive can doubt it: but it must not be a case of presumption, for then we shall get into that miserable way of explaining it by evidence" (c).

"Upon looking," said Lord Eldon, "through the several cases "which have been decided during more than a century past, I think I should have been authorized to say at the commencement of it, that if such a rule were laid down (viz. that the intent to exempt the personal estate must be manifested in such a manner as that persons out of court on reading the will could not fail to agree that such was the intention) there could never in all human probability be any decision upon a will furnishing a solution of the question; and now at the close of it, I think I should have been authorized to say that which was then probable would be the case; for on a comparison of all the cases which have arisen it is scarcely possible to find any two in which the court altogether agrees with itself, there being scarcely a single circumstance that is considered in one case as a ground of inference in favour of the intention, but it is considered in other cases as against the same inference (d); and I can find no rule deducible from all that has been said on the subject but this, (which appears to be a rule supported by all

(a) *Duke of Ancaster v. Mayer*, 1 Bro. 462. The Vice-Chancellor Wigram, adverting to this and the preceding passages, says, where the court, by what is called implication, as distinguished from express gift, gives property to a claimant, it does not by so doing contravene the rule, that an unequivocal intention to give must be found in the instrument; *Blacklow v. Laws*, 2 Hare, 50.

(b) *Brummel v. Prothero*, 3 Ves. J. 112.

(c) *Ibid.* Lord Eldon observed that it "seems strange to lay down as a rule that

express words shall not be required, but yet there must be expressions tantamount to express words;" 1 Meriv. 220.

(d) Lord Eldon illustrates this position, 1 Meriv. 221-4, which is perhaps a little too strong; but there are many instances where some judges have considered a particular circumstance as expressive of an intention to exempt, which other judges have wholly disregarded; the funeral expenses as well as debts and legacies being charged on the real estate is one; 6 Ves. 570.

the cases taken together,) namely, that since it has been laid down that express words are not necessary to exempt the personal estate, there must be on the will that which is sometimes denominated 'evident demonstration,' sometimes 'plain intention,' and 'necessary implication,' to operate that exemption: this much can be collected from the cases. But when it is further inquired as to what it is that constitutes this evident demonstration, plain intention, or necessary implication, it appears to me that Lord Alvanley is right when he says, 'You are not to rest on conjecture, but the mind of the judge must be convinced that he is deciding according to what the testator intended.' I take it that this is what will be found to be the result of all the cases, that the judge is in every instance to look at the whole of the will together, and then ask himself whether he is convinced that it was the testator's intention to exempt the personal estate" (a).

The question, then, in each particular case resolves itself into this: Does there appear upon the whole testamentary disposition taken together, an intention on the part of the testator so expressed as to convince a judicial mind that it was meant not merely to charge the real estate, but so to charge it as to exempt the personal estate; for it is not upon an intention to charge the real, but an expressed intention also to discharge the personal estate, that the question is to be decided, and every testator must be presumed to have been cognizant of the law (b).

The general expressions above adverted to, leave the question much at large, but some definite rules for their application may be collected from the decisions both as regards what will not as well as what will be considered as operating by implication as an exoneration of the personal estate from the payment of debts and legacies.

It is well established that if the testator merely directs that his debts and legacies shall be a charge on his real estate, or if he in any other manner simply devotes his real estate to the payment of his debts and legacies, that is not considered as an indication of an intention to exonerate the personal estate; it therefore still remains primarily liable, and the real estate is only to be applied in aid of the per-

(a) *Bootle v. Blundell*, 1 Meriv. 220; and see *Collis v. Robins*, before Vice-Chancellor K. Bruce, xi. Jurist, and 1 De G. & Smale, before referred to, where the leading cases on the subject are adverted to by the Vice-Chancellor. The principal cases in favour of the heir and against exoneration, are enumerated by the Vice-Chancellor, p. 139, and his

own decision, *ibid.* page 142, must be added to the list.

(b) Lord Eldon, *Bootle v. Blundell*, 1 Meriv. 230; *Dolman v. Smith*, Gilb. Eq. R. 129; S. C. Prec. Ch. 456; *Bickham v. Cruttwell*, 3 My. & Cr. 772; 1 De G. & Smale, 141.

sonalty (a). The most anxious provision for payment of debts out of real estate, coupled with specific directions as to how the specialty debts are to be borne by the several devisees who are to take the estate in succession, which may only have been given on the supposition that such debts must fall on the real estate, though amounting to some indication of intention, will not of themselves be sufficient to exempt the personal estate (b). Nor is a mere gift of the personal estate to a stranger coupled with a charge of debts and legacies on the real estate sufficient (c), particularly if the gift be to the executor (d).

Where real estate is subjected to the payment of debts and legacies, and the personal estate is expressly subjected to certain legacies, to which it would of course have been liable, that is not considered as sufficient to show an intention to throw the debts exclusively on the personal estate; the testator might have meant only to distinguish those legacies from other legacies that were to be paid out of the personal estate (e).

Mere words of recognition of a debt accompanied by a charge will not make the particular estate charged the primary fund as between this and the other real estates; but if a person *actively* charges a particular estate with a particular debt it will (f).

In many of the cases (g) very considerable stress has been laid on the circumstance of the persons who were appointed executors being the same to whom the real estate had been before devised as trustees; in other cases this circumstance is considered as less material; but the degree of weight, said Lord Eldon, to which it is entitled, depends upon the whole will taken together, and if a distinction is to be found from the beginning to the end of the will between what they are called upon to do in the character of executors and what as trustees, and if they are directed as trustees to do that which is properly the duty of executors, this is a circumstance which deserves also to be attended to in determining what is the general intention of the testator (h): though, generally speaking, this circumstance is an argument against the

(a) *Bootle v. Blundell*, 1 Meriv. 220; *Lamphier v. Despard*, 2 Dr. & W. 63.

(b) *Watson v. Brickwood*, 9 Ves. 454; *Tait v. Lord Northwick*, 4 Ves. 816.

(c) *Lord Thurlow, Ancaster v. Mayer*, 1 Bro. 459, 461; *Aldridge v. Wallacourt*, 1 Ball & B. 316; but *v. infra*, p. 341.

(d) *Lex Prætorian*, 313; *inf.* p. 342.

(e) *Sir W. Grant, Brydges v. Phillips*, 6 Ves. 571; and see 2 Jarman, 672, *et seq.*

(f) *Evans v. Cockeram*, 1 Coll. 431. The Vice-Chancellor considering that there were

so many cases on the subject did not in the first instance give a definitive opinion (though not expressing any doubt). The marginal note says in *exoneration* of his *personalty* and other estates, but this was not contended in the argument (see p. 430), nor is it warranted by the judgment, as I read them: the charge of 200*l.* stood on a different footing to the mortgage debt in this respect.

(g) As in *Ancaster v. Mayer*, 1 Bro. 461; 1 Meriv. 228-9.

(h) Lord Eldon, 1 Meriv. 227, and see 231.

intention to exempt, it *may*, under peculiar circumstances, be an argument in favour of that intention (a).

Where a testator has devoted a part of his real estates to the payment of his debts and annuities and legacies, and also of the costs of his trustees and executors, both as trustees and executors, this also is a circumstance on which great stress has been laid, as evidencing an intention to exonerate the personal estate, the real estate being thus made liable to the payment of such expences as exclusively regard the administration of the personal estate, such as the costs of probate and other costs sustained in the execution of the will (b); but this of itself does not necessarily imply more than that the real estate shall make good the deficiency of the personal estate for these purposes (c).

If the personal estate as a whole and not as a residue (d) is given (e) in the nature of a specific bequest, and another fund is supplied for the payment of the debts and legacies (f) and funeral and testamentary charges (g), or if the testator has by express words or any other declaration in his will shown an intention to preserve the personal estate entire for any given purpose whatever, that will be sufficient to exempt the personal estate (h): but, generally speaking, if the individual to whom the personal estate is given is the executor, it will not amount

(a) *Ibid.* 232, *et v.* 234-5. As to the effect of a direction that the executor, to whom property is specifically given, shall pay all the debts and legacies, and the order in which they are to be paid; see *Henrell v. Whitaker*, 3 Russ. 343, (10 Sim. 399,) and the other cases cited there and in *Dover v. Gregory*, 10 Sim. 394, *et v. ibid.* 399, 400, and *Cross v. Kennington*, 15 Law J., N. S. p. 167, M. R., *et v. supra*.

(b) Lord Eldon, *Bootle v. Blundell*, 1 Meriv. 239. In that case Lord Eldon, after an elaborate review of the authorities, and a minute examination of the words of the will and codicil, in reference to the previous authorities, (which case the student will do well to read with attention,) pronounced that the personal estate was exonerated.

(c) Mr. Jarman, after an examination of the cases on this subject, comes to the conclusion that no case, which rests on the simple circumstance, of the funeral and testamentary expenses and other charges which belong to the personalty only being charged on the real estate as exempting the personal estate, can now be depended upon. On Wills, ii. 568-571, and see 2 Ponbl. 287.

(d) See 2 Jarm. on Wills, 586.

(e) To a stranger, *Lex Prætor.* 314; and see *Dolman v. Smith*, Gilb. Eq. R. 123; *Lex Prætor.* 314.

(f) Lord Thurlow, *Inchiquin v. French*, 1 Cox, 5; and see *Burton v. Knowlton*, 3 Ves. 111.

(g) 2 Jarman, 586. But the intention is still to be looked to, if it can be collected from the will; see *Haslewood v. Pope*, 3 P. W. 325: Lord Talbot, however, appears to have imported into this case, and to have founded his judgment in part on, the fact that the legatee was an infant. The cases in the 3rd vol. of Peere Williams' Reports, as is noticed more particularly hereafter, are posthumous, and are not of equal authority with those in the 1st and 2nd volumes.

(h) Lord Thurlow, 1 Bro. 466. But Lord Hardwicke and Lord Thurlow considered that *Adams v. Merrick*, Eq. Ca. Ab. 271—where in favour of the widow, to whom the personal estate was given, a forced construction was given to the words "do and shall," so as to preserve it for the widow—was a weak case, and not to be followed, 1 Bro. 465. "There were two cases before Sir John Leach, *Greene v. Greene*, 4 Mad. 148, and *Michell v. Michell*, 5 Mad. 69, which went far to establish this, that where there first appears an intention to give the whole personal estate, and then a real estate is charged with the debts, the legatee will take the personal estate exonerated;" Sir E. Sugden, L. C., *Lamphier v. Despard*, 2 Dr. & W. 63.

to an exoneration, as he will be held, in that case, to take it as executor, subject to the claims of those who are entitled by law to have those claims satisfied as against the executor (*a*).

The intention to exempt or to exonerate the personal estate may be found not merely in the mode in which the personal estate is given, but also in the mode in which the real estate is given (*b*); as where an estate is devised to a devisee, *he paying* the incumbrances affecting it. Where the testator directs a portion of the proceeds to arise from the sale of his real estate to be applied in discharge of a particular debt and gives the remainder to some one else, the devisee of the residue of the proceeds cannot call for payment of the debt out of the personal estate: indeed it may be stated as a general rule, that in all cases where the will is so constructed as that nothing is given to the devisee but what shall remain after payment of debts, the devisee, under the ordinary rules of construction, will take subject to the payment of the debts, for that is all that is given to him (*c*).

Legacies stand on a different footing from debts; they are created by the will (*d*); and although the personal estate is the primary fund for the payment of legacies generally, as well as of debts, particular legacies may be so provided for as to be a charge upon the real estate exclusively. Thus, where nothing is given to the legatee but a sum to be raised out of the real estate, or if a portion of the real estate or its produce is severed from the estate, and it is directed that it shall be the fund for the payment of the legacies, the personal estate cannot be made to bear the burthen, the legatees are devisees *pro tanto* (*e*). It has been held that the real estate may also be so appropriated to the payment of a particular debt as to show a clear intention that it shall not be a burthen upon any other fund, though an intention to exonerate the personal estate is not in any other way expressed (*f*); and if in such a case the personal estate should be given expressly subject to debts, though this will create a considerable difficulty, yet if on the context the particular debt is clearly intended to be charged on the real estate only, Sir Wm. Grant thought that such a provision might

(*a*) *Stephenson v. Heathcote*, cited 1 Meriv. 227; *French v. Chichester*, 2 Vern. 569; and Lord Thurlow's and Lord Eldon's observations, 1 Meriv. 226-7; *Lex Prætoria*, 313, *supra*.

(*b*) *Hancox v. Abbey*, 11 Ves. 186.

(*c*) *Hale v. Cox*, 3 Bro. 322; *Hancox v. Abbey*, 11 Ves. 187-8, 190; *Ibbetson v. Ibbetson*, 12 Sim. 206; *Lockhart v. Hardy*, x. Jur. 728; 9 Beav. 372, *inf.* p. 346; *Wythe v. Heniker*, 2 My. & Cr. was decided upon the spe-

cial terms of the gift of the personal estate; see p. 644; and see 2 Jarman, 593-4.

(*d*) See 2 Dr. & W. 63, L. C. Sugden.

(*e*) *Wilson v. Lord Bath*, cited 4 Ves. 82; *Hancox v. Abbey*, 11 Ves. 185; *Lamphier v. Despard*, 2 Dru. & W. 64.

(*f*) Sir W. Grant, *Hancox v. Abbey*, 11 Ves. 186-7; but see as to the authority of this case, *supra*, p. 337, and 2 Jarman on Wills, 597-8.

be construed to extend to such debts only as had not been before provided for (*a*).

But it is not often that the decision upon one will can serve as a precedent for the decision on another, or even as a guide, excepting as it may recognize the general rules applicable to such cases (*b*); and these I have endeavoured to extract in the preceding cases. The cases have been particularly examined by Mr. Roper, "On Legacies" (*c*), and by Mr. Jarman, "On Wills" (*d*), to which learned works I would refer the reader for the qualifications of the general rules above adverted to, and for the doctrine generally.

It may here be observed, that if a particular portion of the personal estate be bequeathed subject to the payment of debts and legacies, as between the legatees, the residuary personal estate is exonerated, if there be a residuary bequest; but not where there is no gift of the residue (*e*); and that as between specific and pecuniary legatees, if there is a deficiency of the personal estate to satisfy all the legacies the loss is, as between them, to fall wholly on the pecuniary legatees; the law, as before remarked, considering a testator, when giving specific and pecuniary legacies, as saying by the very act (unless he declares himself, in effect, not to mean so to say) that if there is a deficiency, the loss shall be borne by the general legatees, and as a specific personal legatee shall not contribute towards a pecuniary legacy, much less shall a specific devisee of land (*f*). Neither the heir nor devisee can claim to have the real estate exonerated either against a specific or a pecuniary legatee (*g*).

It is to be observed that the exemption of the personalty in favour of legatees does not necessarily extend to the next of kin in the event of the failure of the bequest of the personalty by lapse or otherwise (*h*);

(*a*) 11 Ves. 189, Sir Wm. Grant; but see *Wythe v. Henniker*, *ubi supra*.

(*b*) See Lord Eldon's observations, 1 Mer. 224.

(*c*) By White, chap. xii. § 3, see the Summary, p. 709.

(*d*) Vol. ii. p. 564, *et seq.*

(*e*) *Hewett v. Snare*, 1 De G. & Sm. 333; *Phillips v. Eastwood*, Lloyd & G. temp. Sugd. 270-1, 294. In the note to this case the authorities on the subject of exoneration are collected, p. 295; *Choat v. Yeates*, 1 Jac. & W. 102, the Lord Chancellor observed that in *Holford v. Wood*, 4 Ves. 76, in which the decision was the other way, there was no gift of the residue; *Gray v. Minnethorpe*, 3 Ves. 103, 2 Fonbl. 287: and see 2 Jarman, p. 598.

(*f*) Lord Macclesfield, *Clifton v. Burt*, 1 P.W. 679, 680; (2 Coll. 505). The point decided was, reversing Lord Harcourt's decree, that a pecuniary legatee shall not stand in the place of specialty creditors who have exhausted the personal estate as against real estate specifically devised.

(*g*) *Hamilton v. Worley*, 2 Ves. J. 65.

(*h*) Lord Thurlow, *Hale v. Cox*, 3 Bro. 324, and Lord Henley's note; *Noel v. Lord Henley*, 7 Price, 258; 2 Jarman on Wills, 592. See the distinction between the case where the exemption fails together with the gift of the personal estate, and where the devisee is in all events to take *cum onere*; 2 Jarman. p. 593; *et v. infra*, pp. 346-7, additional note.

for where the testator bequeaths his personal estate in such manner as to exonerate it, in the hands of the legatee, from the payment of debts or legacies or both, it is presumed that such exoneration is only meant to be in favour of the person to whom the personal estate is given; if therefore such person should die before the testator, so that he cannot take the benefit of the bequest to him, and the personal estate therefore goes to the next of kin of the testator, they cannot take the benefit of the exoneration (*a*).

Where the personal estate is given to a legatee, the widow for instance, in consideration of the legatee giving up certain securities which the testator has entered into, the personal estate so given will be held to be exonerated from the payment of debts (*b*).

Where an estate is limited to trustees for payment of debts and legacies or either, if the amount is once properly raised, although the trustees may waste or misapply the money so raised, neither creditors or legatees can require that the amount shall be again raised out of the estate (*c*). Although all the real estates of a deceased are now (*d*) rendered liable for his debts generally, the creditors have no charge on the land, so that they cannot follow it, their remedy is merely personal (*e*).

It may be well here to consider a description of Exoneration of a different nature. It not unfrequently happens that a person who takes an estate subject to a charge, pays off the charge, and in such case, in the absence of an express declaration on the subject, a question may arise whether the estate is to be considered as exonerated, or whether the charge is to be kept up for the benefit of the person who has paid off the charge: the following cases will exhibit the leading doctrines on this subject.

A tenant for life paying off a charge upon the estate (*f*), in the same transaction merging the security by taking an assignment connecting it with the legal estate of inheritance, *primâ facie* puts an end to the charge, for he does an act indicative of such intention; but something is required to be done by a tenant for life to manifest an intention to exonerate the inheritance; a simple payment of the charge,

(*a*) *Waring v. Ward*, 5 Ves. 670; *Noel v. Lord Henley*, 7 Price, 241, 259; *Roper on Legacies*, 745.

(*b*) *Blount v. Hipkins*, 7 Simons, p. 43; *Waring v. Ward*, 5 Ves. 670: see 2 Fonbl. 287-8.

(*c*) *Anon.*, 1 Salk. 153, in Dom. Proc.; *Omerod v. Hardman*, 5 Ves. 736; and see *Carter v. Barnardiston*. 1 P. W. 518, 519;

Oldfield v. Oldfield, 1 Vern. 336; *Harrison v. Cage*, 2 Vernon, 85; 2 Ves. 603; *Juxon v. Brian*, Prec. Ch. 143; *Hutchinson v. Masareene*, 2 Ball & B. 49, *inf.* p. 381.

(*d*) 3 & 4 Will. IV. c. 104, *supra*, vol. i. pp. 174, 295.

(*e*) *V. infra*, p. 387.

(*f*) *V. supra*, p. 308, *et infra*.

without more, will not extinguish the right of the tenant for life to have the charge raised out of the estate: he has no obligation or duty to make a declaration, or to do any act demonstrating his intention for that purpose: the burthen of proof is upon those who allege that in paying off the charge he intended to exonerate the estate (a); but it is wholly a question of intention, and evidence may be adduced to show the contrary conclusion to be true; such evidence only shows the character in which the act done is to be received (b).

If an adult tenant in tail in possession (c) or a tenant in fee-simple pays off a charge, that payment is presumed *prima facie* to be made in favour of the estate, and it is the same whether he takes an assignment or not (d); and though there has been some conflict of opinion on this subject, it may now be considered that the rule of the court is settled, that there is no difference in the operation of the rule between a charge merely equitable and one that is supported by an outstanding legal estate (e). Where a person executes deeds under an erroneous impression as to his liability, of course those deeds cannot be treated as evidence of an intention to exonerate; as where a person, tenant for life, under the understanding that he was personally liable as residuary legatee to pay portions which in fact were exclusively or at least primarily chargeable on the real estate, paid the portions, and obtained releases, and executed deeds in conformity with such supposed liability, it was held no presumption could arise from acts so done that there was an intention to exonerate the real estate (f).

(a) Lord Langdale, 7 Beav. 232, and the cases in the next note. As to what are the liabilities of the tenant for life, in respect of incumbrances, *v. int. al.* 2 Atk. 463; 3 Atk. 201; 1 Ves. 93; 2 Bro. 128-9; and 5 Ves. 107; *et infra*, chap. on Mortgages.

(b) Lord Langdale, *Burrell v. Earl of Egremont*, 7 Beav. 226-7, in which all the principal authorities were cited; *Astley v. Milles*, (Sir A. Hart), 1 Sim. 326, 327. The Vice-Chancellor said the court was to act upon the intention of Mr. Milles, and was therefore bound to hear all the evidence that could be fairly given on the subject, and he decided on the evidence, *ib.* 346; there the charge was subsisting at law, p. 341; *Earl of Buckinghamshire v. Hobart*, 3 Swanst. 186, 199, Lord Eldon: *et v. Trevor v. Trevor*, 2 My. & K. 678.

(c) As to whom there was formerly a conflict of opinion, see *D. of Chandos v. Talbot*, 2 P. W. 601, 604; *Chester v. Willes*, Ambl. 246.

(d) Lord Eldon, *St. Paul v. Visct. Dudley and Ward*, 15 Ves. 172, and *Ware v. Polhill*, 11 Ves. 278; where his Lordship says the rule does not apply in the case of infancy; *Jones*

v. Morgan, 1 Bro. 206, 218; 1 Ball & B. 140, and Turn. & R. 183; *Earl of Buckingham v. Hobart*, 3 Swanst. 186, 199; (see Sir A. Hart's observations on this case in regard to the illustration given by Lord Eldon). *Drinkwater v. Combe*, 2 Sim. & S. 345, is a case of a person whose estate was defeasible by executory devise; *Wigsell v. Wigsell*, 2 Sim. & S. 364, is a case where tenant in tail in remainder paid off an incumbrance and took an assignment of the security during the life of the tenant for life, and afterwards became entitled in possession; he declared no intention one way or the other, *ib.* 369; in both cases the charges were held to be subsisting. Sir A. Hart considered both these cases to be exceptions to the general rule, 1 Sim. 345.

(e) Sir A. Hart, *Astley v. Milles*, 1 Sim. 344.

(f) *Burrell v. Lord Egremont*, 7 Beav. 232; and see *Countess of Shrewsbury v. Earl of Shrewsbury*, 1 Ves. J. 233; *Pitt v. Pitt*, Turn. & R. 180; *St. Paul v. Viscount Dudley and Ward*, 15 Ves. 173.

It is very clear that a person becoming entitled to an estate subject to a charge for his own benefit, may, if he chooses, at once take the estate and keep up the charge. Upon this subject a court of equity is not guided by the rules of law. It will sometimes hold a charge to be extinguished where it would subsist at law, and sometimes preserve it where at law it would be merged. The question is upon the intention, actual or presumed, of the person in whom the interests are united. In most instances it is, with reference to the party himself, of no sort of use to have a charge on his own estate, and where that is the case it will be held to sink, unless something shall have been done by him to keep it on foot (a). These presumptions may be rebutted by evidence (b).

(a) Sir Wm. Grant, *Forbes v. Moffat*, 18 Ves. 390.

(b) *Ibid*.

ADDITIONAL NOTE.

The following is an abstract of the case of *Lockhart v. Hardy*, x. Jur. 728, 2 Real P. and C. Ca. 293, 9 Beav. 379, cited *supra*, pp. 334, 342:—A copyhold estate, called Field Head, was vested in John Waslie, the testator, to secure the repayment to him by one Smith, of two sums of money. The testator assigned the debt and the mortgage of the Field estate to one Browne, by way of mortgage, to secure 1600*l.* borrowed by him from Browne. The testator was also entitled to an estate called Buttermere, subject to a mortgage made by him to the same Browne, for 4460*l.* By his will the testator gave to his nephew, James Lockhart, the Buttermere estate in fee, "he *paying* the mortgage thereon." In another part of his will he gave the Field Head estate to his sister-in-law for life, with remainder to her daughter Elizabeth, in fee. He gave the residue of his real and personal estate to John Hardy, "in trust to give aid and payment of my debts and legacies." By what he called a schedule to his will, he gave several legacies, and amongst them to Mr. Browne, the mortgagee, "through the medium of my executors, 2000*l.*, they being directed therewith to exonerate my Buttermere mortgage, and to them 1000*l.* to clear in part my Field Head mortgage." Browne foreclosed the mortgage of the Field estate against Smith and the representatives of Lockhart. Under these circumstances, 1st, the devisee of Buttermere estate claimed to have the whole mortgage money, 4460*l.*, paid out of the general estate; and, 2nd, the devisees of the Field estate, which had so been foreclosed, claimed the legacy of 1000*l.* intended for their benefit. Lord Langdale held, as to the first point, that the claim would have been good if the devise had been simply of the Buttermere estate, or of the Buttermere estate *subject* to the mortgage thereon (1); but that the words, "he *paying* the mortgage thereon," imposed a *duty* on the devisee, and amounted to a direction or con-

(1) 9 Beav. 382; see *Serle v. St. Eloy*, 2 P. W. 386: "The devise of the estate, *subject* to the incumbrances, is no more than what is implied, for the testator could not do it

otherwise;" *per* M. R. *ibid.*; *Bickham v. Crutwell*, 3 My. & Cr. 763; and see 2 Jarv. on Wills, 553, 554.

dition that he should pay the mortgage, or take the estate with the burthen upon it. His lordship further held, that this general obligation was qualified by the gift in the schedule to the extent that, to the amount of 2000*l.*, the mortgage should be borne by the testator's estate. (9 Beav. 383.)

As to the second point, his lordship held that the devisees of the Field estate were entitled to the 1000*l.*; the benefit was capable of being afforded, though not in the manner contemplated. (*Ibid.* pp. 383-4).

The following is an abstract of another branch of the case of *Lockhart v. Hardy*, 9 Beavan, p. 349, referred to *ubi supra*, which belongs more properly to the chapter on *Mortgages*:—A. mortgaged certain premises to B. in fee, and B. afterwards, by deed to which the mortgagor was a party, mortgaged the benefit of the mortgage to C., who foreclosed against both A. and B., and sold the premises at a price which fell short of the amount due to him on his security. C. then carried in a claim in a creditor's suit, which had been instituted to administer B.'s estate, for the difference between the debt due to him and the sum realized by the sale, and the Master allowed it. Exceptions were taken to the Master's report, as to the admission of the claim, and they were allowed. The rule, as laid down in this case, (9 Beavan, 354-5-6,) is that where a debt is secured by mortgage, covenant, and bond, the mortgagee may pursue all his remedies at the same time. If he obtain full payment on the bond or covenant, the mortgagor becomes entitled to the estate; if he obtain part payment only, he may go on with his foreclosure suit and foreclose for the remainder. So long as the mortgagee holds the estate, and is able to give effect to the mortgagor's right to redeem, he may proceed on the bond. Where the mortgagee forecloses, and the mortgaged premises prove insufficient for payment of the debt thereby secured, the mortgagee may sue on the covenant contained in the mortgage, or on a collateral bond, or may bring in a claim in a creditor's suit for the difference; but if he does so, he thereby opens the foreclosure, and the mortgagor is at liberty to redeem and so get back his estate. If, however, the mortgagee forecloses and then sells the mortgaged premises, he cannot sue on the covenant or bond, or bring in a claim in a creditor's suit, because by the sale he has put it out of his power to give the estate back to the mortgagor if he should think proper to redeem; so that the right to sue can only be enforced where there is a possibility of opening the foreclosure. Lord Thurlow's opinion, as to this question, in *Took v. Hartley*, 2 Dick. 785, differs from Lord Eldon's in *Perry v. Barker*, 8 Ves. 531; the decision in the principal case is in conformity with Lord Eldon's view.

SECTION IV.—*Trust Deeds for Payment of Debts.*I.—*Preliminary Observations.*

Putting the Bankrupt Laws out of the question, a Person is at liberty to assign his Property for the Benefit of all his Creditors, though for the purpose of Defeating some particular Creditor.

But if there be Fraud it will vitiate the Transaction.

If Grantor retains the Deed and gives no Notice of it to the Creditors, it will be considered Fraudulent and Void as against subsequent Judgment Creditors.

But it is not a Fraud for a Man, not a Trader, to assign all his Property for the Benefit of some particular Creditors, though one of the Trusts is to pay Part to himself.

If one of two Trustees dissents, the Property passes to the assenting Trustee.

Conveyance for Payment of Debts to which no Creditor is a Party, nor any particular Debts expressed, is Fraudulent within 27 Eliz. c. 4.

Conveyance of all a Trader's Property was formerly an Act of Bankruptcy.

Provisions of 6 Geo. IV. c. 16.

Commission must issue within Six Months.

A Trader may give Preference if he do not exhaust his whole Estate.

Stat. 7 Geo. IV. c. 57, § 32. Conveyance void against Assignees of Insolvent if made within Three Months before Imprisonment.

Trusts for Payment of Debts exempted from Thellusson Act.

II.—*Doctrines relating to Trusts of this description, particularly in Equity.*

Lands stand charged only with Debts owing at the date of the Deed, unless otherwise expressed.

On Trust created by Will, all Debts will be included.

On Trust to pay all Debts affecting the Donor's Estate, Bond Debts let in, there being no Debts that directly affected the Estate.

The Court will give all Creditors for whom the Trust is intended the Benefit of it, without reference to their Compliance with merely formal Directions.

The Court will assist in the Enforcement of Agreements for Composition, where they are obtained without Fraud.

But the Terms of the Agreement must be complied with in Substance.

Where Deed is made between Debtor and such Creditors as shall subscribe the Deed within a limited Time, Creditors not complying will have no Interest in the Trust.

Where a Composition Deed is to be void if not executed by a certain Day, and yet the Parties act under the Deed, though void at Law, it may be valid in Equity.

But where a Creditor seeks the Benefit of the Deed, he must comply with substantial Conditions.

A Creditor is not bound to take Less than his Debt, unless the Agreement is substantially fulfilled by the Debtor.

But if the Debtor fail in making Payment by limited Time, the Court may, in respect of the Interest of the other Creditors, prevent a Creditor taking Advantage of the Breach giving him Compensation.

Those claiming the Benefit of a Trust must take it as given.

If Debentures are authorized to be given at the Discretion of the Trustees, and the Trustees act, the Court will not interfere with their Discretion.

If the Trustees decline to act the Court will not let the Trust fail for want of a Trustee.

Persons not Objects of the Trust cannot enforce it, though they might derive a Benefit from its Execution.

Creditors are paid Interest on their Debts according as they are entitled to it or not, independently of the Trust.

Under particular Circumstances Creditors not entitled to Interest will be allowed it in Equity.

The mere Direction by Deed to pay Debts, infers neither Contract nor Trust for Payment of Interest.

Interest may be Payable as between Grantor and Creditors, but not as between certain Creditors and others whose Debts carry Interest.

Bond Creditor not entitled to receive for Principal and Interest more than the Penalty.

Debts barred by Statute will not be revived by the Creation of a Trust.

But Statute ceases to run from the Time of Creation of the Trust.

Difference as regards Personal Estate in Wills—Express Direction is inoperative.

III.—Collateral Questions arising out of Arrangements between Debtor and Creditor.

Transactions of this kind ought to be founded on Good Faith, which, if not observed, will render Transactions arising out of them invalid.

The Deed is considered to speak the Language of all the Creditors, both towards the Debtor and each other.

Creditors becoming Parties to the Deed agree to the Justice of its Stipulations.

This takes it out of the Principle of Accord without Satisfaction.

No Creditor can obtain an Advantage not given to the other Creditors under the Deed.

If he do it is a Fraud on the Policy of the Law, and any Security given becomes invalid.

Creditor not entitled to obtain for himself a Collateral Security of another Person, even for Instalments.

The Case is different if the Transaction be communicated to the Creditors, and they do not object.

Greenwood v. Ledbetter.

Redemption by Creditors.

Parties to Suits for Execution of the Trusts.

SOME notice has already been taken of conveyances and assignments of property to trustees in trust to sell and distribute the proceeds

amongst the creditors of the assignor (a). It has been observed, that such a conveyance, if an instrument of *Agency* only, does not of itself create a trust which the creditors can enforce against the grantor; the only *cestui que trust* being in such cases, generally speaking, the assignor; and in determining this, the court is guided by the particular circumstances (b). The transactions which we are now about to consider are those in which there is confessedly a complete constituted *Trust* in favour of the *creditors* (c).

It is to be observed that, putting the bankrupt laws out of the case, a person is at liberty, without question, to assign all his property for the benefit of his creditors, though it may be for the purpose of defeating some particular creditor of his execution in an action commenced by him against the debtor. A debtor in securing the equal distribution of his effects amongst all his creditors is only performing a moral duty (d); but to give validity to such a transaction, there must be an absence of fraud or misrepresentation (e), and of all underhand dealing and secret understandings as between the assignor and the trustee, or any particular creditor: fraud may vitiate such a transaction at law as well as in equity (f). If the grantor retains the possession of the deed with a view to produce it or not as he pleases, and no notice of it is given to the creditors, it will be considered as fraudulent and void as against creditors by judgment subsequently obtained (g).

It is not of itself a fraud for a man who is not a trader to assign the whole of his property for the benefit of some particular creditors, though one of the trusts be to pay a part of the profits to himself (h). It

(a) *V. supra*, p. 58; and see *Field v. Lord Donoughmore*, 1 Dru. & W. 228; *Wilding v. Richards*, 1 Coll. 660; but see *ib.* p. 664. In that case it was held, under the circumstances, that the deed was a deed of *trust*, not an instrument of *agency*, which is the distinction.

(b) *Bill v. Cureton*, 2 My. & K. 503; *Wilding v. Richards*, 1 Coll. 664.

(c) See, on this subject, *Lewin on Trusts*, 387; *Hill on Trustees*, 330, *et v. sup.* p. 59.

(d) *Lord Ellenborough, Pickstock v. Lyster*, 3 Maule & S. 374; *Le Blanc, J.* 376; *Bayley, J. ib.* 376; *Dampier*, 377; and see *Pollen v. Husband*, *infra*.

(e) *Pollen v. Husband*, 1 P. W. 751; *Cann v. Cann*, 1 P. W. 723; *Tuck v. Tooke*, 9 Barn. & Cr. 437; *S. C.* 4 Bingh. C. P. 224; *Britten v. Hughes*, 5 Bingh. 460; *Greenwood v. Lidbetter*, 12 Price, 183.

(f) *Ibid.* 377; *Buller, J.* 5 T. R. 426; and see *Dutton v. Morrison*, 17 Ves. 197; and

the other cases cited, *Lewin on Trusts*, p. 377, note (b), *et v. infra*, in this section.

(g) *Tarback v. Marbury*, 2 Vernon, 509. The grantor had there also reserved to himself an unlimited power to alien the property. It is to be observed that it is competent to a jury to find that a deed attested by a witness was delivered; and it may be presumed that the donor intended that the deed so delivered was to have all its legal consequences; *Hope v. Harman*, xi. Jurist, 1097.

(h) *Lord Ellenborough, Nunn v. Wilmores*, 8 T. R. 528; *Ashhurst, J.* 5 T. R. 425. The trust there was to pay all or such part of the assignor's debts as the trustees should in their discretion think proper, *ib.* p. 523; *Pickstock v. Lister*, 3 Maule & S. 371, *supra*; there the object was avowedly to delay the plaintiff of his execution; and see the other cases cited, *Lewin on Trusts*, 376.

is neither illegal nor immoral to prefer one set of creditors to another (*a*), and such a preference is not void under the stat. 13 Eliz. c. 5 (*b*). A conveyance for payment of debts generally, to which no creditor is a party, nor any particular debts expressed, is a fraudulent conveyance within the statute 27 Eliz. c. 4, and therefore is void as against a subsequent purchaser for valuable consideration (*c*). How persons in embarrassed circumstances, and not being traders, may, under the statute 7 & 8 Vict. c. 70, effect a composition with their creditors, has been noticed in the former volume (*d*). Where there is an assignment to two trustees, and one assents and the other dissents, the property passes to that assenting trustee: a party may by express proviso make the deed void, unless all the trustees assent to the estate; but unless there be such a proviso, the property will pass to the assenting trustee (*e*).

As regards traders, a conveyance of all the bankrupt's property, though in trust for creditors, was always held to be an act of bankruptcy, the reason being that a trader has not a right by deed to place his property under a distribution different from that ordained by the bankrupt law (*f*); it is now so by statute as being constructively fraudulent (*g*); but by the 4th section of that statute, the execution of such a deed shall not be deemed an act of bankruptcy, unless a commission issue within six months from the execution thereof by such trader, provided the deed be executed and attested as therein is provided, and notice thereof be given in the London Gazette and otherwise, as provided by the act. But it was never held (*h*), even in the

(*a*) Lord Kenyon, 5 T. R. 424, *et v. ibid.* 425, Ashhurst, J.

(*b*) *Supra*, vol. i. pp. 172, 185; *Meux v. Howell*, 4 East, 9.

(*c*) *Leech v. Leech*, 1 Ch. Ca. 249; Sugd. V. and P. 9th ed. ii. 159, 11th ed. 929.

(*d*) *Supra*, vol. i. p. 203.

(*e*) *Small v. Marwood*, 9 Barn. & C. 307; *Browell v. Reed*, 1 Hare, 435; *v. sup.* p. 38.

(*f*) *Ex parte Bourne*, 16 Ves. 148; and see *Dutton v. Morrison*, 17 Ves. 197; *Pickstock v. Lyster*, 3 M. & Sel. 371; Lewin on Trusts, 378-9, 380, where the substance of the cases is fully stated.

(*g*) 6 Geo. IV. c. 16, § 3; and although not intended to defeat or delay creditors, it has been held an act of bankruptcy within that statute; *Stewart v. Moody*, 1 Cr. Mees. & Rosc. 777; 5 Tyr. 493; *et v. Moser v. Newman*, 6 Bing. 556; and although the deed has not been acted upon, nor passed out of the trader's hands; *Botcherby v. Lancaster*, 1 Ad. & Ell. 77.

(*h*) Lord Kenyon, *Estwick v. Caillaud*, 5 T. R. 424; *et v. Jacob v. Shepherd*, cited 1 Burr. 478; *Unwin v. Oliver*, mentioned *ib.* 481; and see *Feates v. Groves*, 1 Ves. J. 282. In such cases the question is, whether by the partial transfer of his estate he has incapacitated himself from carrying on his business, by the insolvency which would ensue; *Wedge v. Newlyn*, 4 B. & Ad. K. B. 831; and see the modern decisions as to fraudulent preference reviewed, and the extent to which the doctrine has been carried examined; *Morgan v. Brundrett*, 5 Barn. & Ad. 289; *S. C.*, 2 Nev. & M. 280; *Balme v. Hutton*, 2 Younge & J. 101; *Gibbins v. Phillips*, 7 Barn. & C. 529. It may be incidentally observed, that if a will be made of real estate, and afterwards a trust-deed for the payment of debts, this, in equity, independently of the modern Statute of Wills, does not amount to a revocation of the will; see *Brydges v. Duchess of Chandos*, 2 Ves. Jun. 428; 2 Jarm. on Wills, 176.

case of a trader, that he could not fairly give a preference, provided that the property so set apart for the payment of one or more favourite creditors did not exhaust his whole estate, or approach so near to a disposition of the whole, as that the exception was merely colourable, and provided it were not in contemplation of bankruptcy and with a view to a fraudulent preference (*a*).

By the stat. 7 Geo. IV. c. 57, § 32, every conveyance or assignment of any estate, real or personal, in trust for creditors, is fraudulent and void against the assignees of an Insolvent, if made within three calendar months before the commencement of his imprisonment, or with a view or intention of petitioning the court for his discharge under the act. A trust for payment of debts is expressly exempted from the operation of the *Thellusson Act*, 39 & 40 Geo. III. c. 98 (*b*), restricting the period within which accumulations of rents and profits may be made.

We now proceed to consider the Doctrines more particularly applicable to trusts of this description when they come before the Court of Chancery, noticing some incidental points as to trusts created by will.

Where lands are subjected by deed to a trust for payment of debts, the lands will stand charged with such debts only as were owing at the time of making the deed, unless it be expressed to be for the payment of such other debts as the grantor shall afterward contract, or to that effect (*c*). When the trust is created by will, all debts which the testator may contract will be included (*d*), unless as in *Lodington v. Kime* the trust is confined to scheduled debts, or debts due at the date of the will: Sir J. Leach was of opinion that a debt originating in a covenant to pay six months after the testator's death was not such a

(*a*) *Ibid.*, and *Bevan v. Nunn*, 9 Bingham 107; *et v. sup.* vol. i. p. 201, stat. 1 & 2 Vict. c. 110. As to what deeds executed by a trader will be considered as good, and not fraudulent and void, within the provisions of the acts relating to bankrupts, see *Lewin*, p. 378, *et seq.*

(*b*) *V. supra*, p. 166.

(*c*) *Purefoy v. Purefoy*, 1 Vern. 29. In *Leukener v. Freeman*, Freeman 235, Prec. Ch. 105, the plaintiff had brought an action for crim. con. against Mr. Montague, who, before judgment, conveyed his estates for payment of certain scheduled creditors, purposely to exclude the plaintiff; the plaintiff, after he had obtained judgment, filed his bill to get rid of the deed for fraud. The Lord Chancellor and Master of the Rolls held that the deed was neither fraudulent nor void; but instead of

dismissing the bill, decreed that the estate should be sold, and that the scheduled debts should be paid in the first place, and that the surplus should be applied as the court should direct; thereby holding, as it is presumed, that the plaintiff, by virtue of his judgment, would have a lien in equity on such surplus, which he might make effectual in that suit: see the decree in the note to *Freeman*, 237; in the report in Prec. Ch. 106, it would appear that the court had declared that the plaintiff might come in under the deed upon the surplus.

(*d*) 3 Lev. 433. It may be observed that a man cannot make himself creditor of another, by volunteering to pay his obligations; Lord Brougham, C., *Hodgson v. Shaw*, 3 M. & K. 190.

debt as a testator who provided by his will for the payment of his debts intended to include (a). A debt honestly, though not legally due, as a debt incurred by an infant for necessities, will be included under a general trust for payment of debts (b), at least when created by will. Where the trust was to pay off all debts affecting the donor's estates, there being no debts that directly affected the estates, bond debts were let in, hesitatingly, by Sir E. Sugden, C.; because as they can easily be converted into judgments, and under the old law were clearly a charge on real assets by descent, he conceived that the donor must have intended to include them (c).

The general disposition of the court is to give to all creditors for whom the trust is intended the benefit of the trust, without reference to their compliance or non-compliance with such provisions and directions as may be considered to be merely formal. Where a trust was created by letters patent for payment of such creditors as should come in within a year, it was decided that a creditor might still file a bill to have the benefit of the trust, though he had not come in within the year (d); if their coming in after the time fixed is inconsistent with any stipulation in the deed, it will of course be different.

The Court of Chancery will assist in the enforcement of agreements of debtors with their creditors for a composition, both in favour of and against the creditors, provided they are obtained without fraud or misrepresentation (e); but the essential stipulations of the agreement must be complied with, at least in substance, or the court will not interfere. Where the trusts of the deed were to sell for payment of the grantor's debts, *should the creditors come in* and agree to accept the composition offered, Sir T. Clarke held, that this was a trust for all or none, and that those who had executed the deed could not file a bill to have it executed for the benefit of those who *might* come in whilst there were any who had not agreed to the terms of the deed (f). And where the deed is expressly stated to be made between the debtor and such creditors as shall subscribe the deed, and a time is limited within which this is to be done, no creditor who has not executed the deed, unless he has by his own acts as regards himself, and by the

(a) *Wathen v. Smith*, 4 Mad. 331.

(b) *Marlow v. Pitfield*, 1 P. W. 560; with interest, if the trust be to that effect, *Lewin*, 387.

(c) *Douglas v. Allen*, 2 Dru. & W. 213; *Pearce v. Stoccombe*, 3 Y. & Coll. 84.

(d) *Dunch v. Kent*, 1 Vernon, 260. The trust was created by letters patent upon special trust for all those creditors who should

come in within a year. Each creditor, it is to be observed, had a distinct case; see p. 261, *ibid*.

(e) *Pollen v. Sir J. Huband*, 1 P. W. 751.

(f) *Atherton v. Worth*, 1 Dick. 376. The marginal note in *Dunch v. Kent*, 1 Vern. 260, is not warranted by the case, but the circumstances were different; there was no stipulation on the part of the debtor in that case.

acquiescence of the parties interested as regards them become a *quasi* party as before adverted to, will have any interest in the trust (a). As regards a deed of composition, in which it is generally declared, that if the creditors do not execute it by a certain day the assignment shall be void, and the deed is not executed by all the creditors within the prescribed time, so that the deed is void at law, Lord Eldon said, It is the constant course in equity where the creditors have acted under the deed (b) and treated it as valid, though they may not have executed it, that the Court of Chancery will also act under it and treat it as valid as against the assignors, whether the creditors have executed it or not (c), that is, it is presumed, if no objection has been made. But where a creditor seeks the benefit of the trust-deed under such circumstances, the court will see that he has faithfully performed the essential conditions of the deed before it suffers him to take any benefit under it; if he has taken any step inconsistent with its provisions, the court will not allow him to take any benefit under it (d). Whatever may be the general rule, if there be any general rule, with regard to the indulgence shown to a creditor under a composition deed who does not claim under or assent to the deed within the time limited by the deed, it does not apply to a creditor who *actively* refuses to assent to the deed within the time specified, and who does not afterwards retract that refusal within the time (e).

On the other hand, it is a general rule that a creditor having entered into an agreement for a composition is not bound to take less than his debt, unless the agreement shall be absolutely and strictly fulfilled on the part of the debtor (f). Still, however, where a breach on the part of the debtor has been committed by not making a stipulated payment within the limited time, yet in respect of the interests of the other creditors, the Court of Chancery may prevent a creditor from taking advantage of that breach, so as to defeat the arrangement, taking care however that the rights of the creditor under the composition be properly secured to him (g).

(a) See *Balfour v. Welland*, 16 Ves. 157.

(b) See *Ex parte Shaw*, 1 Mad. 600.

(c) *Spottiswoode v. Stockdale*, G. Coop. 102.

(d) *Field v. Donoughmore*, 1 Dru. & War. 227, 228, 229, 231, 232, reversing Lord Plunket's decree; and see *Spottiswoode v. Stockdale*, G. Coop. 105-6.

(e) Vice-Chancellor K. Bruce, *Johnson v. Kershaw*, xi. Jur. 795.

(f) Lord Eldon, *Mackenzie v. Mackenzie*, 16 Ves. 374; and see *Sewell v. Musson*, 1 Vern. 211, 1 Eq. Abr. 28; 2 Atk. 527; there the

creditor had agreed to take less than his debt, provided a certain sum were paid him on a particular day, which was not paid; he was allowed to sue for his whole debt: and see *Ex parte Bennett*, 2 Atk. 526, and the other cases in the notes to that case; those are cases of agreements with an individual creditor; and see *Watts v. Hyde*, 2 Coll. 376, stated in the additional note, No. 1, to this section.

(g) *Mackenzie v. Mackenzie*, 16 Ves. 375, and see 373; it was insisted that as the notes had been given, the stipulation had in effect

It is scarcely necessary to repeat that those who claim the benefit of a trust created by deed or otherwise, must be content to take what is given to them, and in the way and under such restrictions as it may be given. Where the trust is that debentures shall be given to the creditors, if the trustees are authorized by the deed to refuse debentures at their discretion to any lawful creditor, and the trustees are willing to act, the Court of Chancery will not take upon itself to control or to exercise such discretion, nor grant a power to the Master to ascertain the parties entitled to the benefit of the deed. Even if the trustees have no such absolute discretion, yet every creditor, before he can have the benefit of the deed, must tender his debt for examination by the trustees. If the trustees decline to act, it will depend upon the terms of the trust-deed whether the court can act, and refer it to the Master to inquire into the debts (a). Where the deed points at equality a creditor cannot first realize any security he may hold, and then come in rateably with the other creditors (b).

Persons who are not objects of the trust cannot enforce it, though they might derive an advantage from its execution (c).

As regards Interest, the practice is that creditors shall be paid interest or not, according as they are entitled to it or not independently of the trust (d); under the old law therefore, simple-contract creditors were not entitled to interest. But when they had obtained reports of their debts in a suit for the administration of the trust, interest would run from that time; and where it appeared that a fund had been realized, which, according to the trusts of the deed, was applicable to the payment of creditors whose debts did not carry interest, but by the interposition of the persons entitled to the residue of the fund the money had not been paid but had been laid out at interest, such creditors were held to be entitled to interest (e). The

been complied with, and that the creditor knew that he would have to rely on the security of the notes.

(a) *Wain v. Lord Egmont*, 3 My. & K. 448, Sir J. Leach. The late cases of *Prendergast v. Lushington*, 5 Hare, 171. The *Attorney-General v. Mosley*, xii. Jur. 889, Vice-Chancellor Knight Bruce; and *Fordyce v. Bridges*, 10 Beav. 111, 119, (where the principle is stated,) are instances, in addition to those which have been referred to in the preceding chapters, of the court refusing to exercise discretionary powers vested in trustees, where they have declined to exercise their discretion, and refusing to interfere with a discretion fairly exercised; v. *sup.* pp. 85-87.

(b) *Buck v. Shippam*, 14 Sim. 243; 1 Phill. 697; *Cullingworth v. Loyd*, 2 Beav. 385;

Leicester v. Rose, 4 East, 372; *et v. inf.* 359.

(c) *Palk v. Lord Clinton*, 12 Ves. 56-7.

(d) *Shirley v. Lord Ferrers*, 1 Bro. 42; *Hamilton v. Houghton*, 1 Bli. 187, Lord Eldon; *ibid.* 190, Lord Redesdale. As to the present state of the law in regard to interest on simple contract debts; by the stat. 3 & 4 Will. IV. c. 28, §§ 28, 29, 30, interest may be recovered on sums payable by virtue of a written instrument at a certain time, and in cases where a demand has been made in writing as provided by the act. Interest on a judgment debt, under the stat. 1 & 2 Vict. c. 110, § 17, runs from the time of the entry of the *incipitur*; *Newton v. Grand Junction Railway Company*, 16 Mees. & W. 139; *Fisher v. Dudding*, 3 Man. & Gr. 238; *et v. sup.* p. 325.

(e) *Pearce v. Slocombe*, 3 Y. & Coll. 90;

mere *direction* by deed to pay a debt does not infer either contract or trust to pay interest upon debts by simple contract. "If the creditors," said Lord Eldon, "do not execute the deed, it cannot be alleged that there is a contract—there was nothing to prevent their suing the debtor after the execution" (a). And even when they become parties it has been held that, in the absence of express direction as to interest, there must be a contract for specialty, and a consideration given to the debtor by taking the charge upon the land and releasing the person (b).

Interest may be payable as between the grantor and the creditors, but not as between certain of the creditors and the other creditors whose debts carry interest, or whose debts it is expressly provided shall be paid with interest; in such case, the latter must have priority, but the others may have interest out of the surplus (c). Lord Abinger, on the subject being brought before him, thought that the cases and dicta might be reconciled, (without reference of course to the modern law above adverted to,) thus:—If a man execute a deed creating a trust of a term for the benefit of his creditors, the deed makes them *mortgagees* of the estate, if they execute it, and so gives them a right to interest, but a mere covenant to pay the debt does not give them that right; if there be a covenant by the trustees to pay at a particular day (they taking charge of the fund in the mean time), that would give a claim for interest by way of damages, according to the ordinary rule. In the case itself, as there was a direction to pay some of the debts with interest, and the deed was silent as to the others, the Lord Chief Baron held that the deed explained itself, as between the two sets of creditors (d).

Bond creditors are not entitled to receive for principal and interest more than the amount of the penalty (e).

Lord Chief Baron Abinger considered that under such circumstances the creditors might have recovered interest at law: and see *Anon.* 1 Salk. 154. Mr. Maddock says, in a note, that it was held by Sir J. Leach, in *Willock v. —*, 26 June, 1818, that a provision for *debts carrying interest* does not include what may be owing in respect of property in an executor's hands, which he may be liable, by the rules of the court, to repay with interest; Pr. and Pr. i. 684. The law having been altered as above, of course the creditors will now have the benefit given to them by the act under the trust. Mr. Ram (On Assets, pp. 686-698) has collected the authorities at law prior to the statute (pp. 698-705), and the authorities relating to the payment of interest in equity;

and see, on this subject, Lewin on Trusts, 386, *et seq.*; Hill on Trustees, 335, *et seq.*

(a) Lord Eldon, 3 Bli. 186; but, as already noticed, a creditor, by his acts, may become constructively a party.

(b) *Ibid.*

(c) See the cases cited, *Jenkins v. Perry*, 3 Y. & Coll. 181-2, and the decision, 194.

(d) *Ibid.* p. 184.

(e) *Hughes v. Wynne*, 1 My. & K. p. 24; there the trust was for the payment of all sums secured by bonds and interest thereon; and see *Anon.* 1 Salk. p. 154—both cases of deeds. In *Wilson v. Poe*, 9 Ir. Eq. R. 114, the general rule was admitted; but though the decree was erroneous, it not having been reversed the creditor had the benefit of it.

Debts which are actually barred by the statute will not be revived by the operation of the trust (a): a trust for payment of debts in aid of the personal estate is necessarily a trust only for the payment of such debts as the personal estate, if sufficient, would have been liable to pay (b). Where the provision is made by will (c) or by deed for payment of debts out of real estate, the statutory time will cease to run, in the first case from the death of the testator, in the latter from the date of the deed; for it is not to be inferred that a man has no debt because he does not go to law to enforce payment when he has a trustee bound to pay it to him; and the court will never hold, in such a case, that because the trustee neglects to do his duty his *cestui que trust* shall be barred (d): and the same principle will apply where personal estate only is assigned in trust for payment of debts. However, in the case of a will, it is different as regards personal estate: an express direction or trust by will for payment of debts out of personal estate, neither has the effect of reviving a debt or of preventing time from running; it is inoperative for any purpose: the legal trust for payment of debts, with which every executor is clothed, does not prevent the operation of the statute at law; and a different effect will not be given to an express trust in the Court of Chancery (e).

Arrangements between debtors and their creditors, by which the latter agree to receive a certain per-centage or composition in full of their respective claims, often give rise to collateral questions, which have now to be shortly considered.

These bargains, as has been laid down at law as well as in equity, must, as before noticed, be founded on entire good faith; and if such good faith be not observed, the whole transaction is void, at least as against the guilty parties (f).

(a) The dictum of Lord K. Harcourt to the contrary, in *Andrews v. Brown*, Prec. Ch. 385, which Lord Brougham considered as of little weight (1 My. & Cr. 269), is overruled by Lord Redesdale's dictum, *Executors of Fergus v. Gore*, 1 Scho. & Lef. 109, and Sir T. Plumer's decision, *Burke v. Jones*, 2 Ves. & B. 290.

(b) Sir J. Leach, 6 Mad. 326.

(c) Lord Redesdale, *Executors of Fergus v. Gore*, 1 Scho. & Lef. 109, and whether by way of direct trust or by charge, "for a charge is a trust to be executed by the devisee or heir," Sir J. Leach, 6 Mad. 326; *Reake v. Lea*, 2 Freem. 479: on a simple charge of an annuity it is different; see additional note, *inf.* pp. 363 and 368.

(d) *Ibid.*, and *Hughes v. Wynne*, T. & R.

309; the real estate was there charged in aid of the personal estate: *Crailan v. Oulton*, 3 Beavan, 8; there were special circumstances in that case; and see *Bennett v. Cooper*, x. Jur. 507, M. R.

(e) *Jones v. Scott*, in Dom. Proc. (affirming Sir J. Leach's decision, and reversing Lord Brougham's, 1 Russ. & M. 261), 4 Cl. & Fin. 398; *Freaker v. Craneheldt*, Lord Cott. 3 My. & Cr. 502; *Evans v. Tweedy*, 1 Beav. 55; and see Hill, 336; Lewin, 382.

(f) *Howden v. Haigh*, 3 Per. & Davison, 661; 4 Y. & Coll. 440. See, as to the doctrine in Equity, *Jackman v. Mitchell*, 13 Ves. 586; *Mawson v. Stock*, 6 Ves. 300; *Child v. Danbridge*, 2 Vern. 71; *Middleton v. Lord Onslow*, 1 P. W. 768; *Spurrell v. Spiller*, 1 Atk.

In deeds of composition, where the creditors agree to release the debtor on receiving a certain per-centage, in the manner provided by the deed, it is considered, that the deed, speaking the language of all the creditors, not only to their debtor but to each other, is a common declaration that the amount mentioned in the deed, and the securities (if any) provided for securing such per-centage, are to be taken in full discharge of their respective debts, and that the terms proposed and embodied in the deed are such as, in the view of all the creditors who are parties to the deed as to the justice and humanity of the case, are proper to be acceded to, and that every creditor, in becoming a party to the deed, makes this representation. This circumstance creates a peculiarity in this description of agreement, which, as between the debtor and creditor himself, might be treated as void, being an accord without satisfaction (*a*). Every creditor has in fact an interest that the agreement should be fairly performed. If any creditor, unknown to the others, has obtained any benefit or security beyond what the others have obtained, the others are imposed upon, as, instead of having the evidence of such creditor that the act which he is about to do is reasonable, proved by the same act on the part of the creditor so secretly preferred, they are circumvented by such preferred creditor, and misled into a situation in which the act of the preferred creditor shows that he thinks it unreasonable that a creditor should be placed: good faith requires that a creditor, proposing to the other creditors to deal upon equal terms, and obtaining some additional security, should impart to the others the benefit of the security he has so obtained (*b*): and if any person enter into a contract with the debtor which prevents him from being put in that situation of freedom from existing demands, which may be considered as one of the inducements to the other creditors to sign the deed, and relinquish a part of their demands, such a contract is a fraud on the arrangement, and any security that may be given in

105; *Ex parte Sadler*, 15 Ves. 52; *Constance v. Blache*, 1 Cox, 284; *Scott v. Scott*, *ibid.*; *Mackenzie v. Mackenzie*, 16 Ves. 372; *Cecil v. Plaistow*, 1 Anst. 202; *Fawcett v. Gee*, 3 Anst. 910: at Law, *Smith v. Bromley*, cited 2 Dougl. 696; *Clarke v. Shee*, Cowp. 200; *Cockshott v. Bennett*, 2 T. R. 763; *Jackson v. Duchaire*, 3 T. R. 551; *Jackson v. Lomas*, 4 T. R. 166; *Leicester v. Rose*, 4 East, 372, overruling *Feise v. Randall*, 6 T. R. 146; *Butler v. Rhodes*, Peake, N. P. Ca. 315; *Wood v. Roberts*, 2 Starkie, N. P. Ca. 417, which L. Ch. B. Richards refers to in *Greenwood v. Lidbetter*, 12 Price, 190, where the general doctrines are stated; and *Knight v. Hunt*, *inf.*

(*a*) See 12 Price, 192, *Greenwood v. Lidbetter*.

(*b*) See *Ex parte Sadler*, 15 Ves. 55, 57, 58. In order that the benefit of the additional security may be imparted to the other creditors (see 15 Ves. 58), of course it must be held to be good as against the party giving it; but may not this produce the consequence, as against the debtor, adverted to *inf.* 359, n. (*d*)? *Spurrett v. Spiller*, 1 Atk. 105; *Chesterfield v. Janssen*, 1 Atk. 352; *Middleton v. Lord Onslow*, 1 P. W. 769; *Dalbiac v. Dalbiac*, 16-Ves. 125; *Daubeny v. Cockburn*, 1 Mer. 626; *Watts v. Hyde*, 2 Coll. 376, stated in the additional note.

pursuance of such contract is absolutely void even against the debtor who may have given such a security (a).

In granting relief in this, as in similar cases (b), to the *particeps criminis*, as the debtor in most cases is, the court proceeds upon the principle that the taking the security in contravention of the arrangement which the other creditors have acceded to, is a fraud on the policy of the law; the relief is given on account, not of the individual, but of the public, and it is absolutely necessary to give relief to the *particeps criminis* in respect of the interests of the other parties (c). Following up this principle, where the creditor stipulates that he shall receive a collateral security from a third person not provided by the deed, though for the mere amount of instalments, the transaction is held to be a fraud upon the other creditors and upon the debtor (d); and where a banking firm, they being creditors, had agreed on receiving a guarantee, to pay a certain composition to the creditors of their debtor, and they privately stipulated with the debtor that he should secure to them the amount of their debt beyond the composition, this was held to avoid the guarantee which had been given to them (e).

In all these cases it is assumed that the transaction complained of was unknown to the other creditors; but an instrument creating an

(a) *Cockshott v. Bennett*, 2 T. R. 765; *Eastabrook v. Scott*, 3 Ves. 460; *Mawson v. Stock*, 6 Ves. 301-306; *Ex parte Sadler*, 15 Ves. 55; *Leicester v. Rose*, 4 East, 379; *Jackson v. Davison*, 4 Barn. & Ald. 695. This is another of the many instances in which the law has followed equity, not, as is the case where equity follows the law, for uniformity of decision independent of choice, but from a deliberate approval of the principle.

(b) *Scott v. Scott*, 1 Cox, 366; *Neville v. Wilkinson*, 1 Bro. 543; *Palmer v. Neave*, 11 Ves. 167, *ibid.* 535, cases of frauds upon the faith of marriage contracts.

(c) *Jackman v. Mitchell*, 13 Ves. 587, with costs, which Lord Chancellor Sugden disapproved, *Lloyd & G.* 183. In *Eastabrook v. Scott*, *ubi sup.* 460-1, Lord Kenyon, M. R., seemed to think that where a creditor, at the instance of the debtor, had set his debt at 1500*l.*, it being really 3000*l.*, on having promissory notes given him for the composition upon the remainder of the debt, he might recover it, if there were any surplus, after paying the compositions to the other creditors.

(d) *Leicester v. Rose*, 4 East, 371-9; *Knight v. Hunt*, 5 Bing. 432, judgment of C. J. Best; *Ex parte Sadler*, 15 Ves. 55: "I was not aware," said Lord Eldon, "of the last decision of the Court of King's Bench; that where the security is obtained [from a third

person] for the same sum which is secured by the general composition, it is a fraud upon the creditors: but I am struck with it, and think there is much principle in it. When the security is for a larger sum it is a fraud upon the debtor; as if the surety pays the larger sum, he has immediately a demand over against the principal, who then has not the benefit of the agreement which his creditors in general intended to give him," *ibid.*; v. *sup.* p. 358, n. (b). In *Cullingworth v. Lloyd*, (2 Beavan, 392; *sup.* p. 355,) a creditor, unknown to the others, before executing the deed had realized a security which the deed purported to release; it was held that the principles of public policy applicable to these cases would deprive the creditor of the advantage he had so obtained. In *Lee v. Lockart*, 3 My. & C. 302, where the creditor had the benefit of his security, there was no contract or common purpose between the mortgagees and other creditors, (*ib.* p. 315); there was besides an indorsement on the deed, reserving to the creditor his rights under his security, which was evidence of *bona fides*, and of the absence of all idea of concealment. In the note, 2 Beav. 395, all the cases in regard to transactions in fraud of composition deeds, from 1688 to 1837, are collected.

(e) *Pendlebury v. Walker*, 4 Y. & Coll. 427, 440.

obligation to pay the deficiency of a composition, though by the debtor himself, is good if it be part of the transaction that it be communicated to the other creditors, and they do not object (*a*): however those who assert that it was known to the creditors, have the onus of establishing that fact by proof (*b*).

It is to be observed, that it is not by refusing, but by consenting to a composition, that one or more creditors may be restrained in their proceedings on the originally equitable and now legal ground of fraud upon the rest: a creditor who enters into a personal individual arrangement, and receives money under it, is not within the principle, if that agreement were not made a lure to others; and he may therefore still proceed to recover the whole of what remains due to him at law (*c*), and there is no ground in equity to restrain him.

Where a composition deed between a debtor and his creditor provides that those who come in under it shall thereby release their debts, a creditor having a lien cannot realize his lien and prove for the difference: if he elects to take the benefit of the deed, he must first give up the property on which he claims the lien (*d*).

It is established as a general principle, as before noticed, that he who is the person to give the discharge, is the person who ought to sue for a debt, and that a person who has an interest in a debt, when recovered, is not, on that account merely, entitled to sue the debtor for the recovery of the debt. He who has the legal estate is the person to redeem a mortgage, therefore some of the creditors under a trust-deed cannot file a bill, even on behalf of themselves and the others, to redeem a mortgage on the property or a part of it which is subject to the trust, unless they make a special case, as that the trustees are colluding with the mortgagor (*e*); nor can they sue for the recovery of any debts due that may have been assigned as part of the trust property, unless the trustees are colluding with the debtors, or they are in circumstances which make it unsafe that the money should get into their hands (*f*).

In a creditor's suit, whether to carry into effect the trusts of a deed

(*a*) Lord Eldon, 13 Ves. 536-7; and see 15 Ves. 57.

(*b*) *Ibid.*

(*c*) *Greenwood v. Lidbetter*, 12 Price, 191.

(*d*) *Buck v. Shippam*, 1 Phillips, 694.

(*e*) *Doran v. Simpson*, 4 Ves. 651; 4 Bro. C. C. 270; *et v. sup.* p. 308; *et inf. Mortgages*.

(*f*) Lord Alvanley, *Troughton v. Binkes*, (Dec. 1801), 6 Ves. 573; and see, on the

necessity of charging and proving collusion or insolvency, where the party suing is not the legal hand to receive, *Francklyn v. Fern*, Barnardist. 30, 33; and *Alsager v. Rowley*, 6 Ves. 749, 750; *Beckley v. Dorrington*, there cited, (and see 1 Russ. & M. 279,) and *Law v. Law*, 2 Coll. 44, where *Newland v. Champion*, 1 Ves. 105, is examined; and see 1 De Gex & Smale, 383.

or for the administration of the estate of a deceased person, any creditor may impeach in the Master's office the debt of any other creditor who offers to prove his debt, though such last-mentioned creditor may have been plaintiff in the suit and obtained the common decree for an account of the debts (a).

It may here be observed in reference to creditors' suits generally that it is *always* advisable for the creditor who seeks by a suit in Chancery to affect the real estate of his deceased debtor to *prove* his debt against the heir or devisees, even though it be admitted by the personal representative, which admission cannot be read, as an admission, as against the heir or the devisees. To allow a creditor at the hearing to supply the defect of evidence is not a matter of right, but of favour; and the court will be very much influenced in granting or refusing such favour by the merits of the case: if therefore the debt be of long standing or attended with any unfavourable circumstances, it is particularly advisable that it should be proved (b). Mistake as to the law or practice of the court is not *per se* a ground for asking the indulgence (c).

(a) *Owens v. Dickinson*, Cr. & Phillips, 56; *Tomlin v. Tomlin*, 1 Hare, 248, where other cases are cited shewing the general practice. As to the form of decrees in matters of this description, v. *int. al.* *Seton on Decrees*, p. 252.

(b) See *Marten v. Whichelo*, Cr. & P. 261, and *Seton on Decrees*, 263, and 2 *Daniell*, Ch. Pract. p. 416, there referred to; and see the additional note, No. 2, p. 363, *infra*.

(c) *Woodgate v. Field*, 2 Hare, 211.

ADDITIONAL NOTE.—No. I.

In the late case of *Watts v. Hyde*, 2 Collier, 376, referred to *supra*, p. 354, the material circumstances were as follow:—In the year 1841, Mr. Watts, the plaintiff, became involved in debt: in the latter part of that year, he was in confinement at the suit of one or more of his creditors: under Mr. Hyde's, the defendant's, advice, who was then, and had for some years, been, and for some time afterwards continued to be, his solicitor, and with his assistance, a composition with Mr. Watts' creditors was effected, and a deed of composition was executed by Mr. Hyde and many of Mr. Watts' creditors, including the trustees of it, Mr. Spottiswoode and Mr. How, for whom Mr. Hyde acted as solicitor in the matter of the trust; several of the creditors executed it after Mr. Hyde. One of the conditions of the deed was, that Mr. Watts should insure his life for 1500*l.*; he did not strictly comply with this condition; what did take place is stated, p. 378, of the report. Mr. Hyde, in consequence of this breach, in 1843, brought an action against Mr. Watts to recover his whole debt, alleging also (by his answer) that it was the understanding between him and Mr. Watts, that he should in any event be paid his entire debt (see pp. 384-6). The bill was filed for a perpetual injunction, and to establish the deed and the release it contained against Mr. Hyde. There was no evidence to show that Mr. Watts knew or understood accurately what was or would be or might be the effect, upon the validity of the deed, of his default or omission to insure in conformity with the provisions of the deed (see pp. 381-2). The Vice-Chancellor K. Bruce, in giving judgment said, "If Mr. Hyde executed the deed with an intention on

his part, or on the part of Mr. Watts, or under any agreement or understanding between them, or any person on the part of Mr. Watts, that the deed should not or was not to have between them full effect and complete operation according to its tenor and purport, that intention, that agreement, that understanding, that promise is plainly not effective or available for any purpose at law or in equity, and did not prevent the deed from operating, as the deed would have operated without any such intention, agreement, understanding, or promise; for it does not appear, and cannot be presumed to have been communicated or known to Mr. Spottiswoode, or any of the other creditors before or at the time of Mr. Hyde's execution of the deed, or before or at the time when any creditor whose execution took place after that of Mr. Hyde executed it. This state of the law must be taken to have been known to Mr. Hyde, a professional man; he must be taken to have been incapable of supposing that any intention, agreement, understanding, or promise could be of any force or validity, and to have considered himself bound by the deed as between him and the plaintiff, according to its tenor and purport" (and see p. 387, of the Judgment). The Vice-Chancellor added, though this part of the judgment has reference to another subject, "But though, as a general observation, it may be true that all persons of full age and competent understanding are liable to be considered as knowing the law, the rule is, I apprehend, not without exceptions; and I am certainly not satisfied that for any purposes of this suit, it is, without proof, to be presumed that Mr. Watts, while the client of Mr. Hyde, was accurately informed or correctly aware of the state of the law, whether as administered in courts of equity or otherwise, as to any matters concerning both of them, in which their interests were, or might be, conflicting, if there were any such." "I may here also add," continued his Honour, "that in my opinion, if, by a deed of composition, a creditor release his debtor, a subsequent agreement between them (not by deed) that the debt shall be paid in full, cannot stand, unless supported by a valuable consideration beyond the mere fact of the released debt: the case of a bankrupt promising after his certificate (*v. supra*, vol. i. p. 246) standing, I apprehend, on a different footing." In pp. 387-8, the Vice-Chancellor sums up the propositions of fact and of law on which his judgment was founded; of which one was, that, until the litigation in 1843, Mr. Watts did not understand that Mr. Hyde's execution of the deed was, as between them, a substantial execution, or that it at any time bound him, as between themselves, in any manner; and that Mr. Hyde must be taken to have been the creator of that impression; and that Mr. Watts' mind being taken to be so impressed, he would not have considered it to be material as between him and Mr. Hyde, whether any default or omission in performing the conditions of the deed or any part of them did or did not or should or should not take place on the part of Mr. Watts; and the Vice-Chancellor was of opinion that, under the circumstances, Mr. Hyde could not be permitted to say that as between him and Mr. Watts the deed or any of its provisions had become void. The injunction was granted, pp. 389, 395. In pp. 389-91, of the judgment, the Vice-Chancellor observes upon the point of Pleading arising from the agreement or understanding above referred to not having been stated in the bill; namely, whether the plaintiff on the record as it stood could have the benefit of the defendant's allegations as fully as if they had been in the bill; referring to *Parsons v. Briddock*, 2 Vern. 608; *Gordon v. Gordon*, 3 Swanst. 400; *Attwood v. —*, 1 Russ. 353, 5 Russ. 149; *Taylor v. Tabrum*, 6 Sim. 281. Liberty was given to the plaintiff to amend (p. 391) in special terms: evidence was gone into on the amendments pursuant to the liberty given, and the cause was reheard; but the Vice-Chancellor retained his former opinion.

ADDITIONAL NOTE.—No. II.

Whether Trusts by Will for Payment of Debts are within the 25th and 40th Sections of the Stat. 3 & 4 Will. IV. c. 27.

The Master of the Rolls of Ireland in giving judgment in *Young v. Wilton*, 1846, 10 Ir. Eq. Rep. 19, made the following remarks: "A question similar to that in *Frances v. Gower*, 5 Hare, 39, (a case of an annuity charged on an estate, v. *supra*, p. 198,) is adverted to by Sir E. Sugden at the close of his judgment in the case of the *Commissioners of Donations v. Wytrantz*, 2 Jo. & Lat. 198; but it is not necessary to decide that question in the present case, as I am of opinion that a trust for payment of debts, although it be an express trust, does not fall within the 25th section, the subject of that section (as was stated by the late Master of the Rolls, in the case of *Knox v. Kelly*, 6 Ir. Eq. R. 285) being land or rent, in which it is impossible from the interpretation clause to comprize a gross sum of money charged on the estate. The question, however, still remains whether where there is a trust for payment of debts, the case falls within the 40th section. This point was in effect, though not in terms, decided by the late Master of the Rolls, in *Knox v. Kelly*, it being impossible, in my opinion, to suggest any sound distinction upon the construction of the 40th section, between a trust for payment of legacies and a trust for payment of debts," though his Honour did not decide the point. The last clause of note (e), p. 229 *sup.* was introduced inadvertently.

ADDITIONAL NOTE.—No. III.

Proof of the Plaintiff's Debt in Creditor's Suit.

The subject of the proof by the plaintiff, of his debt in a creditor's suit, was again called to the attention of Lord Cottenham, in the late case of *Watson v. Parker*. Lord Cottenham there said, "In bills seeking payment out of assets in a course of administration, the court exercises its jurisdiction as incidental only to the account: it has no original jurisdiction over the debt. The first question in such cases is as to the debt: if there is any doubt about that, before the court proceeds to administer the estate it requires the plaintiff to establish his right at law, and for enabling him so to do it will sometimes retain the bill, with liberty to him to bring an action. The question is, whether I ought to do so here, or to dismiss the bill at once. It seems probable that the result will be the same in either case; and though it would be much to be regretted, if the party who is really entitled to have this money should lose it solely for want of evidence, yet I do not think I ought to go further than to give him an opportunity of establishing his title, if he can, at law. The only other course would be to direct inquiries before the Master, as the Vice-Chancellor has done; but though it is sometimes done, where owing to a slip the plaintiff's evidence is left incomplete, I am by no means disposed to encourage a practice of that sort, more particularly where the plaintiff's case is founded on a legal demand." (1)

(1) Lord Chancellor, *Watson v. Parker*, 2 Phillips, 8. In this case there are some important observations of Lord Cottenham, as

to the form of decrees where evidence is admitted *de bene esse*.—Pages 9, 10.

ADDITIONAL NOTE.—No. IV.

Right of Executor to Surplus of Trust Fund.

In the late case of *Russell v. Clowes*, 2 Coll. 648, the question arose on a bequest of certain leaseholds to trustees, upon trust to sell, and to apply the proceeds in payment of the testator's debts funeral and testamentary expenses, between the Crown, there being no next of kin of the testator, and the executors, as to who was entitled to the surplus; a question which, since the passing of the Act of 11 Geo. IV. & 1 Will. IV. c. 40, is not of frequent occurrence. The Vice-Chancellor Knight Bruce, on the authority of *Pratt v. Sladden*, 14 Ves. 193; *Southhouse v. Bate*, 2 Ves. & B. 396, and *Dawson v. Clark*, 15 Ves. 416, held that under the circumstances the executors were entitled to the residue, although they had legacies given to them by the will.

ADDITIONAL NOTE.—No. V.

Of the Passing of Trust Estates by the Will of the Trustee.

The subject of the passing of the trust estate by a devise of his real estates by a trustee, is shortly adverted to *supra*, p. 37 (*et v.* p. 38). In addition to the cases there cited, *Lord Braybrooke v. Inskip*, 8 Ves. 416, and *Bainbridge v. Lord Ashburton*, 2 Yo. & Coll. 349, should be consulted. The subject was brought before the Vice-Chancellor of England in the late case of *Rackham v. Siddall*, xii. *Jurist*, 641, 1848, where his Honour has stated the rule thus: "Where a person having estates of his own and estates vested in him as a trustee does make a devise in general terms, which general terms would be sufficient at law to pass both estates, but couples that devise with something that necessarily leads to the inference that he was thinking only of his own property at the time he made the devise; that, there, the general words of the devise shall not operate to pass that which he held as a trust estate, and although the thing here is very minute" (the devise was of *all his real estate* charged with 50*l.* to one Watson) "the trust estate did not pass."

SECTION V.—Of Sales of Property, Real and Personal, under Trusts and Charges for the Payment of Debts and Legacies.

General Doctrines as to who is the Person to sell under a Devise or Charge by Will.

Who is to sell under Direction in a Will.

Devise in Trust—Powers—Term of Years created.

Difference between Devise to Executors in trust to sell, and Power given to Executors to sell.

Power to sell where more than one Executor is appointed.

Specific Authority not necessary.

Where there is a Direction for Sale without naming any Person to sell.

Where there is a Charge.

Charge of Debts a Trust.

Power extinct at Law.

Estate charged with Annuities.

Trustees for Sale not to wait for Decree of the Court of Chancery.

Generally Power to Sell implies Power to Mortgage.

Direction to raise Money out of Rents and Profits.

Annuity to be paid out of Rents and Profits.

Court cannot direct a Sale not authorized by the Trust, on the ground of its being Beneficial.

It has already been observed that whether the real estate is subjected to debts or legacies (a) or both, by way of trust or of charge, or by way of legal power in the nature of a trust, the estate can only be turned into money and the proceeds distributed, in case of dispute or difficulty, through the agency of the Court of Chancery (b).

Where the land is devised to trustees, in trust, to raise the requisite money out of the estate, by sale, or in any other manner, or a power is given to certain persons for that purpose, or where, as is usual, a term of years is created and vested in trustees upon trust to raise the requisite funds in the manner pointed out, little difficulty can arise; the legal powers of the trustees in ordinary cases enable them to perform the trust: but it sometimes happens that no trustees to

(a) Portions will form the subject of a distinct Section.

(b) There are some old authorities that, where the money, when raised, is to form part of the personal estate, and it has been raised and is in the hands of the executor, a legatee

whose legacy is payable out of the mixed fund may sue for it in the Ecclesiastical Court; see the cases cited 9 Barn. & Cr. 491; but see *ibid.* pp. 492, 493, where the contrary is decided.

perform the trust are named, and difficulties and doubts arise as to who is to sell or otherwise raise the money, and as to the manner in which it is to be done; in these cases the Court of Chancery must necessarily be resorted to: it is necessary therefore shortly to advert to the Doctrines of the Court of Chancery and incidentally of the common law to some extent, in reference to this subject.

It very commonly happens that the executors of the testator are made the trustees for the purpose of raising and distributing the requisite funds; it may be proper therefore first to notice the difference in the view of a court of law between a devise to executors in trust to sell, and a power given to executors to sell.

If the land be devised to executors to sell, such a devise passes the interest in it at law; but a devise that executors shall sell the land, or that the land shall be sold by the executors, gives but a power (*a*).

In all cases where the executor is authorized to sell, he may sell alone, even where he has only a power, for where an authority to sell is given to a particular person, the vendee takes under the will; any right or title in the heir is excluded; there is no need for his joining in the sale; and a complete title can be made to the purchaser, by him to whom the power is given (*b*). A power to sell real estate may not only be expressly given, but, what is equivalent, necessarily implied, as will presently be noticed.

Where the power is given to more than one, as is the case where there are several executors, some nice distinctions have been taken. If a power be given to two or more persons, the power can only be executed by the whole of the persons so named: it cannot be executed even by the survivors or survivor, unless under an express authority, for it is a personal trust in all. But a distinction has been taken where the power is given to executors or persons as a Class. Sir Edward Sugden thus sums up the result of the decisions (*c*):—
1. Where a power is given to two or more persons by their proper names, who are not made executors, the power will not survive without express words;—2. Where it is given to three or more generally, as to “my trustees,” or “my sons,” amounting to three or more, and not by their proper names, the authority will survive whilst the plural number remains;—3. Where the authority is given to “executors,” and the will does not expressly point to a joint exercise of it, even a single sur-

(*a*) Sugden on Powers, vol. i. pp. 131-4; Chance on Powers, vol. i. 53, 54. I need scarcely add that in these learned works the subject of Powers is exhausted.

(*b*) See the judgment of Lord Chief Justice of Common Pleas, *White v. Vitty*, 2 Russ. 497.

(*c*) On Powers, i. 146.

living executor may execute it;—but, 4. Where the authority is given to them *nominatim*, although in the character of executors, yet it is at least doubtful whether it will survive;—and, 5. Where the power to executors arises by implication, the power will equally arise to the survivor (a).

It is not necessary that there should be a specific authority given to the trustee to enable him to sell if a sale is necessary to the due execution of the trust (b): it will always be inferred that the testator means to give to the persons directed or empowered every authority which is necessary for his declared purpose (c). If the testator directs his estates to be sold for certain purposes without declaring by whom the sale shall be made, in the absence of such declaration, if the fund be distributable by the executors (d), they will have by implication a power to sell (e); and it seems that the executors of the executor may sell, so long as the chain of representation is duly kept up, such executors coming within the same reason (f).

If a testator merely charges his lands with the payment of his debts, that is a declaration of intention, on which the Court of Chancery will fasten, and draw out of the mass going to the heirs or to others that quantum of interest which will be sufficient for the debts (g); but to effectuate this the estate must necessarily be sold by the heir or such other person; and a purchaser under the person to whom the legal

(a) Sir Edward Sugden, in his profound Treatise on Powers, has fully investigated this subject, and to it I would beg to direct the student's particular attention.

(b) *Ball v. Harris*, 8 Simons, 485, 4 My. & Cr. 266; and see 1 Coll. 649; *Barker v. D. of Devon*, 3 Meriv. 311; *Shaw v. Borrer*, 1 Keen, 559; see, as to this case, the judgment of Vice-Chancellor K. Bruce, *Gosling v. Carter*, 1 Coll. 648-9; *Forbes v. Peacock*, 11 Sim. 152, 160. The Vice-Chancellor of England, after referring to *Ward v. Devon*, (9 Feb. 1805,) where under a general direction for sale it was held that the executors could sell, held that the plaintiff (the surviving executor) in this case was entitled to sell. "The only other question," he added, "is whether the plaintiff can give a valid receipt for the purchase money; and I am of opinion he can do so, for the testator has charged his real estate with the payment of his debts, and as the bill says nothing at all about debts, *non constat* but that some of them may remain to be paid; at all events the purchaser has no notice that they have all been paid, and he is not bound to inquire whether they have been paid or not."

(c) *Sowarsby v. Lacy*, 4 Mad. 142.

(d) *Barrington v. Att.-General*, Hardress, Rep. 419; *Mackintosh v. Barber*, 1 Bing. 50; *Bentham v. Wiltshire*, 4 Mad. 44; *Patton v. Randall*, 1 Jac. & W. 189; *Tylden v. Hyde*, 2 Sim. & S. 238; *Milward v. Saville*, Dyer, 371 b; *Forbes v. Peacock*, 11 Mees. & W. 639; judgment of Rolfe, B.; and see *Bentham v. Wiltshire*, 4 Mad. 49; and *Gosling v. Carter*, 1 Coll. 644; there the receipt of the executor was held to be a sufficient discharge, *et v. infra*.

(e) Sugden on Powers, i. 139; *Ball v. Harris*, 4 My. & Cr. 266-7, confirming *Shaw v. Borrer*, 1 Keen, 559; in which case Lord Cottenham observes that in fact the point had been long since settled by *Elliott v. Merryman*, Barnardist. 78, followed by other cases down to *Dolton v. Heven*, 6 Mad. 9; see, as to this case, 1 Coll. 649-50; *Wood v. White*, 4 My. & Craig, 460, 481; *Bateman v. Bateman*, 1 Atk. 421, 2 Russell, 496; *Forbes v. Peacock*, 11 Sim. 160.

(f) Sugden on Powers, i. 139, 140; where the representation begins with a prerogative probate it cannot be kept up without prerogative probates throughout.

(g) Lord Eldon, *Bailey v. Ekins*, 7 Ves. 322, *et v. infra*.

estate shall be devised or may descend subject to the charge, will no more be liable to see to the application of his purchase money than if he had purchased of a person having an express authority to sell. In the former case, above referred to, the power is expressly, and in this impliedly given, for the purpose of carrying into effect the declared intention as to the purchase money (*a*), and every thing necessary for effectuating it is enforced against the parties whose concurrence is necessary for its completion (*b*).

A charge for payment of debts has been and ought to be treated as a trust, so far as to give to the creditors a priority over the special purposes of any subsequent devisee; though the charge, directly, affects the equitable and not the legal estate, it is a devise of the estate in substance and effect *pro tanto* to pay debts (*c*): and where upon the construction the trusts of the will affect a particular estate first in common with the testator's other property for the payment of debts generally, and next separately for the special purposes of the will, then the trustees and executors may sell without seeking the authority of the court, and the purchaser is not bound either to inquire whether other sufficient property is applicable or ought to be applied first in payment of the debts or to see to the application of his purchase money (*d*).

Where a power given for sale is for any reason extinct at law, or where in point of law, for want of any persons being named to execute the trust or because those named have died before the testator, the power therefore never could exist and cannot take effect; the Court of Chancery, deeming the purpose for which the testator directs the money arising from the sale to be applied, to be the substantial part of the devise, and the persons, if any, named to execute the power of selling, to be mere instruments, will enforce it; on the principle analogous to

(*a*) *Ball v. Harris*, 4 My. & Cr. 266-7; *Shaw v. Borrer*, 1 Keen, 559, *supra*; *Wood v. White*, 4 My. & Cr. 460, 481; *Bateman v. Bateman*, 1 Atk. 421, (2 Russ. 496); *Forbes v. Peacock*, 11 Sim. 160; and see *Peter v. Beverley*, 10 Peter, R., U. S. 532.

(*b*) On this principle, in *Fowle v. Green*, 1 Ch. Ca. 262, the heir was compelled to join where lands were devised to the executors to sell; but, as we have seen, this is not now considered to be necessary, unless, perhaps, in the case of an implied power to sell, see *Gosling v. Carter*, 1 Coll. 651; v. *sup.* 366.

(*c*) If a man, said Lord Eldon, by deed or will charges or orders an estate to be sold for payment of his debts, and then makes specific dispositions, the purchaser is not bound to see to the application: it is just the same

as if the specific bequests were out of the will; *Jenkins v. Hiles*, 6 Ves. 654. Lord Langdale says, 1 Keen, 576, "A charge of this nature has been and ought to be treated as a trust which gives the creditors priority over the special purposes of the devise." But, as before mentioned, (*sup.* p. 363, additional note, No. 2,) a devise of an estate, subject to a charge of an annuity or the like, though it imposes an obligation, does not otherwise confer a fiduciary character on the devisee; v. *sup.* pp. 198, 357.

(*d*) *Shaw v. Borrer*, 1 Keen, 573, 578; and *Elliott v. Merriman*, Barnard. 78, (approved by Lord Kenyon, *Bonney v. Ridgard*, 1 Cox, 145,) there cited: the seeing to the application of purchase-money will be more fully considered in the next Section.

that before noticed, namely, that a trust shall never fail for want of a trustee, and that if one is wanting the court shall execute the office (a). The relief is administered by considering the land, in whatever person it may be vested (other than a purchaser *bonâ fide* for valuable consideration without notice), as bound by the obligation and by compelling the heir or other person having the legal estate to perform it (b); and that at the instance, not only of favoured objects, as a wife, children, and creditors, but of all persons indiscriminately: every *cestui que trust*—and the persons claiming under a charge are in the nature of *cestuis que trust*—has, as has already been noticed, a right to the aid of the court to enforce the trust in his favour (c). Where the estate is charged with Annuities, it is not the course to discharge the lands; they will still be charged in the hands of a purchaser, because it was the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund (d).

The mode of raising Portions will be considered in a distinct chapter (e), where some others of the doctrines applicable to charges generally will also be noticed.

Trustees for sale are not to wait for a decree of the court for the raising the money, which would oblige every person to come here; and where it is done by the trustees fairly, this court, if the matter be before it afterwards, will always support the sale; for a decree of the Court of Chancery does not give the right, but it is only made for an execution of the trust or power that is given or conferred (f).

Generally speaking, a power to sell implies a power to mortgage (g); but a mortgage is not a proper execution of the trust where the clear, manifest intention of the testator is, that the estate should be sold out and out, and that there should be a complete conversion of his real estate, and that the produce of his real and personal estate should be disposed of as money (h).

Where the direction is to raise out of the rents and profits, or by sale or mortgage, if the words are evidently used in contradistinction, the

(a) The distinction in this respect between naked powers and powers coupled with a trust has been adverted to *sup.* pp. 81, 82; and see *Madison v. Andrew*, 1 Ves. 57; and Sugden on Powers, i. 191.

(b) See *Walker v. Smallwood*, Amb. 676; *Elliott v. Merriman*, Barnardist. 78: as to liability to see to the application of the purchase-money in such case, see *Jenkins v. Hiles*, 6 Ves. 654, and the next Section.

(c) See Hargrave's note (2) to Co. Litt. 113 a.

(d) *Elliott v. Merriman*, Barnardist. 78.

(e) *Infra*, chap. viii. p. 390.

(f) *Earl of Bath v. Earl of Bradford*, 2 Ves. 590.

(g) *Mills v. Banks*, 3 P. W. p. 1; *Ball v. Harris*, 4 My. & Cr. 268; *Allan v. Backhouse*, 2 Ves. & B. 65, affirmed Jacob, 631; approved *Bootle v. Blundell*, 1 Meriv. 233: there leaseholds for lives were devised to several in succession, the money to be raised was for the fines on renewal, *v. sup.* p. 86.

(h) *Haldenby v. Spafforth*, 1 Beav. 390, 395.

former must mean annual rents and profits; and if in such a case the charges to be raised by these respective modes are of two kinds, the one annual and the other in gross, the words will be distributed, the annual charges being raisable out of the annual rents and profits, the sums in gross by sale or mortgage (a).

Where a testator gives freehold and leasehold estates to trustees upon trust to receive the rents when and as the same shall become due and payable, and thereout to pay his wife an annuity during her life, and immediately after her decease upon trust to convey the estates to the use of other persons; in such case the annuity is not considered to be charged on the rents generally, and therefore if the rents received during the widow's lifetime are insufficient to pay the annuity, the arrears are not to be raised out of the estate, but the annuity must abate (b).

However beneficial it may appear to be (as where an advowson is directed to be sold on the death of the incumbent) that an immediate sale should take place not authorized by the trust, the court cannot for the benefit of infants or others not *sui juris* direct an immediate sale: to proceed upon the notion of what might be beneficial to the parties would be to assume a legislative not a judicial power: if the parties are adult they may of course without the interference of the court sell how and when they please (c).

(a) *Playters v. Abbott*, 2 My. & K. 110; 540; and see the section on *Portions*, part i. Jarman on Wills, ii. 540, to which very *infra*.
 (b) *Foster v. Smith*, 15 Law J., N. S. 183, Lord C., 1 Phillips, 629, on appeal, *et v. infra*.
 (c) *Johnstone v. Baber*, 8 Beav. 233.

ADDITIONAL NOTE.

As to the Duties of Trustees for Sale, v. *supra*, p. 369.

It is further to be observed generally, as regards the duties of trustees for sale, that a direction that trustees shall sell at such time and in such manner as they shall see fit will not authorize an indefinite postponement of the sale, so as to interfere with the relative rights of the tenant for life and remaindermen (1); so they ought not to sell the timber separately if the estate be settled, if they do the tenant for life will be entitled to be indemnified (2). The rules for the guidance of trustees who are to sell *with the consent of the tenant for life* are laid down by Lord Eldon in *Mortlock v. Buller*, 10 Ves. 308, 309; and see 2 Sugd. on Powers, 487. Where the trustees have committed the management to one, they will all be answerable, if he should commit a breach of trust in the disposal of the property or in the application of the proceeds (3).

(1) *Walker v. Shore*, 19 Ves. 391-2.
 (2) *Davies v. Westcomb*, 2 Sim. 425.

(3) *Oliver v. Court*, 8 Pri. 166.

SECTION VI.—*Of the Obligation of the Purchaser to see to the Application of his Purchase Money.*

I.—*Purchases of Chattels, Part of the Estate of a Testator or Intestate, from Executors or Administrators.*

As regards CREDITORS.

General Power of Executors and Administrators over the Personal Estate of Testator or Intestate.

Generally speaking, Purchaser or Mortgagee acquires an Absolute Title.

But not if it appear that the Sale is not for the Purposes of the Estate.

Pledge for Antecedent Debt due from the Executor.

Fraud and Covin as affecting such Transactions.

Transactions set aside under Circumstances, though no Moral Fraud or Impropriety.

As regards LEGATEES.

Where it is evident the Sale is not for the Purposes of the Administration.

Mortgage by Executor for his Personal Debt.

Hill v. Simpson.

Sale of Chattels specifically Bequeathed.

Distinction between the Cases of Creditors and of Legatees, especially as regards Specific Legacies.

Scott v. Tyler, and Sir W. Grant's Observations upon it.

Where the Property professedly is not sold as Assets.

Sale, Mortgage, or Settlement by Executor of Specific Chattel given to him.

Condition and Rights of Residuary Legatee.

Alienation without Valuable Consideration.

Effect of Length of Time merely as a Bar to any Claim.

II.—*Purchases of Lands, &c., from Trustees, for Sale, constituted by Deed or Will.*

Condition of Purchaser of Real Estate from Trustee for Sale.

Usual to insert a Clause that the Receipt of the Trustees shall be a sufficient Discharge.

Where the Charges are Indefinite.

Sir William Grant's Observations on the General Doctrine.

Trust for Payment of Debts generally.

Annuity charged on Land—where there is a Paramount Charge of Debts.

Land discharged when the Amount has been properly raised.

Alienation pending a Suit void.

Liability of Purchaser to be determined on the State of Things at the Time.

Bond of Indemnity taken by Purchaser.

Fraud—its Effects.

Trustee cannot aliene to satisfy his Private Debt—or so as to give a Preference to one of several Creditors.

Sale subject to Legacies only where there is a Charge of Debts.

Eland v. Eland.

Braithwaite v. Brittain.

Where the Trust is for Payment of definite specified Charges.

Purchaser not bound to see that no more is sold than is necessary.

Purchaser may obtain good Discharge on Receipt of Trustee only, on apparent Intention of the Deed or Will, though no express Authority be given.

Purchasers under Decree.

Effect of Stat. 3 & 4 Will. & M. c. 47, 47 Geo. III. c. 7, and 3 & 4 Will. IV., as regards Alienation for Valuable Consideration and Settlements on Marriage.

Analogy to a Purchase from an Executor does not hold in such case.

When the Heir may be restrained from receiving the Purchase Money.

Where Estate charged with Legacies the general Charge of Debts under the Statute will not protect the Purchaser from seeing to the Application of the Purchase Money.

Horn v. Horn.

WE have now to consider more particularly the important subject of how far and in what cases a purchaser, in order to obtain a good title to the estate clear of the charges, is bound to see that his purchase-money is applied to the purposes for which the sale was directed or authorized to be made; and perhaps the most appropriate introduction to this subject will be an inquiry into the condition of a purchaser of a term for years or other chattel from an Executor as regards the creditors and legatees (*a*); though, as will be seen, the analogy between the two cases does not universally hold.

The executor and administrator, as has already been adverted to (*b*), are the persons intrusted with the personal property of the testator or intestate: the primary and paramount duty of the executor and administrator is the payment of the testator's debts: for this purpose each of them is bound to make money of the personal estate with all practicable speed, that it may be applied in the first place for the payment of the debts. Even the executor or administrator cannot know at any particular time what is the extent and amount of the debts, or whether all have been paid, and it would be impossible for a stranger to satisfy himself on these points: no one indeed would purchase, except on disadvantageous terms, if he should, by reason of such purchase, become involved in any such inquiries: so that unless those who deal with the executor or administrator could obtain a discharge as regards creditors, from him alone, it might be impracticable, in some cases, for the latter to administer the estate at all (*c*).

(*a*) This subject is treated by Mr. Lewin, in his usual concise and perspicuous manner, p. 353, *et seq.*

(*b*) *Supra*, p. 298.

(*c*) *Lex Pretor.* 319; *Elliott v. Merriman*, 2 Atk. 42; *S. C.* Barnardist. 78; 17 Ves. 162;

The possession of the fund by the executor or the administrator, whether rightfully constituted, or becoming liable in that character by his own unauthorized act (*a*), renders him personally liable both at law and in equity. In the Court of Chancery, indeed, the fund itself is also considered as charged, to a certain extent, with the debts. "The Court of Chancery," says Mr. Justice Buller (*b*), who had applied his powerful mind to the doctrines of this court as well as those of the common law, "considers the fund as the debtor, and therefore they pursue that, collect it all into their own hands under the notion of taking an account, call all persons before them who have a demand upon that fund, and distribute it amongst all according to their priorities at law (if they have any), or if not, equally; but that court never said, that, if the effects of a testator get *bonâ fide* and for good consideration into the hands of a third person, they will take it from him: the case of *Elliott v. Merriman*, 2 Eq. Ab. 450, pl. 6; *ibid.* 686, pl. 12; 2 Atk. 41, (*supra*), proves directly the contrary—at law there is no such thing as a fund in the hands of the executor being the debtor, but the person of the executor, in respect of the assets which he has in his hands, is the debtor."

The executor or administrator therefore having of necessity the absolute power of disposition, it has been established as a general rule that if the assets or any portion of them be sold or aliened by the executor or administrator for valuable consideration, the creditors cannot follow them, they are absolutely vested in the purchaser (*c*). This power of absolute sale on the part of the executor equally applies where the transaction is with one of several executors; for each being liable for the payment of the debts to the extent of the assets received by him, it is necessary that each should have the power of realizing and applying the assets in his hands (*d*).

In considering this question as regards purchasers, it is material to inquire whether money was advanced at the time; if not, and the sale

and see Lord Mansfield's judgment, *Whale v. Booth*, 4 T. R. 625, n.; Sir Edward Sugden, *Vend. and Pur.* 834-5, has fully discussed this subject; and a full examination of the cases relating to sales by executors may also be found in *Roper on Legacies*, i. 374, *et seq.*

(*a*) As to executor *de son tort* and what dealings with him will be good, see *Williams on Executors*, pp. 197-8. Payment to an administrator who has obtained letters of administration in the wrong diocese is a good payment; *Clark v. Hooper*, 10 Bing. 480; 4 M. & Sc. 353.

(*b*) *Farr v. Newman*, 4 T. R. 636; see *xi. Jur. pt. ii. p. 110.*

(*c*) *Lex Præc.* 319.

(*d*) See *McLeod v. Drummond*, 14 Ves. 360; *Scott v. Tyler*, 2 Dick. 725 (stated *inf.*). "It is of great consequence," said Lord Thurlow, in this case, "that no rules should be laid down here which may impede executors in their administration; or render the disposition of the testator's effects unsafe or uncertain to the purchaser: his title is safe by sale and delivery; what becomes of the price is no concern of the purchaser. This observation applies equally to mortgages and pledges, and even to the present instance, where assignable bonds were merely pledged without assignment."

or pledge is for an antecedent debt of the executor, that is evidence that the sale or mortgage is not for the purposes of the will (*a*). "It is not essential," said Sir J. Leach, "that the executor should have the power to pay his own creditor, though it is that he should have the fullest powers for paying the testator's creditors; and it is not just that one man's property should be applied to the payment of another man's debt" (*b*). But a purchaser from an executor of a part of the personal estate of the testator, advancing money at the time, has a right to infer, unless he has notice to the contrary (*c*), that the executor, in making the sale, is acting fairly in the execution of his duty (*d*), and the purchaser shall not be put to examine whether in the particular instance the powers of the executor have been discreetly exercised (*e*); and it matters not whether the transaction be by way of sale or of pledge, provided money be advanced at the time (*f*), and provided the party is not affected with notice that the money is not to be applied conformably to the duty of the executor (*g*).

But fraud and covin will vitiate any transaction, and a purchaser, in his dealings with an executor, may be affected by fraud, direct or implied. The question in such cases must be, whether there is sufficient evidence to prove the fraud (*h*). The fraud, as in other cases, must be made out by the party seeking to disturb the transaction: if the party have the legal possession, of which he could not be deprived at law, the court, according to its ordinary rules, will not, except upon equitable grounds clearly established, take it from him, or make him in any way liable (*i*).

The same doctrine applies where the assets of the testator are,

(*a*) See 17 Ves. 163; 7 Ves. 167.

(*b*) *Watkins v. Cheek*, 2 Sim. & St. 205.

(*c*) See 17 Ves. 171.

(*d*) Sir J. Leach, 2 Sim. & St. 205.

(*e*) Sir W. Grant, *Hill v. Simpson*, 7 Ves. 166.

(*f*) "I have not found any case where money has been advanced at the time, to the full value of the assets, and it was ever called back. There is no trace of that, except in the case of *Humble v. Bill*, (2 Vern. 444; 1 Bro. P. C. 71,) which is the case of a specific charge, and therefore does not apply to this. That case was also distinguished by Lord Hardwicke, and disapproved by Sir Joseph Jekyll;" Sir W. Grant, *M'Leod v. Drummond*, 14 Ves. 355. "Where a man," added his Honour, "is applied to for a loan of money, there is no motive to fraud, as there may be where a party takes the assets in pledge for an antecedent debt;" and his Honour therefore directed an inquiry, in that case, whether the bonds were

deposited for money advanced at the time of the deposits or for any debt antecedently due; *ibid.* and 361-2; now perhaps the inquiry would be extended (if the question were raised) to the purposes for which as between the parties the money was advanced; see 17 Ves. 171; and see *Scott v. Tyler*, 2 Dick. 725.

(*g*) Lord Eldon, *M'Leod v. Drummond*, 17 Ves. 170-1.

(*h*) Lord Thurlow, *Scott v. Tyler*, *ubi sup.* 17 Ves. 167-8; and see *Elliott v. Merriman*, Barnardist. 78; 17 Ves. 162-3; *Bonny v. Ridgard*, 1 Cox, 145, cited 4 Bro. 130-8; 17 Ves. 165.

(*i*) Sir W. Grant, *M'Leod v. Drummond*, 14 Ves. 360; Lord Brougham, *Wilson v. Moore*, 1 My. & K. 358, 362: whether the court will assist in perfecting a title so acquired, is another question, and must depend perhaps on the circumstances of each particular case; see 17 Ves. 167, 172.

through the agency of the executors, and with the knowledge of the party with whom he is dealing, in any other manner diverted from the purposes of the trust for the private purposes of the executor, though the parties so dealing with the executor may not be guilty of any moral fraud or impropriety in the transaction (a). The transaction may have been fair on the face of it, the executor may have had, to the knowledge of the party with whom he was dealing, ample assets to pay the debts; yet if the transaction with such party was not in the character of executor, but for his private purposes, if the executor should afterwards dispose of the assets in hand without paying the debts, the party so dealing with the executor *with notice* that there were debts remaining unpaid must, it is presumed, in order that the rule may be efficient, be held to be liable to the creditors to the extent of the assets which he has received (b).

The doctrines above stated have reference more particularly to creditors, but they are also to a great extent applicable to Legatees, though creditors and legatees stand in many respects on a different footing: creditors have a right to resort to the whole of the assets—legatees only to that part which is given to them; what debts there may be must be matter of extrinsic inquiry—what legacies are given, and to whom they are given, may be ascertained by resorting to the testamentary instruments, which are open to all. As regards the claims of legatees, where there are or may be debts, it is of no importance as regards a purchase from the executor, whether the purchaser has or has not notice of the bequests contained in the will. “Every person,” said Sir John Leach, “who deals with an executor, has necessarily implied if not express notice of the will, but all dispositions of personal property are by law subject to a prior charge for the payment of debts. A purchaser has a right to assume that the executor sells in the necessary course of his administration; and it is upon this principle altogether indifferent what dispositions may be made by the will with respect to the personal property for which he deals; for whether it be specifically given or be part of the residuary estate, it is equally charged by law with the payment of debts” (c). But it is a different case if the purchaser is fixed with notice that

(a) *Wilson v. Moore*, 1 My. & K. 351; Lord Brougham, in this case, considered that *Nugent v. Gifford*, and *Mead v. Lord Orrery*, which have always been disapproved, were decided on the ground that the intended misappropriation by the executor was not in point

of fact brought home to the party (*ibid.* 355-6), so that the principle on which they were decided may be admitted; see *Kean v. Roberts*, 4 Mad. 352; 1 My. & K. 357.

(b) *But v. infra*, 375, 377.

(c) *Keane v. Roberts*, *ubi sup.*

the transaction is not for the payment of debts or for the purposes of administration.

A mortgage (a) by an executor, who is also Residuary legatee, to secure his private debt, may be set aside even at the suit of a pecuniary legatee, for the nature of the claims of legatees, they taking under the will, may be ascertained (b): but as to creditors it is different; if a reasonable time has elapsed since the death of the testator, and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid, or that there are other assets for payment of the debts if any, therefore the mortgagee would be safe as against creditors (c).

If the testator has directed that a specific portion of his personal estate should not be liable to debts, as he does in effect, by giving it specifically and directing his debts to be paid out of the residue, yet as every such direction is a nullity as against creditors, a *bonâ fide* purchaser of a term or other chattel specifically bequeathed, from the executor, as executor, may hold the property against the specific legatee (d). If the executor has assented to the specific bequest, so as to give the specific legatee the legal title (e), the purchaser can of course only obtain an equitable title, and that, like every other similar equitable title, is liable to be defeated by a sale by the legatee to a purchaser giving him the legal estate, for valuable consideration without notice (f). If there be no sale, the property in the hands of the

(a) The case of a mortgage is less favourable than a sale, for by the common law an agent or factor, with power to sell, cannot pledge for his own debt; *Paterson v. Tash*, 2 Strange, 1178; *Daubigny v. Duval*, 5 T. R. 606; *De Bouchout v. Goldsmid*, 5 Ves. 211; and see *Wilson v. Moore*, 1 My. & K. 359, *et seq.*, where the alteration in the law by the stat. 4 Geo. IV. c. 83, and 6 Geo. IV. c. 94, in favour of *bonâ fide* purchasers without notice is mentioned.

(b) *Hill v. Simpson*, 7 Ves. 152; there the plaintiff was not legatee under the will by which the executor immediately derived his title as executor and residuary legatee, but was a legatee under a prior testator, who had given the residue of his estate to the executor's testator, subject to the payment of the plaintiff's legacy; the property pledged was part of the original testator's property. Direct notice that the property pledged was liable to the legacies was not imputed, but negligence only, the bankers relied on the executor's representation that the property was absolutely his own. This was the first case in which a mere pecuniary legatee succeeded in an attempt to follow assets aliened by the executor, the relief having pre-

viously been confined to the cases of creditors and specific legatees; 14 Ves. 354, 361; affirmed, 17 Ves. 171: and see 169-70, where Lord Eldon approves of Sir W. Grant's decision in *Hill v. Simpson*, *supra*, saying he did not see why the doctrine should not be extended also to a residuary legatee; *ibid.* 169-70. The principle that circumstances exciting suspicion only will prevent a person making no inquiry from acquiring property is acted upon at law as regards promissory notes; *Gill v. Cubitt*, 3 B. & C. 466; *Down v. Halling*, 4 B. & C. 330: this subject is discussed at large in *Field v. Schieffelin*, 7 Johns. R. U. S. 155-60.

(c) *V. infra*, p. 377; and *Mead v. Lord Orrery*, 3 Atk. 235, as stated by Sir W. Grant, 7 Ves. 166, though the decision has been disapproved of.

(d) *Ewer v. Corbet*, 2 P. W. 149; *Andrew v. Wrigley*, 4 Bro. 125; *Atty.-General v. Potter*, 5 Beav. 171. There the tenant for life of the term, but who was also executrix, had been let into possession.

(e) See *Chamberlain v. Chamberlain*, 1 Ch. Ca. 256; and *Thomlinson v. Smith*, Rep. temp. Finch, 378.

(f) The observations of Mr. Coote on Mort

legatee and those claiming under him as volunteers, still remains liable in equity for the debts, for every legatee is bound to refund in proportion (a).

If the rule in regard to property specifically bequeathed were not as above stated, it would be incumbent on the purchaser, though the sale of the specific chattel were necessary for the payment of debts, to require that an account should first be taken of the debts and assets of the testator in the Court of Chancery, which would obviously be productive of great inconvenience (b); but the purchase, so as to give an absolute title to the purchaser, must be *bonâ fide*, and without notice that there were no debts or that all the debts had been paid (c).

There is a plain distinction in these cases, in reference to the rights of creditors and those of legatees, and especially as regards specific legatees. Creditors have no lien on the assets; specific legatees have; the claim of the creditors is indeed paramount, and, as we have seen, the purchaser is not bound to inquire whether there is sufficient for the satisfaction of those paramount claims without resorting to the property specifically given; but if all the debts are paid, then the executor is *bound to assent* to the specific legacy, and not to treat it as assets; and if the purchaser is aware of the fact of all the debts having been paid at the time of his purchase, he is a party to a wrongful act on the part of the executor, and will be affected, together with the executor, with the consequences attending such an act (d).

Even where there is no apparent fraud on the part of the executor, the purchaser is not protected from the claims of legatees, if he knows

gages (p. 200, n. 2nd ed.), would lead to the supposition that a purchaser of a term specifically bequeathed, to which bequest the executor had assented, would acquire the *legal* title if he should obtain the muniments of title; the author of the Treatise in the Jurist, vol. xi. referred to below, has remarked (p. 112) on this inadvertence.

(a) *Chamberlain v. Chamberlain*, 1 Ch. Ca. 256; and *Thomlinson v. Smith*, *ubi sup.*

(b) *Langley v. Earl of Oxford*, Amb. App. pend. p. 797, Blunt's ed.

(c) Sugd. V. and P. 852-4, § 9; *Andrew v. Wrigley*, 4 Bro. 125; *Taylor v. Hawkins*, 8 Ves. 212; *M'Leod v. Drummond*, 17 Ves. 162. In this section I have, with Mr. Sweet's permission, made use of and in part adopted a Treatise on this subject in the Jurist, vol. xi. pt. 2, p. 110, *et seq.*

(d) See *Scott v. Tyler*, 2 Dick. 725; 14 Ves. 363. In *Scott v. Tyler*, as reported 2 Dick. 724, also reported 2 Bro. 431, and before referred to, some River Lee Navigation bonds

had been deposited by Eliz. Tyler, who was an executrix with others, and specific legatee in remainder of the property, for her private debt. Four years had elapsed since the death of the testator; Mary Christ. Tyler, the specific legatee of the bonds in question, then filed her bill against the bankers to have it declared that the deposit was null as against her, and Lord Thurlow was of opinion (see 17 Ves. 166), though his decision was intercepted by a compromise, that the plaintiff was entitled to recover against the bankers. In that case the breach of trust, as against the immediate specific legatee, was obvious, but Sir W. Grant observed that the testator was an opulent man, therefore his executrix was *bound to have assented* to that specific legacy, and had no right to deal with it *as assets* (see 14 Ves. 363), much less for payment of his private debts. It is observable, as Sir W. Grant remarked (14 Ves. 360), that Lord Thurlow resorted to implied fraud as the ground for taking the property pledged from the bankers.

that payment of creditors is not the executor's object in effecting the sale; thus, where the testatrix had directed that a leasehold should be sold, and the produce divided amongst five persons; B. who had purchased from H. the executor under a false representation that the testator had become beneficially entitled by an arrangement with the legatees, was held liable to the legatees on the express ground that his vendor did not profess to be selling the leaseholds as assets; "but," said Lord Gifford, M. R., "if H. in his character of executor had sold the property to B., and B. had been ignorant of the real nature of the transaction, the sale could not have been set aside" (a).

If the executor is himself legatee of a specific chattel, he may (after a reasonable time has elapsed from the death of the testator to enable him to ascertain the amount of the debts and the sufficiency of the other assets for payment of the debts,) mortgage that chattel as a security for his own debt, and settle it on his marriage, or otherwise deal with it as his own; his doing so will amount to a sufficient representation that the circumstances are such as to warrant the act, so that the purchaser will have a good title as against the creditors. In this respect a purchaser from the executor stands in the same situation as a purchaser without notice from any other legatee after assent (b). "Although," said Sir W. Grant, "executors are in equity mere trustees for the performance of the will, yet in many respects and for many purposes third persons are entitled to consider them as absolute owners. The mere circumstance that they are executors is not sufficient to vitiate every transaction with them in which they deal as owners (c). Such a length of time may have elapsed since the testator's death as that a purchaser may fairly presume that the executor has paid all demands, and that the assets therefore belong to him, though they may not have been specifically given to him; where the executor is residuary legatee, especially where he is only one of several executors, the circumstances may be such as to raise a fair presumption that his co-executor has released to him or that the property has otherwise become his own; in such cases a stranger may properly deal with him on the assumption that the assets are his own (d).

(a) *Cubbridge v. Boatwright*, 1 Russ. 549.

(b) *Taylor v. Hawkins*, 8 Ves. 209; *Spackman v. Timbrell*, 8 Sim. 260; *et v. Bonny v. Ridgard*, 4 Bro. 133; *M'Leod v. Drummond*, 17 Ves. 163-4. In *Taylor v. Hawkins*, the mortgage, which was made within seven months after the testator's death, was sustained against creditors, ix. Jurist, part ii. p. 110, *et v. supra*, p. 375.

(c) Sir W. Grant, *Hill v. Simpson*, 7 Ves. 166; *M'Leod v. Drummond*, 14 Ves. 363; *Mead v. Lord Orrery*, 3 Atk. 235; *Nugent v. Gifford*, 1 Atk. 463, as there cited.

(d) See *M'Leod v. Drummond*, 14 Ves. 363, *et v.* 17 Ves. 164; *Whale v. Booth*, 4 T. R. 625 n., Lord Mansfield; though the decision itself is overruled by *Farr v. Newman*, *ubi supra*, *Nugent v. Gifford*, as stated from

As regards a residuary legatee, if in fact all the debts are paid the residuary legatee may call for a transfer in equity; therefore though the creditors have no lien on the assets it cannot be said that the residuary legatee in such a case has not. If therefore the purchaser from the executor has notice that all the debts are paid, that consequently the remaining assets are in effect specifically the property of the residuary legatee, it would seem to have been Lord Eldon's opinion that the purchaser from the executor is accessory to a breach of trust, and cannot hold the property against the residuary legatee (a): so though possibly an executor may have *prima facie* a power to lease so as to bind all parties, yet when the residuary legatees or next of kin have called for a sale, and the lessee takes with knowledge of that fact, the lease is void in equity (b).

It is clear that wherever the executor or administrator disposes of the assets without valuable consideration, there the creditors, or whoever is entitled either as legatee or under the Statute of Distributions, may follow the assets if distinguishable (c): for such disposition is fraudulent as against the persons beneficially entitled; and therefore it is as if they were in the hands of the executor, and he in whose hands they are, at least if he took them knowing that they were parts of the estate of a testator or intestate, being *particeps criminis*, the creditor has a demand against him as well as the executor (d). If the property so transferred be money and not distinguishable, and the party taking it knew that it was part of a testator or intestate's estate, the creditors and legatees will still have a right to the amount; but the remedy will be confined to a personal demand.

Whether where it is admitted on all sides that the debts are paid and that the sale is made only for the payment of legacies, the purchaser is bound to see to the payment of the legacies, has not been, that I can find, expressly decided; Sir Joseph Jekyll does not appear to have had

the Registrar's Book, 4 Bro. 135-6, and in *Hill v. Simpson*, 7 Ves. 166-7; and Lord Hardwicke's observations on the same case, in *Mead v. Lord Orrery*, 1 Atk. 235 (7 Ves. 167), (which latter case, however, was disapproved by Lord Kenyon, in *Bonny v. Ridgard*, 1 Cox, 145).

(a) See 17 Ves. 163, Lord Eldon's dicta; but Lord Lyndhurst says, in *Forbes v. Peacock*, 1 Phillips, 721, assuming that the purchaser knew that the debts were paid, as the executor had authority to sell not only for the payment of debts, but also for the purpose of distribution amongst the residuary legatees,

this would not afford any inference that the executor was committing a breach of trust in selling the estate.

(b) *Drohan v. Drohan*, 1 Ball & B. 187.

(c) It is established that they cannot be taken in execution for the private debt of the executor; *Farr v. Newman*, 4 T. R. 621.

(d) *Payett v. Hoskins*, Gilb. Eq. Rep. 111; S. C. Prec. Ch. 431; Lex Prætor. 319. If the property be money, without any ear mark, and had previously been mixed with the executor's money, it cannot of course be followed, v. *supra*, p. 221, add. note.

a clear opinion upon the subject: as a sale is necessary, I presume that in such case the purchaser may obtain a good title from the executor alone; though the principle stated below may be applicable in this case also (a).

Length of time alone, that is without reference to any presumption it may afford (b), may be a bar to any relief being granted to creditors or legatees in cases of this description, as indeed it may as regards every kind of equitable claim (c).

II. We now proceed to the consideration of the condition of a purchaser of Real estate from a trustee.

As regards a purchase from a trustee for sale (d), whether under a will or a deed, the only liability of the purchaser at law, is, that he pay the purchase-money to the vendors; though they may be trustees for others, of the money to be produced by the sale; the receipt of the vendors is a sufficient discharge to him at law (e). It has been already noticed that in the Court of Chancery where a person purchases land bound by a trust with notice of the trust, the land generally speaking will still be bound in the hands of the purchaser, and it has been considered that as the trust in these cases is not only to sell, but to sell for the purpose of payment of the charges, the purchaser ought, when he can, to see that the trust is performed in all its parts; as a general rule the payment of the money is to be made in the way the deed or will directs, for that is the purchaser's title (f), so that, as a general rule, the receipts of the persons who are entitled in whole or in part are necessary to the obtaining a complete title in equity.

It is usual in deeds or wills by which trustees are empowered to sell lands, to insert a clause, declaring that their receipts of the purchase-moneys shall be a sufficient discharge to the purchasers. Such a clause should in no case be omitted; it will relieve a purchaser in all cases from the necessity of seeing to the application of the purchase-money, and by facilitating the sale will enhance the price (g).

(a) "I admit if an executor should sell a term for an undervalue or to one who has notice that there are no debts, this might be another consideration," *Ewer v. Corbet*, 2 P. W. 149; though that observation may have applied to the case of the claims of specific or residuary legatees; and see *Burting v. Stoward*, *ib.* 150; there *extrinsic evidence* was resorted to to see whether a sale was in fact necessary; *et sup.* 378, n. (a), v. *inf.* p. 381, at n. (d).

(b) *V. supra*, p. 61.

(c) *Andrews v. Wrigley*, 4 Bro. 138, before Lord Alvanley; *Bonny v. Ridgard*, 1

Cox, 145, 4 Bro. 125, before Lord Kenyon, where the general principles adverted to in the text are recognised, and the limitations of the right of the executor are particularly noticed, and the prior dicta and decisions reviewed; but relief was refused on the ground of the lapse of time.

(d) See, on this subject, Hill on Trustees, 357-361.

(e) Sugd. V. and P. 832.

(f) See Lex Priet. 320.

(g) See Sugd. V. and P. 832; and see the add. note, *infra*, p. 389.

But it would have been extremely inconvenient to have held that the rule that the purchaser shall be bound to see to the application of his purchase-money, or to obtain receipts from all the parties interested in the proceeds, should apply to cases where the individual objects are not pointed out. To have mixed up a purchaser with such a trust, and to have imposed on him the duty of seeing to its execution would have been attended with the same inconveniences as would have resulted from the application of a similar rule to purchasers from executors (a); it would have laid an embargo on property in the hands of trustees for sale, and have prevented any sale taking place with safety to the purchaser, excepting under the directions of the Court of Chancery, or for a price calculated on the amount of the trouble and risk incurred (b). The rule therefore has been relaxed in cases where the charge is indefinite, that is where the specific objects of the trust are not pointed out; but it remains in full force in all cases where the purchaser has the means of seeing that the payments whether to specific creditors or others to which the purchased estate has been made liable, have been duly discharged (c).

Sir William Grant disapproved of this doctrine; he considered that in principle it ought to have been held that as regards the purchaser, the only trust by which the land was bound was the trust for sale, and that the trust for the application of the purchase-money was quite distinct, and that this part of the trust only affected the trustees personally. "I think," said that very eminent judge, "that the doctrine upon this point has been carried further than any sound equitable principle could warrant: where the act is a breach of duty in the trustee, it is very fit that those who deal with him should be affected by an act tending to defeat the trust of which they have notice; but when the sale is made by the trustee in performance of his duty, it seems extraordinary that he should not be able to do what one should think incidental to the right exercise of his power, that is, to give a valid discharge for the purchase-money" (d). His Honour, however, though no decision was called for on the point, assumed that the law was established so as to exclude all doubt or discussion.

Where a trust of this nature is created for payment of debts gene-

(a) *V. sup.* p. 371.

(b) See *Ewer v. Corbet*, 2 P. W. 149; *Ithell v. Beane*, 1 Ves. Sen. 215; *S. C.* 1 Dick. 132; *Elliott v. Merriman*, Barnard. 78; and 1 Keen, 573; see Lord Mansfield's observations in regard to the corresponding doctrine as to a purchaser from an executor, *Whale v. Booth*, 4 T. R. 625, n.; and Lord Hardwicke's, in *Nu-*

gent v. Gifford, 1 Atk. 463.

(c) See *Lex Prætor*. 120.

(d) Sir Wm. Grant, *Balfour v. Welland*, 16 Ves. 156; and see 4 Ves. Jun. 99; Sugd. V. and P. 841; and Butler's note to Co. Litt. 290, b. note (1), § 12; *v. supra*, p. 379, at n. (a).

rally, it is clear that the purchaser is not bound to see to the application of the purchase-money (*a*), as he cannot any more than a purchaser from an executor be supposed to have notice of all the general creditors; and the reason of the rule, and the rule itself equally applies where the trust or charge is for the payment of debts generally and of legacies, as the payment of the debts, which are indefinite, must precede the payment of the legacies (*b*), and that, whether the estate be specifically devised subject to the charges or not.

Where, as before observed, an Annuity is charged on land, and there is no devise for the payment of debts, and no general charge of debts, it must generally be deemed that the land was intended to be a constant and subsisting security for the payment of the annuity (*c*): but if there be a paramount general charge of debts, the annuitant stands in the same situation as a legatee; the annuitant being a mere volunteer cannot prevent the loss or diminution of his security upon the land charged, and the rule by which the purchaser is discharged from seeing to the application of his purchase-money equally applies to a case of this description (*d*): where a man devises an estate to be sold for payment of debts generally, or charges it with debts generally, and then makes specific dispositions, it is just the same thing as regards the purchaser as if the specific devises were out of the will (*e*).

In these cases as soon as the money is raised, though it may be misapplied by the trustees or persons whose duty it is to distribute the money, the land is discharged (*f*); what becomes of the price is no concern of the purchaser (*g*), and the purchaser from the trustee is no more liable to see that the trustee has discreetly exercised his powers than is a purchaser from an executor (*h*). But where a suit has been instituted by creditors to have the estate sold for the payment of debts the execution of the trust is taken out of the hands of the trustees; and an alienation pending the suit is void (*i*).

(*a*) See 2 Jarman, 511.

(*b*) *Watkins v. Cheek*, 2 S. & S. 199; that case was decided on the special circumstances: *Johnson v. Kennett*, 3 My. & K. 630-1; *Ball v. Harris*, 4 My. & Cr. 264; Sugd. V. and P. 835, § 10.

(*c*) See *Elliott v. Merriman*, Barnard. 78, cited *Shaw v. Borrer*, 1 Keen, 575-6; *et sup.* p. 369.

(*d*) *Page v. Adam*, 4 Beav. 284-5; Sugd. V. and P. 839-40; the same principle, as regards leaseholds charged with an annuity, appears to have been established by *Watts v. Kaney*, Tothill, 141; 9 Jac. 1.

(*e*) Lord Eldon, *Jenkins v. Hiles*, 6 Ves.

654, n.

(*f*) *Anon.* in Dom. Proc. 1 Salk. 153; *Carter v. Barnadiston*, 1 P. W. 518-9; *et v. sup.* p. 344.

(*g*) *Culpepper v. Aston*, 2 Ch. Ca. 115; Sugd. V. and P. 835, § 9; *et v. 2 Dick.* 725.

(*h*) *Shaw v. Borrer*, 1 Keen, 577; there a specific portion of the estate was devised on a particular trust, but the whole of the estates were charged with debts: *Page v. Adam*, 4 Beav. 285; *Culpepper v. Aston*, 2 Ch. Ca. 115; Sugd. V. and P. 835, § 8; *et v. supra*, p. 373.

(*i*) Lord Camden, *Walker v. Smalwood*, Amb. 677; the trustees had answered and submitted to the jurisdiction: see *Bishop of*

In determining as to the liability of the purchaser the court will not, it seems, look to subsequent events. In the case of a trust by deed, the deed must receive its construction as from the moment of its execution : as a general rule, according to the frame of the deed, so the court determines whether the purchasers are or are not liable to see to the application of the purchase-money (*a*). So as regards a trust or charge by will the question is to be determined on the construction of the instrument itself (*b*). If there be a general charge, whatever may have happened since the testator's death cannot it seems affect the liability of the purchaser (*c*), unless a case of fraud or collusion be made out so as to make him a party to a breach of trust on the part of the vendor (*d*). If therefore where the charge is general, and the debts are paid after the death of the testator and the legacies only are left as a charge, that circumstance alone does not prevent the application of the general rule (*e*) ; indeed, to follow out the rule, evidence of that fact ought not in any case to be admitted, unless with a view of showing that the purchaser was a party to an intended mis-

Winchester v. Paine, 11 Ves. 197 ; and see the other cases cited in Mr. Blunt's note as to purchases made *pendente lite*.

(*a*) Sir William Grant, *Balfour v. Welland*, 16 Ves. 156.

(*b*) See Mr. Phillips's note, 1 Phill. Rep. 722-3.

(*c*) See *Johnson v. Kennett*, 3 My. & K. 631, reversing the decision of the Vice-Chancellor of England, 6 Sim. 384, which reversal the Vice-Chancellor approved, (*Speakman v. Tumbrell*, 15 Law J., N. S.) ; the decree, as drawn up, was wrong on the face of it, as it directed an account of *debts*, see 6 Simons, 390 ; *Eland v. Eland*, stated *infra* ; 4 My. & Cr. 428-9 ; *Page v. Adam*, 4 Beav. 269, 283 ; *Forbes v. Peacock*, 11 Sim. 152 ; 12 Sim. 528, before the Vice-Chancellor of England ; 11 M. & W. 630, on case sent to the Court of Exchequer ; 1 Phillips, 717, 722-3, before Lord Lyndhurst, where the decree of the Vice-Chancellor of England was reversed. In the course of the investigation of the title before the Master, the defendant inquired of the plaintiff, the vendor, whether all the debts had been paid, to which question the plaintiff declined to give any answer : the Vice-Chancellor of England considered this as equivalent to his having been told that the debts had been paid, in which case the purchaser would not be exonerated. In this case his lordship said (p. 721-2), " But assuming that the facts relied upon in this case amount to notice that the debts had been paid, yet as the executor had authority to sell, not only for the payment of the debts, but also for

the purpose of *distribution amongst the residuary legatees*, this would not afford any inference that the executor was committing a breach of trust in selling the estate, or that he was not performing what his duty required." His Lordship then referred to his dictum in *Johnson v. Kennett*, before cited, as applying to a case where the debts are *paid off* before the sale, and the purchaser knows it (see p. 722), without expressing any change of opinion. Mr. Phillips adds a note, which is partly as follows : " If, notwithstanding this decision, it should still be inferred from the terms of the dictum in *Johnson v. Kennett*, that the rule would not apply to a case in which it should happen that there were no debts due *at the testator's death*, and that the purchaser *knew it*, I have the authority of Lord Lyndhurst for stating that he did not intend, on that occasion, to lay down any rule that should govern such a case ; and that the guarded and somewhat qualified terms in which the dictum is referred to and adopted in this case were used for the express purpose of excluding that inference." See the observations on this case, in the Jurist, vol. xi. part ii. pp. 125-6, and Mr. Phillips's note, which is there set out.

(*d*) As in *Watkins v. Cheek*, 2 S. & S. 199 ; *Eland v. Eland*, 4 My. & Cr. 429 ; *Balfour v. Welland*, 16 Ves. 151 ; see *Forbes v. Peacock*, 1 Phillips, 721.

(*e*) *Rogers v. Skillicorne*, Ambl. 188 ; *Elliot v. Merryman*, Barnard. 78 ; *Johnson v. Kennett*, 3 My. & K. 624, and the cases cited in the last note.

application of the purchase-money or some other fraud on the part of the trustee (a).

If the case is such that the purchaser is to be considered as having been discharged from liability, but he should nevertheless for his security have taken a bond of indemnity, that will not have the effect of imposing upon him the liability from which he was at the time free (b); but if by his contract he expressly or virtually binds himself to pay, or he takes subject to, any charges on the estate, by that contract he must abide (c).

But in these cases, as in the instance of a sale or mortgage by an executor (d), fraud, direct or constructive, if proved may vitiate the transaction. If the transaction affords intrinsic evidence that the sale or mortgage was not made in order to pay off the charges, but for other purposes which would amount to a breach of trust, then the purchaser or mortgagee being a party to the breach of trust the estate remains liable in his hands (e). Or if there be collusion between the purchaser and the trustees who are guilty of a misapplication, the estate will still be liable (f); just as a purchaser from an executor will be, if he is party to a breach of trust on the part of the executor in the misapplication of the assets (g).

There never was any pretence that a trustee could aliene in payment of his own private debts, whatever might have formerly been thought as to the power of an executor to do so (h). Nor can he mortgage to a

(a) But see the reporter's note to *Forbes v. Peacock*, 1 Phillips, 722; and see *Gosling v. Carter*, 1 Coll. 644, 648; that was a case of a charge.

(b) See *Johnson v. Kennett*, 3 My. & K. 624, *supra*, (Sugd. V. and P. 11 ed. 840); some of the bonds mentioned legacies only, but some were general bonds of indemnity. Quære, could the creditors have claimed the benefit of the bonds? Lord Lyndhurst did not notice one principal ground of the Vice-Chancellor of England's decision, that the prior conveyance to uses to bar dower showed that the executor was dealing with the estate as his own: his Lordship appears rather to have misapprehended the ground of the argument of the counsel for the legatee.

(c) In *Eland v. Eland*, 1 Beav. 235, (affirmed on appeal, 4 My. & Cr. 420,) the testator devised real estate, subject to a general charge of debts and legacies, to his son in fee, and appointed his son executor. Nine years after the testator's death the devisee mortgaged the estate, with a covenant against all incumbrances, excepting the legacies; there were debts still due: it was held that the mortgagee took subject to the legacies, but not to

the debts; not subject to the debts on account of the general rule, but subject to the legacies because, by *his contract*, he was to take subject to them: how the case would have stood if there had been no such contract, is left in doubt upon that case. In *Rogers v. Rogers*, 6 Sim. 364, a testator devises his estates charged with debts and legacies; the devisee mortgaged the estate to A., subject *expressly* to the legacies. A. having called in his money, and the devisee requiring a further advance, they joined in a mortgage of the estate to B., but not expressly subject to the legacies, and B. was informed, falsely, by the devisee, that all the legacies had been paid: it was held that B. took the estate subject to the legacies.

(d) *Supra*, p. 373.

(e) *Watkins v. Cheek*, 2 Sim. & S. 205-6; 4 My. & Cr. 426-7; Sugd. V. and P. 840, § 27.

(f) *Rogers v. Skillicorn*, Ambl. 189.

(g) *Crane v. Drake*, 2 Vern. 616; *v. supra*, p. 373.

(h) *Ithell v. Beane*, 1 Ves. 215. This is one of the cases in which Lord Hardwicke is supposed to have recognized the authority of *Nugent v. Gifford*, 1 Atk. 463, which would

creditor of the testator to secure his individual debt, as it is a fraud to give a preference to one individual creditor, which the law has not established and the court will not allow (a).

If the money which is raised by the mortgage might have been applied for the payment of debts, though nothing is said in the deed on the subject, the mortgagee will have the benefit of that presumption. If a devisee of the estate, subject to a charge of debts and legacies, raises money as owner upon the security of the estate, and mortgages it, subject to the legacies only, it will not be presumed that the money was raised for the devisee's own purposes, he might have raised the money expressly for the immediate payment of the debts (b): nor is it evidence of fraud that the devisee sells the estate as his own; he is, in truth, owner, subject to the charge (c). There may be circumstances under which a purchaser or mortgagee may be at liberty to assume that a devisee has become the actual owner free from the charge, and deal with him as such: the same principles which apply to a sale by an executor as absolute owner (d) may be applied to a devisee (e). An attempt to establish such a case was lately made in the suit of *Braithwaite v. Brittain*, but it failed (f). That case was in substance as follows:—The testator, a trader, devised an estate called Sinderly to his nephew William, charged with 3800*l.*, to be paid to his executor; and devised an estate called Bridlington to his nephew John, charged with 1400*l.*, to be paid in like manner, and gave those sums and his residuary real and personal estate, charged with the payment of his debts, and the annuities and legacies given by his will, to his nephews William, John, and George. The nephews William, John, and George were appointed executors, but John and George alone proved. Two years after the testator's death, a deed was executed by the three nephews, whereby, after reciting that the two sums of 3800*l.* and 1400*l.* were given to the three nephews, William, John, and George, and that they had apportioned between them their respective shares of the 3800*l.* and 1400*l.*, and that all accounts between them as to these sums had been settled to their satisfaction, (but saying nothing as to the debts

have established that an executor might mortgage the assets for his own individual debt; *v. supra*, p. 383.

(a) *Ibid.*

(b) *Eland v. Eland, supra*. The amount of the legacies so excepted and remaining charged was directed to be applied first in payment of debts, *ibid.* 429-30; and see *Lyon v. Colville*, 1 Coll. 470, 471; *Braithwaite v. Brittain*, 1 Keen, 207, stated in the text, appears to

have been decided on the special circumstances in regard to the previous dealings between the parties; see the *Jurist*, vol. xi. part ii. pp. 113-4, as to this case; *cf v. infra*, p. 386, n. (b).

(c) Lord Cottenham, *Eland v. Eland*, 4 My. & Cr. 427.

(d) *Supra*, p. 377.

(e) See 1 Keen, 222.

(f) 1 Keen, 206.

and legacies); William and George released John, and George and John released William from all claims in respect of those two sums respectively. William, shortly afterwards, mortgaged his estate. John, two years afterwards, did the same. The question was whether the mortgagees could hold as against the claims of the creditors under the charge, or by virtue of the statute 47 Geo. III. c. 72, the testator having been a trader (*a*); Lord Langdale was of opinion they could not: the mortgagees had notice of the will and of the charge, and constructively at least that there were or might be debts of the testator: there was no representation that the debts had been paid; the release only referred to the claims of the executors and residuary devisees to the 3800*l.* and 1400*l.* amongst themselves, and consequently his Lordship held that these sums so charged still remained charges so far as creditors were concerned (*b*).

When the trust or charge is for the payment of some specified debts only, or for the payment of legacies only, or of both specified debts and legacies, there the debts, as well as the legacies, are specific charges on the land, and the purchaser has the means of ascertaining to what particular charges his money is to be applied, and who are the persons from whom he may obtain a discharge are pointed out (*c*). The purchaser, however, as a general rule, is not bound to see that no more is sold than is necessary to pay the charges; for he is not bound to enter into the account, and the trustees in general cannot sell just so much only as is sufficient to pay the debts, besides they may have to cover their expenses (*d*); but if the trustees are plainly selling more than is requisite, it would seem that the sale would not be good (*e*); no one is protected who is a party to a plain breach of trust. Where lands are vested in trustees by act of parliament to be mortgaged for a particular purpose, it is incumbent on the mortgagee to see that the money is applied accordingly (*f*).

A purchaser may, in some cases, obtain a sufficient discharge by the receipt of the trustees, upon the intention to be collected from the deed or will, though no express authority be given for that purpose: if it can be collected that the intention must have been, at the

(*a*) 1 Keen, 220.

(*b*) *Braithwaite v. Brittain*, 1 Keen, 222. If, said Lord Langdale, the two sums had been raised and paid to the executors, the mortgagees would not have been bound to see to their application; but, added his Lordship, so far from its appearing that the money received from the mortgagees was paid to the

executors, the contrary appears, *ibid*.

(*c*) *Dunch v. Kent*, 1 Vern. 260; *Balfour v. Welland*, 16 Ves. 153, 157; Sugd. V. and P. 11th ed. 834.

(*d*) *Spalding v. Shalmer*, 1 Vern. 303.

(*e*) *Culpepper v. Aston*, 2 Ch. Ca. 115, cited 1 Vern. 487, 1 Fonbl. 149.

(*f*) *Cotterel v. Hampson*, 2 Vern. 6.

time the deed was executed or the will made, that the trustees were to have the power to give an effectual discharge to the purchaser, then their receipt alone will be sufficient. Thus, if, in the case of a will, a sale is directed, which is to take place immediately after the testator's death, and the persons for whose benefit the money is to be raised are unborn, or if born are infants, and therefore incapable of giving a receipt for the purchase-money; or where the deed or will clearly confers an immediate power of sale, for a purpose which cannot be immediately defined—as to pay particular debts which cannot be ascertained until a future distant period; it will be implied that the intention was that in such case the trustees should have authority to give effectual discharges, for as no one else would have ability to do so, the sale could not otherwise be effected according to the explicit direction (a): but if an estate be charged with a sum of money payable to an infant on his attaining 21, there the purchaser is bound to see that the money is actually paid on the infant attaining that age, if not the estate will remain liable; and it seems that the court cannot bind the right of the infant in such a case (b).

So if the trust is of such a nature that the contemplated sale might have to be effected at a time when the distribution could not possibly be made (c), or if the trusts on which the purchase-money is to be applied are of a nature requiring time and the exercise of discretion (d), it has been considered that it must have been intended that the trustees should of themselves be able to give a discharge to the purchaser for the produce, for otherwise in this case the sale would have to be deferred (e).

(a) *Balfour v. Welland*, 16 Ves. 151, (see 1 Phill. 722, note of Mr. Phillips); *Sowarsby v. Lacy*, 4 Mad. 142; *Lavender v. Stanton*, 6 Mad. 46; and see *Breedon v. Breedon*, 1 Russ. & M. 413. In *Glynn v. Locke*, 3 Dru. & W. 22, a policy of insurance had been assigned to a trustee upon certain trusts, one of which was for the payment of the debts of the party insured; the ultimate trust was for the family. Lord Chancellor Sugden held that the trustee could give a valid discharge to the insurance company notwithstanding they had notice of persons having adverse equitable claims, though the deed had not provided that the receipt of the trustee should be a sufficient discharge. "The nature of the trust deed," said his Lordship, "is sufficient to absolve the company from the necessity of seeing to the application of the money; 'if,' his Lordship continued, 'I were to decide in favour of the company (they had filed a bill of

interpleader) it would amount to a decision that in all cases a party paying money to a trustee is bound to see to its application, and consequently to the execution of the trusts of the deeds, however complicated;—no such rule exists."

(b) *Dickenson v. Dickenson*, 3 Bro. p. 19; Sugd. V. and P. 836, § 14.

(c) *Balfour v. Welland*, 16 Ves. 151; that was the case of a trust deed; an immediate sale was contemplated, and the money was to be applied amongst such creditors as should come in within 18 months from the date of the deed.

(d) As where the money is to be laid out in land; *Doran v. Wiltshire*, 3 Swanst. p. 699; Sugd. V. and P. 836.

(e) See *Balfour v. Welland*, 16 Ves. 156; *Rogers v. Skillicorn*, Amb. 188; *Johnson v. Kennett*, 3 My. & K. 624.

It may here be observed, that although, generally speaking, persons purchasing under a decree are safe, it is a settled maxim of equity that persons purchasing under decrees of the court are bound to see that the sale is made according to the decree, and they must see that the persons who are the parties to convey are before the court (*a*).

Neither the stat. 3 & 4 Will. & M. c. 14, re-enacted by the 1 Will. IV. c. 47, against devises made in fraud of creditors, nor the statute 47 Geo. III. c. 74, which made the real estates of traders liable to their debts, *charged* the real assets descended or devised with the ancestor's debts, but the remedy, as we have seen, was against the heir or devisee personally to the extent of the value of the assets; the same principle applies to the stat. 3 & 4 Will. IV. c. 105, which makes the real estates of all persons liable to their debts: therefore if the estate be conveyed for a price in money or settled on marriage, which is a valuable consideration (*b*), the parties claiming under the sale or settlement (*c*) hold the land discharged of the debts, (though having full notice that there are such debts,) and the only remedy is against the heir or devisee, who is personally liable for the value of the assets he has so conveyed or settled (*d*). Here it will be seen the analogy to the case of a purchaser from an executor does not hold; it is not because the purchaser is to presume that the alienation is an execution of a trust that he is discharged, but because any alienation would have defeated a creditor before the Statute of Fraudulent Devises, and neither that or any subsequent statute has done more than to give to the creditors a remedy against the alienor whether heir or devisee (*e*). But where there is danger that the price of the estate will be misapplied, the Court of Chancery will at the instance of the creditors restrain the heir from receiving it from the purchaser (*f*).

Where the estate is charged with Legacies the purchaser is clearly

(*a*) Lord Redesdale, *Colclough v. Sterum*, 3 Bli. 186; *Giffard v. Hort*, 1 Scho. & L. 386.

(*b*) *V. supra*, p. 52.

(*c*) As to a purchase from an executor, *v. supra*, p. 372. In *Higgins v. Shaw*, 2 Dru. & W. 362, Sir E. Sugden appears to have thought that a settlement, where nothing passes, would not affect the rights of creditors.

(*d*) *Spackman v. Timbrell*, 8 Sim. 259-60; *Richardson v. Horton*, 7 Beav. 123. There a portion of the estates had been set apart to answer the debts, which had proved to be insufficient, yet the settlement of the remainder was supported as against the claims of the creditors; these cases are founded on *Matthews v. Jones*, 2 Anst. 515: and see, as

to the effect of these statutes, 4 My. & Cr. 268-9; Sugd. V. and P. 834-5. The testator, as we have seen, may make the estate equitable assets by charge or devise in trust for his creditors, though he cannot exempt his heir or devisee from liability, *supra*, p. 313; the statement, 7 Beav. 123, if it means that the debtor may now withdraw the land from his specialty creditors altogether appears to be a mistake; *et v. supra*, p. 344; note (*e*).

(*e*) There is a dictum of the Lord Chancellor Sugden, 2 Dru. & W. 362, which may seem to be at variance with this doctrine; but it was introduced *obiter*, and did not affect the decision.

(*f*) *Green v. Lowes*, 3 Bro. 217.

liable to see to the application of his purchase-money, notwithstanding the general liability of the estate under the statute-law, above adverted to, to the payment of debts, and the estate *may* therefore have been sold for that purpose. "The purchaser from and heir or devisee," said Sir J. Leach, "being before the stat. 47 Geo. III. sess. 2. c. 74, bound to see to the application of his purchase-money in satisfaction of legacies charged on the land by the devisor, notwithstanding specialty debts which were to be paid out of the land, and the statutes having made no difference in this respect, the purchasers from the heir or devisee must continue bound to see to the application of his purchase-money in satisfaction of legacies charged upon the land, notwithstanding the statutes by which simple-contract debts are to be paid out of the land" (a).

(a) Sir J. Leach, *Horn v. Horn*, 2 Sim. & S. 451; and see Sugd. V. and P. 835, as to the stat. 3 & 4 Will. IV. c. 104.

ADDITIONAL NOTE.—See p. 380, *supra*.

Cestuis que Trust Parties.

The 30th of Lord Cottenham's very beneficial orders of Aug. 1841 directs, That in all suits concerning real estate which is vested in trustees by devise and such trustees are competent to sell and give discharges for the proceeds of the sale and for the rents and profits of the estates, such trustees shall represent the persons beneficially interested in the estate, or the proceeds or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate, and that it shall not be necessary to make the persons beneficially interested parties to the suit; and under such circumstances persons having charges are under this order unnecessary parties. In *Osborne v. Foreman*, 2 Hare, 656, the Vice-Chancellor Wigram has stated the reason of the order and the cases to which it applies. The order does not operate where the trustees have not the legal estate, *Turner v. Hind*, 12 Sim. 414; see Daniell's Practice, by Headlam, 224; and see *Weatherby v. Giorgio*, 2 Hare, 629, where the Vice-Chancellor Wigram gives the rule as to foreign trustees and *cestuis que trust*.

SECTION VII.—Of Portions.

§ 1.—General Doctrines.

§ 2.—Double Portions.—Satisfaction.

§ 1.—General Doctrines.

*Introduction.**Portions secured by a Term.**Personal Estate Primary Fund.**When only Fund.**Portions given by Will.**Case of Parent.**Person loco parentis.**Portions, how far governed by Rules of Civil Law.**Rules of Civil Law adopted by Court of Chancery.**Old Rule as to Legacies charged on Real Estate payable in futuro.**Where Postponement is for Convenience of the Estate.**Where Time fixed for Payment of Portions.**Court has enlarged the Powers of Trustees.**Where no certain Time for Payment is fixed—vest immediately.**Unless different Intention to be collected from Context.**Rule must be construed in a Reasonable Sense—if the Portion be wanted.**Hubert v. Parsons.**Hinchinbrooke v. Seymour.**Where no Gift but in the Direction to Pay.**Conditions must be fulfilled.**Where Postponement not annexed to Substance of Gift.**Condition Precedent.**After Debts paid, or the like.**Leaning of Court of Chancery in favour of Vesting of Portions when wanted.**"Payable" construed "vested."**Observations on this Rule of Construction.**Some Children living held in some cases to satisfy the Contingency.**Lord Eldon, Hope v. Clifdon.**Sir W. Grant's Rule.**Lord Cottenham's Observations as to this Doctrine,**Whatford v. Morris.**Of raising Portions by Sale of Reversionary Term.**Early Cases.**Distinctions taken in subsequent Cases.**Rule as stated by Lord Hardwicke.**Lord Talbot.**Lord Eldon.**Intention must prevail if expressed.**Winter v. Bold.**Gough v. Andrews.**Circumstance that Child of Tender Years.*

Survivorship of Portions.

Evans v. Scott, Dom. Proc.

Mode of raising by Sale or Mortgage—or by Perception of Rents.

Time for Payment fixed.

Rents and Profits clearly pointed out, &c.

Exempt from Thellusson Act.

The Rule stated by Sir W. Grant and Sir T. Plumer.

Extended to Arrears, if any.

Forster v. Smith.

Charge of Debts.

Sale implies Mortgage.

Sale or Mortgage for raising the whole together, or each Portion successively.

Interest on Portions.

Lyddon v. Lyddon.

Clayton v. Lord Glengall.

Person having Power to appoint may appoint unequally.

Marshalling as between Portionist and Mortgagee.—Expense of Raising paid out of Trust Estate.

Rules of Construction established in the Court of Chancery, for determining who are “Younger Children.”

Great Latitude of Construction in this respect.

Reason of this explained.

Younger construed all except the one who succeeds to the Estate.

Younger who so succeeds to the Estate excluded.

Settlement of Real Estate rectified to give it to Eldest Daughter.

Heneage v. Hunloke.

Duke v. Doidge, in Note.

Third Son to whom Estate appointed considered as Eldest.

Only Daughter considered Eldest Son.

Earl of Northumberland v. Egremont.

This latitude only applies to Parents and those in loco parentis—In Gifts by Strangers “Younger Children” receive their ordinary Construction.

Reason of this Distinction.

Not every Act done by a Parent to be construed on Principles different to those done by a Stranger.

Shifting Clause.

Scaresbrick v. Skelmersdale.

On Evident Intention Only Child construed Youngest in Gift by Stranger.

But the Rule that Elder unprovided for shall be deemed Younger, only applies to Elder unprovided for by the Settlement or Will itself.

Peacock v. Pares.

General Rule of Construction.

Where the Portion has become vested in Younger Child, who has become Eldest, application of the Rule more difficult.

General Rule.

Whether Time of Vesting or Time of Distribution is to be taken as the Period for determining who is Elder and who are Younger, depends on Terms of Will.

Matthews v. Paull.

Rule in ordinary cases that the Time of Distribution is to be taken.

Tacit Condition for divesting vested Portion of Child becoming an Eldest Son.

But if it is to be collected from the Instrument that the Portion was to be vested and remain so, it will not go over.

Loder v. Loder.

Court will not always interfere with an Appointment made by the Father amongst Children, though he may derive a personal Benefit from it.

The Question as to the Time within which Children must be born so as to share, and the Mode of Distribution, whether per capita or per stirpes, here introduced.

As to first Question.

Natural Meaning of "Younger Children" all who may be born after the First.

Where Gift executory, i. e. where Future Time of Distribution fixed, all who shall be born within that period shall take.

Whether the Gift is present or executory depends on the Terms of the Will.

Ellison v. Airey.

As to second Question, namely, whether Children of two or more Persons are to take per capita or per stirpes.

Where the words "Equally to be Divided" are used, Children take per capita.

Rule applied to case of Gift to a Brother and Children of a deceased Brother.

ONE very important instance of the use to which express trusts may be applied, is the raising of Portions for younger children. Whether an estate be settled by deed or by will there is usually a provision for that purpose introduced. The usual mode in which this is effected is by vesting a term for years in trustees, to take effect in possession immediately on the expiration of the tenancies for life given to the parents, and before the limitation of the estate to the eldest son and his issue and the others who are to take the estate itself in succession; and the trusts of the term are declared to be that the trustees shall by sale, mortgage, or other means (*a*), as by receipt of the rents, &c. raise the intended portions (*b*).

The enjoyment of the estate, liable to the payment of portions by the person to whom the estate is limited, is secured, he paying the portions, for it is in default of such payment that the trustees are authorized to exert the powers conferred upon them in relation to the term. Portions are also very frequently given to children in the form of legacies and of charges on real estate.

The general rules for the construction of instruments containing directions or powers for raising portions by the creation of trust

(*a*) See *Warter v. Hutchinson*, 1 Sim. & St. 276, 281; and *Walcott v. Bloomfield*, 4 Dr. & W. 235, as to the forms generally used. It may be observed that where, after a direction for the insertion of powers for jointuring, leasing, and sale and exchange, all other clauses, powers, and provisos usually inserted in settlements

of the same kind are directed to be inserted in a settlement, whether by will or articles, before marriage, this will not authorize the insertion of a power to raise portions; *Higginson v. Barnaby*, 2 Sim. & St. 518; and see *Hill v. Hill*, 6 Sim. 144-5.

(*b*) See *Hill on Trustees*, p. 363, *et seq.*

terms (a) and by way of legacy or of charge, are the same as those which are adopted on similar subjects; the Intention is to be followed, so far as it is consistent with the rules of law; the ordinary rules of the court govern the general construction, but some latitude of construction in regard to intention has been introduced as regards portions.

In the following pages an attempt will be made to give an outline of the doctrines which have been applied to the Raising and Payment of portions, and the Incidents of portions, and in regard to the important and much litigated subject of Double Portions. But the subject is one of great complexity, and the cases, to appearance, are not always consistent, so that much must be left to the reader to investigate for himself; the leading authorities will be laid before him, but I cannot pretend to reconcile them all or to extract such principles as shall be free from doubt, or which may not to some extent at least be controverted or qualified by some others of the numerous cases which have occurred on this subject.

Where portions are secured by a term, and there is also a covenant by the settlor to pay them, the real estate is considered as the primary fund, and the covenant as auxiliary only (b). In the case of *Lechmere v. Charlton*, Sir W. Grant at first was inclined on general principles to consider the covenant in such cases as creating a personal debt and liable to all consequences. He observed that where a person becomes entitled to an estate subject to a charge and then covenants to pay it, the charge still remains primarily a charge on the real estate, "because the debt is not the original debt of the covenantor" (c), which does not apply to the covenant of a settlor; however in the principal case Sir W. Grant ultimately decided that the land was primarily liable on the authority of the case of *Lanoy v. The Duke of Athol* (d). And though the testator may have given his residuary personal estate expressly charged with the payment of all his just debts, this will make no difference, as such a direction is construed to apply to personal debts (e).

It is the same though the covenant be to settle land out of which the

(a) *V. int. al. Warter v. Hutchinson*, *ubi sup.*; *Hume v. Rundell*, 2 Sim. & St. 174.

(b) *Lechmere v. Charlton*, 15 Ves. 193. In *Graves v. Hicks*, 6 Sim. 405, the Vice-Chancellor of England held that as on the settlement and mortgage it was plain that the intention was that the testator should secure 6000*l.* as a marriage portion, though there was a covenant in the mortgage to pay it, the personal estate was an auxiliary, not the principal fund;

the testator had given the residue of his personal estate, charged with the payment of all his just debts; *et v. Lex Prætor*. 269.

(c) See *Evelyn v. Evelyn*, 2 P. W. 663; and Mr. Cox's note, p. 664.

(d) 2 Atk. 444-5.

(e) *Ex parte Digby*, Jac. 235; *Graves v. Hicks*, *ubi sup.*; and see *Ward v. Lord Dudley*, 2 Bro. 318.

portion is to be raised absolutely within a specified time as six months, and it is broken so that damages might be recovered, for still the intended portionist must first resort to the land and only in case of a deficiency call upon the personal estate: the articles to settle the land are in equity equivalent to an actual settlement (*a*). If there be a covenant to settle lands and to raise a term of years out of them for securing a portion, but no covenant for payment of the portion, and only a bond for performance of covenants, the portion is not in any event payable out of the personal estate (*b*).

Portions may also be given by will. In the case of a parent a legacy to a child is presumed to be a portion, although it be not so expressed (*c*), because providing for a child is a duty which the relative situation of the parties imposes upon the parent. The duty which is imposed upon the parent may be assumed by any other person, who for any reason thinks proper to place himself in that respect in the place of the parent; and when that is so the same presumptions will arise as in the case of a legacy or gift by a parent. Whether the donor has for this purpose assumed the office of parent so as to invest his gift with the character of a portion, may be proved by extrinsic evidence, such as the general conduct of the donor towards the children; or by intrinsic evidence, that is, from the nature and terms of the gift. If the former be alone relied upon, it may prevail, although it should appear that the donor did not assume all the duties of a parent, or effectually perform those which he had undertaken; the question being merely whether the facts proved fairly lead to the conclusion that he intended to provide a portion for the child; and not merely to bestow a gift (*d*). There are many doctrines which are applicable to portions, that is, sums of money secured or given by a parent or person

(*a*) *Edwards v. Freeman*, 2 P. W. 438; though there is a dict. by Sir T. Powis to the contrary, in *Howel v. Price*, 1 P. W. 293, but no case cited; *Countess of Coventry v. Earl of Coventry*, 2 P. W. 222, 233; *Burgoyne v. Fox*, 1 Atk. 576; *Ward v. Lord Dudley*, *ubi sup.*

(*b*) *Edwards v. Freeman*, 2 P. W. 437; but in the case of a mortgage, the money borrowed is a personal debt (*Howel v. Price*, 2 P. W. 293), and to be paid out of the personal estate in the first instance, whether there be a covenant for payment or not; *Cope v. Cope*, 2 Salk. 449; *Howel v. Price*, *ubi sup.*

(*c*) Lord Eldon, *Ex parte Pye*, 18 Ves. 153; Lord Cott. *Pym v. Lockyer*, 5 My. & Cr. 35.

(*d*) Lord Cott. *Pym v. Lockyer*, 5 My. & Cr. 35; and see *Booker v. Allen*, 2 R. & M.

299; *Carver v. Bowles*, *ibid.* 301; *Powys v. Lord Mansfield*, 3 My. & Cr. 359; Lord Cottingham (3 My. & Cr. 366), observed that the authorities had left in some obscurity the question as to what is to be considered as meant by the expression *in loco parentis*: his Lordship preferred Lord Eldon's definition, in *Ex parte Pye*, 18 Ves. 154. The Vice-Chancellor of England had considered (6 Sim. 556), that it could only be applied to a person who has so acted towards the child as that he has thereby imposed upon himself a moral obligation to provide for it; and that the designation would not hold where the child had a father with whom he resided, and by whom he was maintained; on which subject, see *Shudall v. Jekyll*, 2 Atk. 518; *et v. sup.* vol. i. p. 560, note.

standing *in loco parentis* to a child, which would not be applied to a gift as between strangers (a).

It must be remembered that portions secured by marriage settlement or by any deed or writing not being a will, are not governed by the rules of the civil law which prevail as to legacies of personal estate given by will (b); those rules, so far as they differ from the ordinary rules of construction, are not applicable to any interests but those of a purely legatory nature, that is, which cannot be taken notice of unless in the form of a probate or letters of administration with a will annexed, although the fund be merely personal (c). To some extent the rules as regards legacies charged on land are the same as those which are applied to legacies given out of personal estate only; thus, a pecuniary legacy, whether charged on land or not, given by will to a person *in esse* simply without any postponement of payment, is vested immediately on the testator's death (d). The difference is chiefly in regard to legacies payable at a future time.

The Court of Chancery, as before mentioned (e), in construing gifts of this description, following the rules of the civil law (f), has adopted two rules of construction: that a bequest to a person *payable* or *to be paid* "at" or "when" a person shall attain 21 or at the end of any other certain determinate term, confers on him a vested interest immediately on the testator's death, for the words payable or to be paid are construed so as to disannex the *time* from the *gift* of the legacy, and thus to leave the gift immediate, in the same manner, as respects vesting, as if the bequest stood singly and contained no mention of time. The other rule is that if the words "payable" or "to be paid" are omitted and the legacy is given "at" 21 or "if," "when," "in case" or "provided" the legatee shall attain 21, or at any future definite period, these expressions shall be construed as annexing the time to the substance of the legacy, so that the right of the legatee is made to depend upon his being alive at the time fixed for its payment (g);

(a) *V. int. al. Hope v. Clifden*, 6 Ves. 506-8-9; *Edgeworth v. Edgeworth*, Beat. 334.

(b) *V. supra*, vol. i. p. 293; vol. ii. pp. 94, 184; and see *Hubert v. Parsons*, 2 Ves. 262-3.

(c) *Ibid.*; and see the cases 2 P. Wms. 612, in Cox's note (where the exceptions to the application of the rule are stated), and *Bolger v. Mackell*, 5 Ves. 513; and *Lex Præt.* 268.

(d) *Supra*, v. p. 94, 184; and see 1 Jarm. on Wills, 756; *Williams on Executors*, 766.

(e) *V. supra*, pp. 94, 103, 184, and vol. i. p. 523.

(f) See 6 Ves. 243, 245; *supra* vol. i. p. 512.

(g) *Hanson v. Graham*, 6 Ves. 245; *Williams on Executors*, 767, *et seq.*; 1 Jarm. 760, where several cases are stated, in illustration of these rules, and the exceptions to them. The cases of *Saunders v. Vautier*, 1 Cr. & P. 248; *supra*, pp. 94, 99; and *Leeming v. Sherratt*, 2 Hare, p. 17, *et seq.*, afford important illustrations of the nature of the second point (which resolves itself into this, whether the beneficial interest is or is not intended to be contingent), and of the cases to which it is and is not to be applied; and see *May v. Wood*, 3 Bro. 473, there referred to; *supra*, p. 94.

though these rules, as all other mere rules of construction, will give way to a contrary intention to be collected from the whole context of the instrument (a).

As regards legacies or portions payable out of lands *in futuro* the civil law has not been entirely followed; the old rule, which was established at a time when the judges, in all cases, were much inclined to favour the heir whether *hæres natus* or *hæres factus*, was that the legacy or portion, whether charged on the real estate primarily or in aid of the personalty, should not be raised out of the land if the legatee died before the time of payment, though the legacy were given in words which would have vested it according to the first of the rules adopted from the civil law in legacies of personal estate only (b). But, as has been before noticed, this doctrine, though it still prevails in the main, has undergone some modification.

If portions or legacies charged on land are made payable on an event personal to the party to be benefited and such party die before that event happen, the portion or legacy is not to be raised out of the land; but if the payment be postponed until the happening of an event not referable to the person of the party to be benefited, but to the circumstances of the estate out of which the portion or legacy is to be paid, such as the death of the tenant for life, then it will be raisable after the death of the tenant for life, although the term out of which it was to be raised had not arisen in consequence of the party to be benefited not having been *in esse* when the event happened (c). When a particular Time is fixed for the payment of a portion, and the portion has become payable, the court has laid great stress upon the time appointed

N. B. *Festing v. Allen*, referred to p. 99, *sup.* is in 5 Hare, 573, not 240; and the case in 9 Sim. 538 (p. 97), is *Spry*, not *Fry v. Bromfield*; see also, in addition to the cases, in the same page, n. (a), *Cruse v. Barley*, 3 P. W. 21.

(a) See Williams on Executors, p. 768, *et seq.*; *Leeming v. Sherratt*, 2 Hare, 18; and the other cases cited in the pages in this and the former volume, above referred to: the subject of Vesting so frequently recurs that it is impossible to avoid repetition, without putting the reader to the inconvenience of continual back reference.

(b) See *Lex Præc.* 267; *et v. infra*, p. 399, n. (b); and *Poulet v. Poulet*, add. note, No. 1.

(c) Lord Cottenham, *Evans v. Scott*, in Dom. Proc. xi. Jurist, 292; 1 Cl. & Finell. N. S. p. 57; referring to *Emperor v. Rolfe*, 1 Ves. 208; and *Cholmondeley v. Meyrick*, 1 Eden, 77, and other cases; *et v. supra*, p. 99; 1 Jarman on Wills, 756-7. The Question in *Evans v. Scott* was whether, the por-

tions provided for children who had died infants and unmarried, were or were not to be raised for the benefit of the surviving children. It was held on the context that the vesting of the portions did not depend upon the portionee surviving the tenant for life, and that the children, if they had attained 21, or the other events specified had happened, although they had afterwards died in the lifetime of the tenant for life, would have been entitled; but the children in question died before any of the events on which they were to become vested: it was held—Lord Cottenham, Lord Brougham, and Lord Campbell concurring—that on the terms of the settlement (reversing the decree of the Vice Chancellor K. Bruce), the portions to which they would have been entitled had they lived were to be raised for the benefit of surviving younger children: the case of a child dying in the lifetime of the tenant for life was actually provided for in the clause for the further *accruer* of *accrued* shares.

being adhered to, and has, in some instances, enlarged the powers of trustees in order to raise the money within the time, though payable out of the rents and profits, to the extent of ordering a sale; but the interests of the reversioners will be protected by taking care that the rents applicable to the payment are first applied (*a*). Where there is an immediate gift of a portion (*b*), and where portions are charged on lands, and no certain time of payment or vesting is fixed by the settlement or will (*c*), generally speaking, the portions will *vest* immediately; but though vesting in the first-born, on the birth of others they divest to answer the intent (*d*). But it does not always follow that the portions are to be immediately raised, or that the portionist will be entitled to any immediate profits (*e*); in this, as in every other case of construction, the particular penning of the instrument must be looked

(*a*) *Okeden v. Okeden*, 1 Atk. 551-2, Lord Hardwicke; and see 2 P. W. 669; *Warler v. Hutchinson*, 1 Sim. & St. 281. The subject of raising portions charged on rents and profits will be more particularly adverted to in this Section.

(*b*) *Lex Præst.* 270; *Cowper v. Scott*, 3 P. W. 119, was decided on this principle; there the trustees were *to raise* and pay a portion for the testator's daughter *within six years*; she died before the expiration of that time; her representatives were held to be entitled; and see *Wilson v. Spencer*, 3 P. W. 174, to the same effect. In *Jackson v. Farrand*, 2 Vern. 424, a portion, charged on real and personal estate, to be paid by the executors at 21, was ordered to be raised by a sale of the real estate, the daughter having married, but died under 21, 2 P. W. 174; *King v. Withers*, Dom. Proc. 3 P. W. 416; there the event on which the daughter was to have the additional portion did not happen till after her death: all these cases were decided on the absolute gift in the will, but in all the time had arrived for the daughter *wanting* her portion; as to which, *v. infra*, p. 398; and see add. note, No. 2.

(*c*) *Staniforth v. Staniforth*, *inf.* note (*e*); *Sandys v. Sandys*, 1 P. W. 709, stated *infra*; *Evelyn v. Evelyn*, 2 P. W. 671; 3 P. W. 120; and see *Earl Rivers v. Earl Derby*, 2 Vern. 72, (additional note, No. 2); *Chandos v. Talbot*, 1 P. W. p. 612; *Hynes v. Rodington*, 1 Jones & L. 605; *Reilly v. Fitzgerald*, 1 Dru. 122.

(*d*) *Teynham v. Webb*, 2 Ves. 208.

(*e*) See *Evelyn v. Evelyn*, 2 P. W. 668-9-70; and *Emperor v. Rolfe*, *ubi sup.*; *Stanley v. Stanley*, 1 Atk. 548; *Okeden v. Okeden*, 1 Atk. 551; there were circumstances in that case, showing an intention that the trustees should continue in possession, which would have been defeated by an immediate sale; *ibid.*

p. 551. The case of *Staniforth v. Staniforth* was this:—By settlement on the marriage of the plaintiff's father and mother, the estate was settled on the father for life, and to the mother for her jointure, and to the heirs male of their two bodies; and if there should be no issue male, and one or more daughters, then to trustees for a term of 500 years, to raise portions; no time was appointed for payment: there was no issue male of that marriage; the father died, leaving the plaintiff, the only daughter: it was declared—1, that by the contingency of the death of the father without leaving issue male, the term arose, *though not to take effect in point of profits until after the death of the mother* (*sed v. infra*); 2, that the portion vested in the daughter in the lifetime of the mother; 3, no time being appointed for the payment of the portion, nor any maintenance in the mean time, that she was entitled to a reasonable maintenance, not exceeding the interest of the portion, from the death of the father, or at least from such time as the portion might have been raised by sale; and it was decreed that the portion should be *raised by sale of the term*, with a reasonable maintenance in the mean time: as regards the direction for an immediate sale, which will be noticed more particularly hereafter in this Section, it was made on the authority of *Gerrard v. Gerrard*, 2 Vern. 458; but though that and some other cases of a similar character (see Cox's note to *Butler v. Duncombe*, 1 P. W. 452, and Lord Macclesfield's dictum, *ibid.*) have been acknowledged as law, the judges have been disinclined to follow them, excepting under precisely similar circumstances; *v. infra*, p. 403. In *Butler v. Duncombe* the sale was postponed on the special wording of the settlement; see p. 453: a power will not generally prevent the vesting: 1 Eden, 85; 1 Ves. 208.

to in order to come to a right conclusion (a). According to the modern doctrine, where a portion is Secured and no particular time is fixed for the vesting, it is to be construed in a reasonable sense, namely, when the child shall *want the portion*, so that if the child should die before that time the portion shall not be raised (b); for it is, said Lord Cowper, highly reasonable the land should be eased of the charge, when the only motive and inducement for making the same is at an end, and determined by the daughter's dying before she had any occasion for the portion (c). Trustees were directed, by marriage articles, to raise 5000*l.* out of 9000*l.* stock, and pay it to such child or children, not being an eldest son, and in such manner as the father should appoint, and in default of appointment to pay the same to such younger children at 21, the interest to be applied for their maintenance in the mean time. The wife died, so that there could be no more children; there had been two, one had died at two years old, and the father, as his administrator, claimed a moiety of the fund. *The intent*, said Lord Hardwicke, plainly was this: to take out of the 9000*l.* provided for the eldest son, 5000*l.* for younger children, by way of portion, which must be construed in a reasonable sense when they shall be supposed to want the portion, and if there be *any doubt* on the construction of these contingencies and the words, it must be construed accordingly; and Lord Hardwicke held on this reasoning that the portion was not to be raised (d). So where a power was given to the father to raise portions for younger children at such times as the father should by deed or will appoint, the father directed that 10,000*l.* should be immediately raised for the only daughter, she then being 14, and on her death he claimed it. Lord Thurlow said, the meaning of a charge for children is that it shall take place *when it shall be wanted*; it is contrary to the nature of such a charge that it should be raised before that time; the power given to the parent was only to enable him to raise it during his life if it should be necessary; he might properly have directed it to be raised on the daughter's marriage, or for other purposes, but what he had done was against the nature of the power (e). The converse will some-

(a) *Int. al. Teynham v. Webb*, 2 Ves. 209.

(b) Lord Hardwicke, *Hubert v. Parsons*, 2 Ves. 263; *Lord Teynham v. Webb*, *ibid.* 209; 1 Eden, 451-2; *Brewin v. Brewin*, Prec. Ch. 195; and see *Edgeworth v. Edgeworth*, Beat. 334-5; (*et inf.* p. 405). There are cases where, though the court would not raise the portion for the representative, it has given interest for so long as the child lived; *ibid.* 337.

(c) *Wilson v. Spencer*, 3 P.W. p. 174. In

the case itself the legacy had become vested by the first words of the will.

(d) *Hubert v. Parsons*, 2 Ves. 262; and see the cases in the following note.

(e) *Hinchinbrooke v. Seymour*, 1 Bro. 395; 1 Beat. 334. The cases on this subject are collected and examined in *Edgeworth v. Edgeworth*, *ubi sup.*; and by Mr. Fonblanque, vol. ii. pp. 203-4-5: as to the question of fraud in the execution of such a power, see 13 Ves.

times hold: a portion was given to be paid at 21, charged, in aid, on lands; the daughter married, and died under 21: the portion was directed to be raised for her representatives (a).

Where there is no gift but in the direction to pay, and the authority to pay is only on a given event, as marriage or attaining 21, the portion, though given wholly out of personal estate, does not vest in the interim (b). Whatever condition may be annexed which refers to the person must be performed: if there be any definite condition precedent to the vesting of the portion in the same manner as of an ordinary legacy, its non-performance will prevent the vesting. If the condition be indefinite, as after debts paid or the like, the court will direct an inquiry to ascertain when the debts might have been paid, so as not to allow the negligence of the trustee to affect the interests of the parties claiming the portion or legacy (c). If, said Sir William Grant (d), by the settlement it clearly and unequivocally appears that the gift to the children is to depend upon their surviving their parents, then a Court of Equity has no power to alter such a plainly expressed disposition. Where however the words are in any degree ambiguous (e), and there appears to be an uncertainty at what period the gift is intended to vest, the court is always in the habit of leaning towards the construction that the vesting took place at the time when the provision is most required for the children, which is usually at the age of 21 in males, and at that age or marriage in females (f).

479; 14 Sim. 454; 2 Conn. & L. 342; and *Gee v. Gurney*, 2 Coll. 489.

(a) *Farrant v. Jackson*, 2 Vern. 424, *sup.*; though the general rule is that if the child die before the time fixed for payment, the portion shall not be raised; *Poulet v. Poulet*, 1 Vern. 204, 321; 3 P. W. 418.

(b) *Cheraux v. Aislabie*, 13 Sim. 72; *et v. int. al. Wingrave v. Palgrave*, 1 P. W. 402; *et v. supra*, p. 97.

(c) *Small v. Wing*, 5 Bro. P. C. 66; *Bernard v. Montague*, 1 Meriv. 433; and see 11 Ves. 508, note: the words were that the portions were to become vested in two years, "if my debts shall be then paid."

(d) *Howgrave v. Cartier*, 3 Ves. & B. 85-6, cited with approbation by Lord Cottenham, 2 Phillips, 351: this case was decided by Sir Wm. Grant, upon some inaccuracies in the provisions, and particularly upon there being a power of appointment which was inconsistent with the contingency continuing; see *Whatford v. Moore*, 3 M. & C. 289: this case was also recognized and acted upon in *Perfect v. Lord Curzon*, 5 Mad. 444. It was there stated by Sir J. Leach, that in settlements of this kind there are two sets of clauses to be

considered—the clauses of gift to the children, and the clauses of gift over on failure of children; the authorities require that both sets of clauses should be clearly and unambiguously expressed. In *Bright v. Rowe*, 3 My. & K. 316, the same doctrine was applied to a will, but Sir J. Leach added, "the expressions of the testatrix are not to be subjected to any violence for the purpose of raising an implication in favour of the children;" *ibid.* 322: in that case a distinction was taken and allowed as to a share which had accrued to a deceased child; *ibid.* 323.

(e) *Fry v. Lord Sherborne*, 3 Sim. 243, is one of the latest cases in which the decision turned on there being a variety of clauses inconsistent with each other; see 7 Sim. 585.

(f) See *Bouverie v. Bouverie*, before Lord Cottenham, (1847,) xi. Jurist, pp. 661-2; 2 Phillips, 351, (citing *Howgrave v. Cartier*, *ubi supra*). In that case the question was, whether the vested gifts in the prior part of the will were to be considered as controlled by the subsequent words, so that the shares of children who had attained 21, and then died in the life of the mother, should go to the survivors: the Vice-Chancellor of England had been of

The leaning of the court in favour of the vesting of portions at the time they may be wanted has been carried to the extent of controlling express words (a). Where a portion is given to a child at 21 or marriage, though actual payment be suspended by reason of the existence of a life interest in the estate out of which the portion is to come, if the portion is given over or directed not to be raised simply in the event of the death of the child before the portion becomes "payable," that word has been construed to refer to the time of vesting, that is the attaining 21 or marriage (b).

It has been observed that though in some of these cases the words have been strong and difficult to manage (c), yet the court looking upon it as a hard thing to impute to a father that he should mean a child, having attained 21 or come to marriageable years and formed a family, yet because that child dies in his lifetime the descendants should have nothing, and feeling that not to be a probable intention in a parent, have thought themselves at liberty to manage the construction of the words, as they *would not*, in the case of a *stranger* (d) or upon a matter of mere contract, without any mixture of parental feeling (e). In some cases the circumstance of there being some children living

opinion that the words, "in case one dies, the others are to have share and share alike, the survivor to have the whole," controlled the prior gift; but Lord Cottenham was of a different opinion, and, reversing the decree of the Vice-Chancellor of England, declared that the children were entitled to vested interests, following *Salisbury (Earl of) v. Lambe*, Amb. 383; *S. C.* 1 Eden, 465.

(a) See the notes 2 Fonbl. 204-5.

(b) *Emperor v. Rolfe*, 1 Ves. 208. There the daughter had married, (see 6 Ves. 507-8); *Cholmondeley v. Meyrick*, 3 Bro. 253; 1 Ed.; *Woodcock v. Duke of Dorset*, 3 Bro. 569; 3 Ves. & B. 87; *Hope v. Clifden*, 6 Ves. 507; *Powis v. Burdett*, 9 Ves. 433, "leave," was there turned into "have," (see 3 Ves. & B. *ubi supra*); (in both these cases the earlier authorities are observed upon): *Schenk v. Legh*, 9 Ves. 310; *Jefferys v. Reynolds*, 6 Bro. P. C. 398; *King v. Hake*, 9 Ves. 443; *Howgrave v. Cartier*, 3 Ves. & B. 91; *Perfect v. Lord Curzon*, 5 Mad. p. 447; all cases of settlements; and see *Jones v. Jones*, 13 Sim. 568, a case of a will; and *Henderson v. Kennicot*, *infra*, p. 406: see also 2 Roper on Leg. 534, *et seq.*

(c) See *Woodcock v. Duke of Dorset*, 3 Bro. 569; "This case," said Lord Cottenham, in *Whatford v. Moore*, 3 My. & C. 289, "has always been considered as carrying the doctrine to its utmost limits. It appears that that decision was much influenced by the considera-

tion that, according to the construction contended for, by which the deceased daughter was to be excluded, if all the children had died before the surviving parent, the fund (the wife's money) would have gone to the father." "It is impossible," said Lord Thurlow, "it could be intended (notwithstanding the express words,) that Lord Gower (the father) should take in the event that a young woman of twenty should survive her children. —The intention of the settlement is the truth and honour of the case;" see *Clayton v. Earl of Glengall*, 1 Dru. & War. p. 15.

(d) The same difference is observable in the doctrines as to *satisfaction*; 9 Ves. 427.

(e) Lord Eldon, *Hope v. Lord Clifden*, 6 Ves. 506-8-9; the objects of the portions, as Lord Cottenham remarked (3 My. & Cr. 290), were described to be "all and every the child and children" of the marriage; and see *Woodcock v. Duke of Dorset*, 3 Bro. 569; more correctly 3 Ves. & B. 83. "These cases, *Hope v. Lord Clifden*, *Powis v. Burdett*, and some others, have proceeded upon grounds so peculiar, and have departed so widely from the rule of construing instruments according to the obvious and natural meaning of the words used, that it is not possible to come to a very satisfactory conclusion upon any case which varied at all from former decisions."—Lord Cottenham, 3 My. & Cr. 290-1; and see *Willis v. Willis*, 3 Ves. J. 54; 5 Mad. 444; and 9 Sim. 58.

at the death of the parent has been held to satisfy the contingency, and to let in children who died before; this is always unsatisfactory, though sometimes adopted to avoid a greater absurdity, as it makes the title of one younger child depend upon some other younger child living till the death of the father, for which there could be no reason (a). In *Hope v. Clifden* there were children surviving, but Lord Eldon, in *Powys v. Burdett*, said that he should have come to the same decision in *Hope v. Lord Clifden*, on the authorities, if that circumstance had not occurred, adding, "I agree it is mischievous to decide these cases upon small circumstances" (b).

In a late case, where Lord Cottenham had to consider the doctrine applicable to the cases last referred to, his Lordship observed, "that the cases upon this subject turn upon such nice distinctions and are so little reconcileable that the only reasonable course is to adopt the rule which has been generally recognised of leaning in favour of a construction which includes all children, if the instrument affords fair ground for doing so; but, if not, to give effect to the plain meaning of the words used" (c). His Lordship added, "In case of doubtful construction upon the whole instrument, the court leans to that which will include children so dying, as most convenient, and most likely to have been the intention of the parties. It may be thought that courts have gone the full length that is justifiable in order to attain this object, but no case has gone so far as to do violence to the words, if no other part of the instrument be found inconsistent with them" (d). The case which produced these remarks, and in which Lord Cottenham reviewed the principal authorities on this subject, was to this effect.—The trusts of a term of 500 years were, that in case the father, J. R. Moore, should die leaving his wife, an eldest or only son who should attain 21, and one or more younger sons or daughters, the trustees should after the several deaths of the father and mother *and the commencement of the term*, but not before or sooner unless the father should by writing request or direct the same, (but without prejudice to the wife's estate,) raise a certain sum by way of portions for the daughters and younger children, share and share alike, and to survive to the survivors or survivor of them; the shares of the daughters were to be *paid at the age of 18 or marriage*: until the portions should become payable, the trustees were authorized *after the commencement of the*

(a) Lord Cottenham, *Whatford v. Moore*, 3 My. & Cr. 288.

(b) *Powis v. Burdett*, 9 Ves. 437.

(c) *Whatford v. Moore*, 3 My. & Cr. 287. In *Hotchkin v. Humfrey*, 2 Mad. 68, and

Fitzgerald v. Field, 1 Russell, 439, 446, which arose on a covenant, the time of vesting was postponed on this principle.

(d) *Whatford v. Moore*, 3 My. & Cr. 289.

term to raise and levy maintenance not exceeding the interest of the respective portions (a). Lord Cottenham observed, that however inconvenient an arrangement may be which excludes a child attaining its age in the lifetime of its parents, and dying before them, and the court therefore leans to the construction which would include them; in this case it was quite clear that if all the younger children had died before the father, no portions would have been raisable, a feature which distinguished it from *Woodcock v. Duke of Dorset*, and which afforded a strong argument against any portion being raisable for any younger child dying before that time; it was also distinguished from *Howgrave v. Cartier*, there being no power of appointment as in that case: and after noticing the difficulty in reconciling the decisions, Lord Cottenham—adopting Sir Wm. Grant's rule in the last-cited case, that where nothing inconsistent with the contingency continuing is to be found in the instrument, the words must have their plain meaning—with that degree of hesitation which necessarily arises from the state of the authorities, felt himself bound to decide that the child under whom the portion was claimed had not become entitled to it, confirming the decision of the Vice-Chancellor (b).

As to portions secured by Reversionary Terms, the general rule is that where the portions secured by such a term are made payable at a particular time or on a particular event, and all the contingencies have happened, the portions are to be raised by a sale of the reversionary term during the life of the tenant for life: but this must depend upon the particular penning of the trust and the intention of the instrument (c). The doctrine of the court on this subject has undergone some fluctuations.

The ordinary rules of construction would require that if a portion is directed to be paid at 18 or day of marriage, or any other fixed period, the portion should be raised, and accordingly it was decided in some early cases, as before noticed, that where the term was absolutely vested, then the daughter should not expect during the life of the

(a) There were other provisions which were relied upon in the argument and judgment, too long to be here inserted. One of the daughters died in the lifetime of both the parents, having attained the age of 18, and married; then the father died, leaving a son who attained 21, and three daughters; the representative of the deceased daughter claimed her portion.

(b) 3 My. & Cr. 291. An additional portion to be paid "in the same manner," &c.

was held to be governed by the same construction; and see 7 Sim. 574, the original hearing.

(c) *Corbett v. Maydwell*, 1 Salk. 159; 1 Eq. Ab. 337; 2 Vern. 656, as it is cited *Codrington v. Lord Foley*, 6 Ves. 372, judgment of Lord Eldon. In *Smyth v. Foley*, 3 Y. & Coll. 157, Mr. Baron Alderson has stated the general rule as deduced from the modern cases, and he adds it is much too late to dispute its propriety: but see add. note, No. 3.

father, but it should be sold even in the father's life, although the term were in remainder and not in possession (a). In subsequent cases, these determinations were considered as replete with inconveniences in their application, and that they ought only to be allowed to govern cases precisely similar in all their circumstances (b). Lord Macclesfield thought that the raising of portions in the lifetime of the parents was encouraging disobedience, and therefore not to be countenanced, and that where it was intended to be done it should be so expressed in the instrument, and he said he would not go a step farther than precedents forced him (c). Pains have been taken to make distinctions so as to prevent the portion being raised in the lifetime of the father or mother. Thus it has been held that they should not be raised unless all the contingencies annexed to the gift should have happened (d). In like manner (e), where maintenance has been provided out of the rents and profits *after* the term limited to raise the portion should take effect *in possession*, that has been allowed to take the case out of the general rule (f). But if there are inconveniences in raising portions out of reversionary terms, there are also inconveniences in the delay; the inconvenience of a younger child starving for want of his portion, said Lord Northington, is as great as the injuring the estate of the eldest son by raising the portion out of the reversion (g); and as regards considerations of convenience or inconvenience, Lord Cowper remarked that it would be to no purpose for any one to make deeds if the argument of convenience or inconvenience were to prevail to overrule them (h).

Lord Hardwicke, on a review of the authorities, laid down, that as a general rule, if there be a term of years or other estate limited to

(a) *Greaves v. Mattison*, T. Jones, 201; *Corbett v. Maydwell*, *ubi sup.*; *Gerrard v. Gerrard*, 2 Vern. 458; *Staniforth v. Staniforth*, *ibid.* 460, in which a series of precedents were produced, *v. supra*, p. 397.

(b) See *Sandys v. Sandys*, 1 P. W. 707; *Hebblethwaite v. Cartwright*, Forrest. 31; *Hall v. Carter*, 2 Atk. 354; *Lyon v. Duke of Chandos*, 3 Atk. 416; *Smith v. Evans*, Ambl. 633; and Lord Eldon's observations, 6 Ves. 376, 377.

(c) Lord Macclesfield, *Sandys v. Sandys*, 1 P. W. p. 709. Lord Macclesfield, in that case, though with reluctance, ordered the portions to be raised by a sale of the term in the lifetime of the father, *ibid.*

(d) *Corbett v. Maydwell*, 1 Salk. 159; (6 Ves. 377); *Butler v. Duncomb*, 1 P. W. 448; Cox's note, *ib.* 453; *Churchman v. Harvey*, Ambl. 335; *Reresby v. Newland*, 2 P. W. 93. Lord Thurlow's dictum in *Conway v. Conway*,

as reported in 3 Bro. 270, is not to be relied upon, see 6 Ves. 379.

(e) See 2 Fonbl. 201.

(f) *Brome v. Berkley*, 2 P. W. 484; but see 3 Y. & Coll. 160; *Cotton v. Cotton*, cited *ibid.* 149; *Stevens v. Dethick*, 3 Atk. 39; *Lyon v. Chandos*, 3 Atk. 416; *Goodall v. Rivers*, Mosely, 395; and *Clinton v. Seymour*, 4 Ves. Jun. 464. In *Codrington v. Foley*, 6 Ves. 373, 378, the cases upon the subject are very fully considered; and by Lord Chancellor Sugden, 1 Conn. & L. 320, *et seq.*

(g) Lord Northington, *Smyth v. Evans*, Amb. 633, who said the old rule was right.

(h) See 6 Ves. 377. "What warrant," says Lord Hardwicke, *Lyon v. Chandos*, 3 Atk. 417, "is there to insert by implication and construction what the parties themselves have not expressed?" not referring of course to necessary implication.

trustees for raising a portion for a daughter payable at a certain time, which is become a vested interest, she shall not stay till the death of the father and mother unless some *intention* appears upon the instrument to postpone it, and if there does, the court will always take notice of such intention and postpone it accordingly; and for this purpose the court will lay hold of very small grounds that speak the intent of the parties (a) to hinder the raising of the portions in the lifetime of the father and mother (b). And Lord Hardwicke seems to have considered that the court might in this respect legitimately be governed to some extent by the consideration of preserving the parental authority rather than giving license to daughters to marry improvidently (c). Lord Talbot thought that the true rule was this, that it must depend upon the particular penning of the trust, and he agreed with Lord Cowper in thinking that if all the contingencies have happened, the portion must be raised notwithstanding the inconvenience, or that there would be an end of deeds (d). This rule was approved by Lord Eldon, his Lordship adding, that he did not think that the court ought to be eager to lay hold of circumstances, but ought to hold an equal mind while construing the instrument; and his Lordship said he could not agree with what was said by Lord Hardwicke, in *Stanley v. Stanley*, that very small grounds are sufficient. "If they are sufficient to denote the intention," said his Lordship, "they are not small grounds; if they are not sufficient to denote the intention the court does not act according to its duty by treating them as sufficient, thereby disappointing the true intention of the instrument" (e). "The rule upon the whole," said his Lordship, depends upon this, "whether it was the intention of the

(a) And see Lord Alvanley's statement of the result of the authorities, *Lady Clinton v. Seymour*, 4 Ves. 460. "Small circumstances and small grounds," said Lord Eldon, "are words I do not like to hear in any court," 6 Ves. 384; *et v. sup.* p. 403, n. (h).

(b) *Stanley v. Stanley*, 1 Atk. 549, and the cases in Raithby's notes. Lord Macclesfield, in *Butler v. Duncomb*, 1 P. W. 455, said, declaring the portion should be raised *after* the commencement of the term implied a negative.

(c) *Stevens v. Dethick*, 3 Atk. 42, 43; *Brome v. Berkley*, 2 P. W. 484; 1 Eq. Ca. Abr. 340, Lord King: it was held that the portion was not to be raised in the mother's lifetime, because the maintenance which was naturally to precede the portion was not to be paid till the trustees were in possession; but see 3 Y. & Coll. 160, *et ib.* 149; and see 6

Ves. 377, 380.

(d) *Hebblethwaite v. Cartwright*, Forrest. 32.

(e) *Codrington v. Foley*, 6 Ves. 380. In the case itself Lord Eldon held that the intention was that the portions should be payable at such ages, days, and times as Lord Foley should appoint, so that inconvenience and impolicy were excluded. In *Smyth v. Foley*, 3 Y. & Coll. 157, Mr. Baron Alderson has stated the rule with somewhat more particularity; and see *Mitchell v. Mitchell*, 4 Beav. 549, and *Lygon v. Lord Coventry*, 14 Sim. 45; the case itself, which is special, relates to the title of a portionist to maintenance out of her portion, and to what amount; she was entitled to two funds: maintenance, the amount to be settled by the Master, was given to her out of that which was most for her benefit.

parties to the instrument, attending to the whole of it, that the portion should or should not be raised in this manner; taking it *primâ facie* to be the intention upon the general rule, if there is nothing more than a limitation to the parent for life, with a term to raise portions at the age of 21 or marriage—if there is nothing more, and the interests are vested, and the contingencies have happened, at which the portions are to be paid—the interest is payable, and the portions must be raised in the only manner in which they can be raised; that is, by mortgage or sale of the reversionary term.”

If the intention (a) appears to have been that the portions should not be raised until the term comes into possession, of course it will be acted upon (b). The trusts of a term were to raise 3000*l.*, and dispose of the same amongst the younger children in such proportions and at such times, and upon such conditions and in such manner as the parents or the survivor of them should by deed or will appoint, and in default of appointment for the children equally at 21 or marriage; but in case any one should die leaving issue the share of such one to go to his children: the husband died, the eldest son attained 21, and afterwards the widow sold her life-interest to him. She then apportioned the 3000*l.* amongst her children equally. The eldest son then filed a bill to have the portions raised; two of the children had attained 21, others were infants. The Vice-Chancellor, Sir J. Leach, held, that inasmuch as the widow had a power to appoint the 3000*l.* to the younger children by her will, it was plain it was not the intention that it should be raised during her life, and dismissed the bill (c). But in *Gough v. Andrews* (d), the Vice-Chancellor K. Bruce considered that the existence of a *joint power* was not a sufficient indication of intention that the portion should not be raised in the life of the parents (e).

The circumstance of the child being of tender years so as not to want the portion, will have a material effect in inducing the court not to direct the portion, though vested and raisable, to be raised out of a reversionary term during the life of the mother having a life interest or a jointure upon the estates (f). Lord Hardwicke said he had always refused to raise portions or interest on portions to be

(a) The intention, according to the ordinary rules, must be collected from the instrument itself; *Corbet v. Maydwell*, 2 Vern. 641.

(b) *Butler v. Duncomb*, 1 P. W. 448, *sup.* p. 404; there the words were “from and after the commencement of the term.”

(c) *Wynter v. Bold*, 1 Sim. & S. 507, *inf.* 408.

(d) 1 Coll. 59, 68; *et v. sup.* 397, n. (e).

(e) Mr. Hill, on Trustees (p. 364), observes, “that to prevent any question on the subject, a direction is usually inserted that the portions shall not be raised in the lifetime of the parents.” I would refer the reader to his observations on the precautions to be observed in order to make such direction complete.

(f) *Evelyn v. Evelyn*, 2 P. W. 669, *supra*.

raised out of reversionary terms upon construction or implication only (a).

If there be any clause directing that a portion of a child, though vested, shall, in the event of the child dying before the time appointed for payment, go over to the survivors (b), effect will of course be given to such direction, and the portion will be divested on the happening of the event pointed out; but there is no authority which authorizes the court, upon any supposed rule applying to gifts to a class, to hold that the surviving children or child shall take the whole fund without a direction in the settlement for that purpose (c).

Where a fund is given in the way of portion or legacy to a person, as the wife, for life, and after the death of the tenant for life to certain persons in equal shares; and in case any of such persons should die before they become *entitled* to their respective shares, the share of the person dying is directed to go amongst the children of the person so dying; it is now it seems settled by authority, that the word "entitled" is not to be construed as "entitled in possession;" and the children of a legatee in remainder dying during the life of the tenant for life are not entitled to the share of their parent; the share is vested in the donee on the death of the donor (d): a clause of survivorship would no doubt be construed in the same manner.

Though the Court of Chancery will in general consider a charge on the rents and profits to raise portions, legacies, or debts, as a charge on the land (e), if such charge be not restrained to the annual pro-

(a) Lord Hardwicke, *Lyon v. Duke of Chandos*, 3 Atk. 416; and see *Stanley v. Stanley*, 1 Atk. 549, and the references; *Stephens v. Dethick*, 3 Atk. 39.

(b) In general survivorship will be referred to the period when the portions become payable; Lord Cottenham, *Whatford v. Moore*, 3 My. & Cr. 287; and see *Bouverie v. Bouverie*, 2 Phill. 349; *v. sup.* p. 396; *et v.* p. 400.

(c) Lord Chancellor Sugden, *Hynes v. Reddington*, 1 Jones & Lat. 604; his Lordship added, "I must not only ask what is to be done in the case that has happened, but also what ought to have been done if a different state of circumstances had arisen;" and the court must also look to the gift over where there is one, *ibid.* 605; and see *Evans v. Scott*, in Dom. Proc. xi. Jurist, 291; *supra*, p. 396.

(d) *Henderson v. Kennicot*, Vice-Chancellor K. Bruce. xii. Jur. 848; *Fry v. Lord Sherborne*, 3 Sim. 243; *Charit. Comm. v. Cotter*, 1 Dru. & W. 498; 2 Drury & Walsh, 615. This case, in which all the principal authorities

are cited, arose on a clause of survivorship under an appointment of lands purchased with the trust fund; in default of appointment the fund was to go amongst the children living at the death of the father the appointor; the case was decided on the authority of *Doe v. Prigg*, 8 Barn. & Cress. 231. The Lord Chancellor said it was impossible to reconcile all the authorities, 1 Dru. & War. p. 499; *et v. sup.* p. 400.

(e) "By a liberal construction of 'rents and profits,' in the case of a will, they will usually be considered as including a direction to sell or mortgage, especially when in favour of *debts* and *portions*;" see 2 Ves. & B. 75, Sir Wm. Grant; *Trafford v. Ashton*, 1 P. W. 418, (and see the other cases in Sanders' note to Atk. 1551); it was there said "profits," as applied to raising debts and portions, meant any profits, including what could be raised by sale or mortgage; where a term is created, it is clearly so, though the natural meaning of profits is annual rents and profits; *Bootle v.*

fits (a), and imply a power in the trustees to sell (b); yet if no time for payment be appointed, as a general rule, a sale will not be decreed, but the portion must be raised in the manner directed (c).

The Court of Chancery will not decree a sale in any case in which the rents and profits (d) distinctly appear to have been exclusively intended to satisfy the charge (e); nor will the court decree a sale if any particular mode is prescribed by the instrument to satisfy the charge, so as to indicate an intention that the estate should be preserved, as if it contain a power to lease or to mortgage the premises for that purpose (f). "In construing the words 'rents and profits' in a will," said Sir Wm. Grant—and it must be the same, it is presumed, in a settlement—"upon such a subject to amount to a power to raise a gross sum of money, the occasion on which the necessity of providing that sum must be observed. The court has, by a technical, artificial, but liberal construction (g) in a series of authorities, admitting it not to be the natural meaning, extended these words when applied to the

Blundell, 1 Meriv. 232-3, (a case of a charge of legacies); or, where the nature of the payment to be made with the sum when raised requires it, as where it is to pay fines for renewals and portions, *Allan v. Backhouse*, where Sir Wm. Grant examines the authorities, 2 Ves. & B. 73-4-7; see Jarman on Wills, ii. 537; 1 Fonbl. 447; 2 Fonbl. 201. Whenever the words "rents and profits" stand alone without the word "annual," or "mortgage," or "leasing," or some words of restriction to enforce the sense of the preceding words to "annual profits," they are considered as including the land itself. Lord Hardwicke, *Gibson v. Rogers*, Amb. 95; and see *Smith v. Evans*, Amb. 364: but a gross sum is not necessarily to be raised at once, 1 Atk. 551; see add. note, No. 4.

(a) *Anon.* 1 Vern. 104; in this case a distinction is taken between a will and a deed, in respect of a charge on rents and profits generally; *Warburton v. Warburton*, 2 Vern. 420, case of a settlement; the application was by the heir, and opposed by the younger children. *Green v. Belchier*, 1 Atk. 506, case of a settlement; *Chitty v. Selwyn*, 2 Atk. 359; there the trustees had an option to raise by mortgage; *Baines v. Dixon*, 1 Ves. 42; "As to the intention," said Lord Hardwicke, "there is not one case in ten where the court has decreed a sale on the words 'rents and profits,' that it has been agreeable to the testator's intention;" and see 1 Ves. J. 234; and *Mills v. Banks*, 3 P. W. 7, 8.

(b) *Meynell v. Massey*, 2 Vern. 2.

(c) *Trafford v. Ashton*, 1 P. W. 418-9; *Ivy v. Gilbert*, Prec. Ch. 583; 2 P. W. 13, 19; 2 P. W. 672: the Master of the Rolls said, "there

was not one single precedent where a sale had been decreed of a trust-term, for a portion to be raised by rents and profits, and no time limited for payment;" and see *Okeden v. Okeden*, 1 Atk. 550, and Mr. Sanders' note; *Rivers v. Derby*, 2 Vern. 72; *Mills v. Banks*, 3 P. W. 1; there the legacy was a bounty and not a portion, p. 7, *Small v. Wing*, 5 Bro. P. C. 66; trust for payment of debt; *Shaftesbury v. Duke of Marlborough*, 2 M. & K. 121; and see 2 Jarman, 538, *et seq.*

(d) It is to be observed that a trust for raising portions by the accumulation of rents, is expressly exempted from the operation of the Thellusson Act, 39 & 40 Geo. III. c. 98; *sup.* p. 166.

(e) *Small v. Wing*, 5 Bro. P. C. 66, where a man creates a term for payment of debts, and declares the trust of that term to be by perception of rents and profits, or by mortgaging to raise sufficient for payment of debts, it restrains it to a payment out of rents and profits merely; but if it had been a trust of the rents and profits the term might have been sold for the satisfaction of creditors. "Where there are other limiting words following rents and profits in a trust for payment of debts," said Lord Hardwicke, "I do not remember any case which would authorize a sale;" *Ridout v. Earl of Plymouth*, 2 Atk. 104. Lord Loughborough appears to have been of the same opinion; *Lingard v. Earl of Derby*, 1 Bro. 311; see Fonbl. 447-8.

(f) *Ivy v. Gilbert*, 2 P. W. 13; *Mills v. Banks*, 3 P. W. 1.

(g) *Ivy v. Gilbert*, *ubi sup.* Prec. Ch. 583; *Rivers v. Earl Derby*, 2 Vern. 72; 3 P. W. 672.

object of raising a gross sum at a fixed time, when it must be raised and paid without delay, to a power to raise by sale or mortgage, unless restrained by the words" (a). A power to sell will in general warrant a mortgage, but not where the intention is that there should be a sale out and out (b).

Where portions are to be raised out of real estate in a gross sum, and the whole are vested and some have become actually payable, the court will direct the whole to be raised, unless there be something in the instrument indicating that the others are not to be raised till a future time; it has been objected that this will prevent the others from having the security of the estate for the full amount of the respective portions as they become payable (c), yet the inconvenience of having 10 or any other number of successive mortgages has been considered to be so great as to induce the court to raise the whole fund at once; the court, said the Vice-Chancellor of England, considering the investment in Three per Cent. Consols for the others as equivalent to payment (d).

(a) *Allan v. Backhouse*, 2 Ves. & B. 74, 75, 77, affirmed Jac. 631; *Bootle v. Blundell*, 1 Meriv. 193, 230, 232, Sir T. Plumer; see also *Sheldon v. Dormer*, 2 Vern. 310; *Backhouse v. Middleton*, 1 C. C. 175; *Okeden v. Okeden*, 1 Atk. 551; and Jarman on Wills, ii. 534, *et seq.*, where the whole doctrine is fully stated and considered; and see *Foster v. Smith*, 2 Y. & Coll. C. C. 193. Mr. Justice Story makes the following observations on this doctrine:—"Where a testator directs a gross sum to be raised out of the rents and profits of an estate at a fixed time, or for a definite purpose or object which must be accomplished within a short period of time, or which cannot be delayed beyond a reasonable time, it is fair to presume that he intends the gross sum shall at all events be raised, so that the end may be punctually accomplished, and that he acts under the impression that it may be so obtained by a due application of the rents and profits within the intermediate period. But the rents and profits are but the means, and the question, therefore, may properly be put, whether the means, if totally inadequate to accomplish the end, are to control the end, or are to yield to it. Now if the gross sum cannot be raised out of the rents and profits at all, or not so soon as to meet the exigency contemplated by the testator, it would seem but a reasonable interpretation of his intention to presume that he meant to dispense with the means, and at all events to require the sum to be raised." The same principle, as Mr. Justice Story observes, § 1064, is applied by the Court of Chancery in other analo-

gous cases, as, for example, in cases of charities, where the doctrine of *cy pres* is applied, and in cases of elegits on judgments under the old law, and in other cases where the debt cannot be paid at all out of the rents and profits, or not within a reasonable time; see *Stileman v. Ashdown*, Ambl. 13; 2 Atk. pp. 477, 608; *O'Gorman v. Comyn*, 2 Scho. & Lef. 150, "which is taking the profits by anticipation," Lord Hardwicke, Ambl. 17. In *Ivy v. Gilbert*, *supra*, the Lord Chancellor said, "Where no time is appointed for the raising of a portion charged only on the profits of the estate, it is due when the profits can raise it;" and see 1 Atk. 551, *sup.* p. 407.

(b) See additional note, No. 5.

(c) This was acted upon by Sir J. Leach, in *Wynter v. Bold*, 1 Sim. & St. 507. There the widow had actually made an appointment by deed, and two of the children had attained 21; but as the original settlement gave her the power of appointing by will or by deed, Sir J. Leach thought that was a sufficient indication of the intention that the portions should not be raised during her life, (see the cases, *sup.* p. 405). In *Dickenson v. Dickenson*, 3 Bro. 19, the M. R., Lord Kenyon, though he allowed the portions, separately charged, to be raised and invested, gave the infant children a right to resort to the real estate for any deficiency.

(d) *Gillibrand v. Gould*, 5 Sim. 156. In the settlement in this case there was a clause that no mortgage was to be made until some one of the portions should become payable, p. 153. *Sheppard v. Wilson*, 4 Hare, 394, does not contradict the rule, as the decision turned

Though younger children may not be entitled to have their portions paid until a future time, they may be entitled to interest on those portions immediately, though such interest may not be immediately raisable: it is a constant rule in equity, that whenever a legacy is given by a father to a child as a provision for such child, though the legacy be payable at a future day, the child has an immediate right to the interest of the money; if the legatee were a stranger to the testator it would be otherwise (a).

By the settlement, a term was created to raise portions to take effect immediately on the death of the father; the wife had an annuity secured to her, and the trustees had a power to enter and distrain; the term was limited, subject to, and not after the expiration of that annuity, and then there was a limitation to the first and other sons; the trustees were not to raise the principal of the portions until after the death of both the father and mother, but interest was given for maintenance until and consequently before the portions should become due and payable. The provision for interest was general, without any qualification whatever, but the eldest son contended that interest was not to be paid during the life of the mother; Sir Wm. Grant held that it was. In giving judgment his Honour said the qualification insisted upon by the heir-at-law was not warranted by the words, and would be contrary to the intention: the children are equally in want of maintenance during the mother's life as after her death. If indeed the estate had been limited to her for her jointure; it might have been argued that the limitation for maintenance could not take effect until the term should come into possession; even in that case it would be doubtful whether these strong and general words would warrant raising maintenance *by sale or mortgage of the reversion*, or at least raising it afterwards, *retrospectively*; but where the trustees have the legal right to the rents and profits, and interest is given for maintenance until the portions shall become due and payable, it would be equally contrary to the spirit and words of the settlement to hold that the maintenance should not take place until after the death of the mother. And in answer to an objection arising upon the proviso that the term on certain events should attend the inheritance, Sir W. Grant, referring to *Hall v. Carter* (b), said, Lord Hardwicke lays no stress on words less qualified than these, observing upon that will,

on the terms of the instruments; it was the heir who sought to raise the whole amount in that case; as in *Wynter v. Bold*; and see *Leech v. Leech*, 2 Drury & W. 577, where Lord Chancellor Sugden declined to follow *Hays v. Bailey*, 3 Sugd. V. and P. 10th ed. p. 4.

(a) Lord Hardwicke, *Green v. Belchier*, 1 Atk. 506; and see *Hall v. Carter*, 2 Atk. 358; a case of a settlement: *Lyddon v. Lyddon*, 14 Ves. 566; *Staniforth v. Staniforth*, 2 Vern. 460.

(b) 2 Atk. 358.

that the intention was that the daughters should have maintenance till the portions became payable, and interest afterwards till they were raised; whence it follows that if you collect from any other part of the will that maintenance was intended to be paid, mere general expressions in a proviso of this kind shall not defeat or counteract that intention (a).

Notwithstanding the latitude of construction that has been resorted to in cases relating to portions, it was held by Lord C. Sugden that when a settlement provides over and over again expressly and carefully, and with all necessary circumstantiality, for the raising of interest in any case in which it appears to have been considered necessary or proper that interest should be raised, it is not possible on such a settlement to conjecture from an ambiguously framed clause, in which nothing is said as to interest, that it was the intention of the parties that interest should be raised, though on the clause standing by itself it would have given interest (b): but interest may be given on the intention without express words (c).

Where a tenant for life has a power conferred on him by will to charge the estate with any sum or sums of money not exceeding 2000*l.*, or any other sum, for the portion or portions of any daughters or younger sons, independently of the stat. 1 Will. IV. c. 46, he may appoint that sum in unequal portions amongst such daughters and younger sons (d).

If an estate on which a portion is charged be together with another estate subject to a mortgage, the estates will be marshalled in favour of the portionist: the party entitled to the portion may say this: "The mortgagee has two funds, and my portion is charged on one of them; and if that one is not sufficient to pay both of us, then I am entitled in equity to compel the mortgagee to resort to the other fund (e), so that the payment of both may be worked out" (f).

The expense of raising portions is generally directed to be borne by the trust estate, and not by the portions themselves (g).

Portions are commonly provided for "Younger children," in respect of which expressions difficulties of construction frequently arise. We

(a) *Lyddon v. Lyddon*, 14 Ves. 565-7; the portion was directed by the decree to be raised with interest from the death of the father.

(b) *Clayton v. Earl of Glengall*, 1 Drury & W. 19, affirming the judgment of the Master of the Rolls; see *Whatford v. Moore*, 3 My. & Cr. 284, Lord Cottenham.

(c) *Clayton v. Glengall*, 1 Con. & L. 320.

(d) *Cotgreave v. Cotgreave*, 1 De G. & S. 39.

(e) N. B. Not merely to stand in the place of the mortgagee, v. *infra*, *Marshalling*.

(f) Lord Eldon, *Lord Ranclyffe v. Parkyns*, 6 Dow. 216.

(g) *Michell v. Michell*, 4 Beav. 549.

now proceed to the consideration of the rules of construction which have been established by the Court of Chancery in order to determine who are to be considered as "younger children."

The head of portions or any other provision for children, especially younger children, as was observed by Lord Hardwicke, admits of a greater variety of determinations here, and of judgment on circumstances than perhaps any other head (a); and the words "younger children" have received what has been called a prodigious latitude of construction (b). The reason is thus explained:—When a real estate is so settled as that it must, on the death of a parent, go to his eldest son, and provision is made, by that parent or by any person standing *in loco parentis*, whether by settlement in contemplation of marriage or by will, for the younger children of such parent, the court has considered the presumption that it was intended to make provision for all the children and not to give a double provision to any so strong, as to warrant it in holding that by the word "younger" must have been intended all except the one who succeeds to the estate (c).

Carrying out this principle, the court has felt itself warranted not only in letting in children not strictly "younger," in favour of the manifest intention of including all *unprovided* for, but also in excluding the child *provided* for by the family estate, even though such child may be a younger child (d). In such cases—as in determining who are

(a) Lord Hardwicke, *Lord Teynham v. Webb*, 2 Ves. 206; and see 1 Eden, 450. In Bythewood's Conveyancing, by Jarman, vol. x. page 189, the cases are collected; and see 2 Jarman on Wills, 118-9.

(b) Lord Hardwicke, *Lord Teynham v. Webb*, 2 Ves. 210.

(c) Every one but the heir, or head and representative of the family, is a younger child in equity, Lord Harcourt, *Beale v. Beale*, 1 P. W. 244; and Lord Hardwicke, 2 Ves. 210; 2 Atk. 457; in the case before Lord Harcourt, the whole estate had gone away to the remainderman, who was thus *hæres factus*, and the rule was applied, *Butler v. Duncombe*, 1 P. W. 451; *Lord Teynham v. Webb*, 2 Ves. 203-10; *Pierson v. Garnett*, 2 Bro. 47; judgment of Mr. Justice Maule and Mr. Baron Rolfe, *Scarisbrick v. Lord Skelmersdale*, 4 Y. & Coll. 113; *Peacocke v. Pares*, 2 Keen, 698, Lord Langdale. It is to be observed that in *Teynham v. Webb*, the provision was not by a parent but by a grandmother, by deed, under a power which had been given to her; but she did it, as Lord Hardwicke said, as a parent providing for the younger children of her daughter, and that it must receive the same construction; 2 Ves. 210.

(d) As in *Mead v. Cave*, 1 Ch. Rep. 224;

Bretton v. Bretton, 2 Freeman, 158; see *Scarisbrick v. Lord Skelmersdale*, 4 Y. & Coll. 114. In *Heneage v. Hunloke*, 2 Atk. 457, by marriage articles it was agreed, *int. alia*, that a freehold estate should be settled by the sister of the plaintiff's grandfather, (who had himself also provided a portion for the younger children,) upon the younger child or children of the marriage of the plaintiff's father and mother, in tail general. A deed was accordingly executed, by which the estate was settled on the younger child or children in tail general. The plaintiff was the only daughter of the marriage, but was older than her brother, the only son. It was admitted that under the limitations in the deed she could not recover at law, but as the articles under which the settlement was made were executory [directory], Lord Hardwicke held he could correct the deed, though of the same date as the articles; and as the plaintiff, under the circumstances, according to the rule above adverted to, was to be considered as a younger child, he ordered that the estate should be conveyed to her in tail general; *ibid.* 458. In *Duke v. Doidge*, cited 2 Ves. Sen. 203-4, it was said by the court, "that every child, except the heir, is considered in equity as a younger; and that eldership not carrying the estate with it, is considered not

to be considered as "heirs of the body" in marriage articles—the court construes the words in a sense in which, from the nature of the instrument, they must have been understood by the parties (a). But this latitude of construction is only applied to gifts from parents or persons standing *in loco parentis*; in dispositions by strangers, unconnected with a provision by way of portion, the words "younger children" receive their ordinary literal interpretation (b). This distinction, it has been said, is founded on the moral obligation on the part of the parent to provide for all his children, and not to make a double provision for any, whereas in the case of a stranger no such obligation exists; in the former case, therefore, the court construes the language used so as, if possible, to make the thing done amount to a complete discharge of the moral obligation (c). This latitude of construction is not extended to a legal limitation in a deed (d). It is not every act done by a parent which is to be construed on principles different from those which would have been applied if the same thing had been done by a stranger, but only those acts which the parent does in the discharge of some natural duty (e). But in the case of a legacy by a brother (who in this sense is a stranger) to the youngest child of his sister born within a certain period, on the evident intention, an only child born within the period prescribed was held to take (f). If a testator has given his own construction to the words "younger children" it must be abided by (g).

such an eldership as shall exclude by virtue of such clauses, and it would be hard that the right of eldership should be taken away, and yet not have the benefit of it as a younger child." In that case the estate went by appointment to the third son, and the eldest, being thus deprived of the estate, was considered as a younger child. As regards the correction made in *Heneage v. Hunloke*, it is to be observed that a settlement made before marriage, if purporting to be made in pursuance of articles, as this evidently was, may be corrected in favour of each child, equally as one made after marriage, *Legg v. Godwire*, Forrest. 20; *Honour v. Honour*, 2 Vern. 658; *S. C.* 1 P. W. 123; though not where the settlement, so executed, is not in pursuance of the articles, but must be taken to be a new agreement. See Cox's note to *West v. Errissey*, 2 P. W. 355; and see *Marquis of Breadalbane v. Marquis of Chandos*, 2 My. & Cr. 735-6, 739, 741-2; *et v. infra*, in this section.

(a) *Scarlsbrick v. Lord Skelmersdale*, 4 Y. & Coll. 114. So an only daughter has been construed to be an only son, and that after the portion given to her had become vested; *Earl of Northumberland v. Earl of*

Egremont, 1 Eden, pp. 435, 449; *Spencer v. Spencer*, 8 Sim. 99; see *Gray v. Earl of Limerick*, add. note, No. 6.

(b) See *Hull v. Hewer*, Amb. 204; 4 Y. & Coll. 116; *Lady Lincoln v. Pelham*, 10 Ves. 173; that was the case of a grandmother; and see the other cases cited, *ibid*.

(c) Judgment of Maule and Rolfe, Barons, 4 Y. & Coll. 116.

(d) Lord Hardwicke, *Heneage v. Hunloke*, 2 Atk. 456. If the words of a deed as they stand are contrary to the clear intent proved by legitimate evidence, as where the deed is made in pursuance of articles, from which it is plain that "younger" was intended in another sense; this, or indeed any other mistake, may be rectified under a distinct head of jurisdiction; 2 Atk. 456; *supra*, p. 411, n. (d).

(e) *Scarlsbrick v. Lord Skelmersdale*, 4 Y. & Coll. 117; the shifting clause, for instance, in that case was not considered to be one.

(f) *Emery v. England*, 3 Ves. 232; the gift over was in the event of the sister having no child born within the period prescribed.

(g) See *Hall v. Luckup*, 4 Sim. 5; but see the strictures on this case, (4 Y. & Coll. pp. 115-6).

When it is said that an elder child unprovided for shall be deemed a younger, it means, as it would seem, an elder child unprovided for by the settlement or will itself, or by means which were in the contemplation of the parties making the settlement or will (*a*). In *Peacock v. Pares* (*b*), a younger child becoming an elder was held not to be entitled to a share under the following circumstances. The younger son before he attained 21, and therefore before his portion vested (*c*), became an eldest son, and then attained 21; he did not take the estate under the limitations in the settlement, his father and brother having intercepted the limitation under which he would have taken it, by joining in suffering a recovery, though his brother by will had devised the estate to him for life, with remainder to his first and other sons in tail. The younger son insisted that under these circumstances he was not to be considered an eldest son within the clause of exclusion: Lord Langdale, after observing that it was not immaterial that whilst the claimant remained a second son he never had a vested interest in the portion (*d*), said, The estate which he would have enjoyed under the settlement was defeated by means incident to the estates created by the settlement, but not by any defect of the settlement itself in providing the means to carry the intention into effect; and that it did not appear to him that the event of the recovery could reasonably be considered to have been in contemplation at the time when the settlement was made, so as to entitle the only son to the benefit of that which has been called “a prodigious latitude of construction” (*e*), which has been adopted in these cases, and appears to be founded on the presumption that it was intended to provide for all the children of the marriage (*f*). That presumption ought, said his Lordship, always to be had in view, and ought, he apprehended, to be acted upon in all cases in which a loss of provision occurs by an event which can properly be supposed to have been in the contemplation of those by whom the settlement was made, and within their intention to provide for. “All the cases appear to me,” added his Lordship, “to be consistent with that view; none of them go the length of deciding that every disappointment of a child’s provision, from whatever cause it may arise, is to be made good by construction upon the presumption to which I have referred (*g*);” and accordingly his Lordship decided against the claim of such eldest son, without reference to the interest in the estate which he had

(*a*) Lord Langdale, *Peacock v. Pares*, 2 Keen, 699.

(*b*) 2 Keen, 689, 691.

(*c*) The portions were to vest at 21, but not to be payable till the death of the father.

(*d*) As to this point, *v. infra*, p. 414.

(*e*) *Supra*, p. 411.

(*f*) *V. supra*, pp. 411-2.

(*g*) *Peacock v. Pares*, 2 Keen, 698-701; and see *Spencer v. Spencer*, 8 Sim. 87.

derived from his brother (a). He had, in fact, become an eldest son within the words of the proviso for accruer; there was nothing in the settlement to alter the natural construction of the words (b), and the presumption under which "elder" has been construed to be "younger" did not apply.

In most (c) of the cases above cited, the portion had not become vested in the child who from a younger son had become the eldest; where the portion has become *vested*, the application of the rule becomes more difficult.

It is settled, as a general rule, that where provisions are made for younger children to the exclusion of an eldest son, and a child who was originally a younger son becomes an elder son, before the time of vesting, according to some of the authorities (d), or before the time of distribution, (though the time of vesting may be antecedent to that period,) according to others, such younger son is to be excluded (e): whether the time of vesting or the time of distribution is to be taken, in like manner as who is to be taken as an eldest and who a youngest son, will depend on the terms and purport of the instrument, the court taking to its aid, according to the general rule of construction before referred to, the surrounding circumstances.

One Bull, by marriage articles, had a power to appoint the sum of 800*l.* (to raise which a term was carved out) for younger children after the death of the wife; but it was provided by the power "that the eldest son, or the son possessing the estate, should have no share of the 800*l.*" Bull had an eldest son John, a second Anthony, and five other children; he appointed the 800*l.* to Anthony and the other younger children by name. After the appointment, and before the death of the wife, John died, whereby Anthony became an eldest son, and the estate

(a) See *Taylor v. Earl of Harewood*, 3 Hare, 385; a case arising upon a bequest to a son, to go over in the event of his coming into possession of an entailed estate.

(b) The safe rule of construction, in general, is to interpret the words of wills, as well as of deeds, according to their plain natural import, unless by so doing some manifest absurdity or inconvenience follow, which is sufficient to satisfy the judge that the person using the words must have used them in some sense different from their ordinary meaning, *Maule, J., and Rolfe, Baron; Scarisbrick v. Lord Skelmersdale*, 4 Y. & Coll. 108; and, they added, if there is nothing to shew that the testator meant to use the word "younger," in any other than its ordinary sense, it matters not whether the trust is executed or executory, *ib.* 117, v. *sup.* p. 135; and accor-

dinally in that case, which arose on a shifting clause, "younger" was construed in its natural ordinary sense, *younger in age*; as to the construction of "besides an eldest only son," see *Walcott v. Blomfield*, 2 Conn. & L. 577.

(c) *Earl of Northumberland v. Egremont*, *sup.* p. 412, is one instance where the portion had become vested.

(d) See *Savage v. Carroll*, 1 Ball & B. 277; and the cases in the note 1 Russell, 341, *et seq.* In *Chadwick v. Doleman*, 2 Vern. 528, more particularly noticed *infra* in this section, the Lord Keeper considered the appointment as in its nature defeasible, though no power of revocation was reserved, on the appointee becoming an eldest son before the time of payment arrived, *Edgeworth v. Edgeworth*, 1 Beatty, 336.

(e) *Windham v. Graham*, 1 Russ. 340.

charged with the same descended upon him. Lord Thurlow held, that Anthony was excluded, though appointed to by name, and that the 800*l.* belonged to the children exclusive of John and Anthony (*a*).

The case of *Matthews v. Paul*, before Sir Thomas Plumer, is an important case on this subject. It was the case of a will made by a grandmother (*b*); the trust was, after the decease of the testatrix's daughter the tenant for life, to transfer the trust fund to all the children of the testatrix's daughter (except an eldest son) equally, the same to be vested interests at 21. John Paul, the actual eldest son at the death of the testatrix, died before the tenant for life and before the time of distribution, leaving an only brother, Walter M. Paul, and sisters surviving. Walter M. Paul had not at that time attained 21, but the eldest sister had attained 21 in the life of the elder son, so that her share at least was vested. The first question was, as W. M. Paul was an *only* son, and as the estate enjoyed by his elder brother (which had come to him under another instrument) had been devised away from him by his brother, whether he was to be considered as an "eldest" son (*c*): it was decided that he was. As to the question, whether under the circumstances W. M. Paul should be excluded, Sir T. Plumer observed, that the distribution of the property was to be at a future time (*d*), so that there was a *prospective direction* to divide the property amongst the children with an express exclusion of an eldest son. The testatrix appearing by her will to be conversant with the state of the family, (having made a gift to W. M. Paul as the second son,) it must be assumed that by using the words an eldest son she referred not to an individual but a character, and to *any* one who might sustain it. As to the case of hardship arising from W. M. Paul not having inherited the family estate, the Master of the Rolls said, cases of hardship might be supposed the other way, but the court must proceed upon general principles (*e*). It had been urged in the argument that the shares were vested under the special clauses in the will, but the Master of the Rolls was of opinion that they were not vested; and his Honour clearly held that the period of distribution was the period to which the exclusion referred;

(*a*) *Broadmead v. Wood*, 1 Bro. 78.

(*b*) Sir T. Plumer expressly noticed this, p. 334.

(*c*) *Duke v. Doidge*, cited 2 Ves. 203, *sup.* p. 411; *Lord Teynham v. Webb*, *ibid.* 198; and the other cases cited in the argument, 3 Swanst. 332.

(*d*) Some part of it was not to be distributed till the termination of certain public

annuities. *Proximum accipere nos oportet, eo tempore quo bonorum possessio deferetur*, Dig. xxxviii. 8. 1. l. 6.

(*e*) See *Peacocke v. Pares*, 2 Keen, 700, *supra*, p. 413. "It would be to no purpose to make deeds if this court could construe them according to what may be for the convenience or inconvenience of the parties, *Cotton v. Cotton*, cited 3 Y. & Coll. 150.

and he said, that even had the words been favourable to W. M. Paul taking a vested interest, yet that a *tacit condition* was annexed to the gift divesting it in the event of the character of exclusion devolving on one in whom it had vested (*a*). Some of the cases, said Sir T. Plumer, had gone further than this, as *Chadwick v. Doleman* (*b*), an excessively strong case; for there, though the appointment of the portion had been in favour of an individual by name, that individual was held to have become an eldest son; the same doctrine of a tacit condition had been recognized in other cases (*c*). So that the rule in ordinary cases appears to be that the period of distribution, not the period of vesting, is the time for ascertaining who is to be excluded, liable to be controlled by any words of a contrary tendency appearing upon the instrument: for if it is fairly to be collected from the provisions of the settlement or other instrument that it was the intention of the parties that the shares of the children were to be vested interests, and to remain so whatever might occur afterwards, or if by appointment or otherwise the share has become, within the meaning of the instrument, indefeasibly vested in such younger son before he becomes the eldest, then such elder son will not be excluded, and if he die before the period of distribution, his share will go to his personal representatives, though there be a clause of survivorship (*d*).

Where a clause in a will is plain and simple in its language the rules of construction, now considered as settled, will not warrant the clause receiving any construction other than according to its ordinary meaning without its appearing satisfactorily from the other parts of the will that the language was used by the testator in some other sense; to induce the court to give to them any other meaning there must be some gross absurdity or glaring inconsistency with the manifest intention of the party making the will: in some cases, therefore, "younger son" has been construed to mean actual younger son, though such con-

(*a*) *Matthews v. Paul*, 3 Swanst. 336-40; and see *Livesey v. Livesey*, 13 Sim. 43. That case, which arose upon a will of a grandmother, was peculiar in its circumstances: and the will, said the Vice-Chancellor of England, evidently consisted of "a mere collection of capricious devises," and the only safe way of deciding was to give the words as they stood in their natural and literal meaning, *ib.* 43-4; so that it was decided on the general rules of construction; it was more like *Matthews v. Paul*, 3 Swanst. 328, than any other case, *ibid.* p. 43.

(*b*) *Supra*, 414.

(*c*) *Savage v. Carroll*, Lord Teynham v. Webb, *Hall v. Hewer*, *Lady Lincoln v. Pet-*

ham, *ubi supra*; and *Bowles v. Bowles*, 10 Ves. 177.

(*d*) *Windham v. Graham*, 1 Russ. 342, 347; Lord Gifford. In *Spencer v. Spencer*, 8 Sim. 98, a younger son who became the eldest, was held to be entitled; the amount of the portion and the time at which it was to vest were considered to be in the power of the father; and that on the terms of that settlement the parties meant that the eldest or only son, was that son who should take the estate by virtue of the settlement, which the younger son did not in that case, within the meaning of the settlement; *et v. supra*, p. 413; see also on this subject *Livesey v. Livesey*, 13 Sim. 35; and *Taylor v. Earl of Harewood*, 3 Hare, 372.

struction may have been contrary to what no doubt would have been the provision in case the actual events had been contemplated (a).

Where a parent had the power to raise portions for younger children, and it was left to him to consider how much should be raised, and on his neglecting to give any direction, 3000*l.* was to be raised, payable to sons at 21 and daughters at 21 or marriage: it was held by Lord Hardwicke, that nothing vested in a younger son who had attained 21 and then by the death of his elder brother became the eldest son, but died in the life of his father; for the father had during his whole life to give direction, and he might have excluded the one who had become the eldest (b).

The court naturally looks with jealousy upon any appointment made by the father amongst his children where he may derive a personal benefit from the deaths of the appointees; but this jealousy is not to be extended to the setting aside what may be a fair *boná fide* exercise of the power. "It is said," observed Lord Eldon, in *Macqueen v. Farquhar*, "that if there is any ground for suspicion that the execution of the power was for the benefit of the party executing, the court must act upon it as a judicial suspicion; I am extremely apprehensive I should make great havoc in many considerable titles by adopting that principle" (c). The Vice-Chancellor, in the late case of *Butcher v. Jackson*, on Lord Eldon's principle, refused to interfere with an appointment of this description (d).

The question as to within what period children must be born so as to take a share in a legacy, or provision by way of portion, given to children or younger children as a class; and how the distribution is to be made, whether *per capita* or *per stirpes*, where a provision is given or secured to the children or younger children of more than one person, though it most commonly arises upon gifts of general legacies, and more properly perhaps belongs to the next section, may be here incidentally noticed.

As to the first of these questions. In cases of portions provided by Settlements, the provision being a debt of nature (e), there can be no doubt, generally speaking, that all younger children to be born of the marriage will be entitled to the benefits by way of portion or otherwise that are given to younger children; but it often becomes a question, where gifts are made by Will to younger children, whether

(a) *Boottle v. Scarisbrick*, 1 Cl. & Fin. Ho. of L. Ca. 189; *Trevor v. Trevor*, *ib.* 267.

(b) *Loder v. Loder*, 2 Ves. 527.

(c) 13 Ves. 479, *v. sup.* p. 399, n. (a).

(d) 14 Sim. 455.

(e) See 1 Ves. 114.

those only who are living at the testator's death or at some period prior to the death of the parent are entitled to share in the distribution. Lord Eldon, in reference to this subject, said, The expression "younger children" is not, unless it is so to be taken on the context, equivalent to naming them; that description *primâ facie* means all the children born after the first (a). Generally speaking, in all cases where the gift is not in possession, that is when a future period of distribution is contemplated by the will or other instrument, all who shall be born during the life of the parent, or until the period of distribution shall arrive, will be entitled to share (b). Whether the gift is to be considered as a present, or an executory gift so as to extend to the period of distribution, must depend upon the construction to be put upon each particular will; very few words will vary the evidence of the testator's intention in these cases, and consequently the meaning of the will. Some general principles may be extracted from the cases on this subject. The court generally takes it that there ought to be a legatee in being, and therefore will not construe a will to extend to persons not in being, unless the testator shows his intention to be such by the words of his will; and the court has been the more induced to adopt this construction by reason of the inconveniences of keeping children out of their provisions when of age to require them (c), and from the consideration that by suspending the period when children are to take the provision intended for them, amongst other inconveniences a greater chance is given of some of the shares going to the father, for whom the bounty was not intended, by the deaths of some of the children in his lifetime (d). In the case from which the latter observations are taken, a legacy was given to younger children on a contingency; Lord Hardwicke determined that on the happening of the contingency there was a present gift, for the legacy upon the face of the will was to be then divided, and consequently all after-born children were excluded (e). There are nice-

(a) Lord Eldon, *Lady Lincoln v. Pelham*, 10 Ves. 172.

(b) See *Matthews v. Paul*, 3 Swanst. 337, 340, dict. of Sir T. Plumer; *Weid v. Bradbury*, 2 Vern. 705, (Lord Cowper); there, by the terms of the will, all the younger children of the plaintiff, living at her death, were let in, as to their moiety; the other moiety was given to the children of J. S. and J. N.; and the rule was applied as to this moiety, so as to let in all their after-born children. Mr. Raithby, referring to Mr. Sanders's note on the same subject in *Heathe v. Heathe* (2 Atk. 122), where the general rules are stated, has, in his own note to *Weid v. Bradbury*, collected the cases

as to when children living at the death of the testator alone are included, and when all who shall be born during the life of the parent, or until the period of distribution shall take; 2 Vern. 705, *et seq.*

(c) In *Horsley v. Chaloner*, 2 Ves. 83, for this reason, and because the legacies were expressly payable at 21, the Master of the Rolls excluded all younger children who were not living at the death of the testator; the Master of the Rolls also relied upon the words "born, or to be born," being omitted. See on this subject, 2 Jarman on Wills, 98.

(d) *Ellison v. Airey*, 1 Ves. 114.

(e) *Ellison v. Airey*, 1 Ves. 111. This case,

ties connected with the subject of the period of the vesting and payment of gifts to children as a Class, upon which I do not enter, nor indeed do they belong to this place: the cases have been most carefully examined and distinguished by Mr. Jarman (*a*), and any further notice on my part would be superfluous.

As to the second question above adverted to, namely, whether the children of two or more persons are to take *per capita* or *per stirpes*; it is clear that if a bequest be made to the younger children of two or more persons, equally to be divided between and amongst them, the division will be *per capita*: and it is the same where the gift is to certain persons who are named, and others, as the children of other persons, who are only described; indeed, such appears to be the general rule in all cases in which children take in their own rights, and not by representation or in substitution for their parents: in the latter case they take *per stirpes* as regards each class, *per capita* as amongst the members of each class (*b*). Where a legacy was given to be divided equally between two persons named and the children of a third, Lord Thurlow held, that the distribution should be *per capita* (*c*). The rule as to division *per capita* has been applied in some instances upon which doubts have been strongly raised; for instance, a gift to a brother and the children of a deceased brother, who in case there had been no will would have taken *per stirpes*, was held to give to each an equal share. A bequest to the younger children of A. and to the younger children of B. means the same exactly as a bequest to the younger children of A. and B., in each case they will take *per capita* (*d*). But the general rule must yield to the intention directly expressed or to be implied from the context, as where the income is given in proportion to the number of the families until the children attain 21, they

fortified by numerous other authorities, was followed in *Ayton v. Ayton*, 1 Cox, 328, by Lord Kenyon, who said that "the rule of construction was settled by that case most conveniently for all parties, and it was this—that so many of the children as come *in esse* before the time when the fund is *distributable*, shall be comprehended and no more." In *Graves v. Boyle*, 1 Atk. 510, Lord Hardwicke included all the younger children, the legacies being given in satisfaction of a bond given in favour of all. Jarman on Wills, vol. ii. p. 73, *et seq.*

(*a*) The terms of the gift over, if any, here as in other cases, may be material to help the construction. *Madison v. Andrew*, cited 2 Ves. 85; see the authorities on this subject, 2 Jarman on Wills, 97, *et seq.*

(*b*) *Weid v. Bradbury*, 2 Vern. 705; *Crone*

v. Odell, 1 Ball & B. 486-7, and cases there cited; *Tomlin v. Hatfield*, 12 Simons, 171; and see *Wyth v. Blackman*, 1 Ves. 196, 202; *et v. supra*, p. 75.

(*c*) *Butler v. Stratton*, 3 Bro. 367. In *Blackler v. Webb*, 2 P. W. 385, the testator's children and grandchildren were held to take *per capita*, "as if all the grandchildren had been named by their respective names," but there one of the testator's daughters was living, so that her children could not represent her.

(*d*) *Lady Lincoln v. Pelham*, 10 Ves. 175. "I cannot," said Lord Eldon, "safely draw an inference from other parts of the will (relating to other property), introducing distinctions tending to shake the settled doctrine;" *ibid.* 176.

in the interim taking a proportionate share as a class, the corpus will be divided in the same manner (a). Where there was a gift to the three nieces of the testatrix, "to be by them divided equally, share and share alike, and at their deaths to go equally, share and share alike, to their children, it was held that the words "their children" meant their *respective* children (b). But the same learned Judge, unwillingly, held that what a testator gave by the words "I give, devise and bequeath the same unto the said Helen Stuart and Agnes Cunningham and their several children, to be divided between them in equal shares and proportions," was given to Mrs. Stuart, Mrs. Cunningham, Mrs. Hay (a daughter of Mrs. Cunningham), and the five children of Mrs. Stuart, equally *per capita* as tenants in common (c).

A direction that property shall be divided between two or more persons *or* their children as a person named shall appoint, gives to such individual a power of selection from the whole as a class, but if he do not exercise the discretion the court will not exercise it, but give the whole to the class, each taking an equal proportion (d), not on the ground that "or" is to be construed "and," but upon the principle of the general intention in favour of the whole as a class, as established by frequent decisions (e).

Where a person entitled to a charge under a trust-term becomes the owner of the inheritance, the term, generally speaking, in equity, will merge (f).

This may suffice to give a general view of the doctrine of the Court of Chancery on the important subject of portions, so far as relates to

(a) *Brett v. Horton*, 4 Beav. 239; and see *Flinn v. Jenkins*, viii. Jur. 661; 1 Coll. 366; and see Roper on Leg. 161.

(b) *Arrow v. Mellish*, 1 De G. & S. 355; the Vice-Chancellor considered that this case was distinguishable from *Malcolm v. Martin*, 3 Bro. 50; *Pearce v. Edmeades*, 1 Younge, p. 357; and *Smith v. Streetfield*, 1 Meriv. 358.

(c) *Cunningham v. Murray*, 1 De G. & S. 370: this part of the decree was not appealed from: there was another point as to a partial intestacy, on which the Lord Chancellor, on appeal, differed from the Vice-Chancellor; see xii. Jur. 547. It was contended, on the part of the plaintiff and Mrs. Hay, that the division should be *per capita*, on the authority of *Brett v. Horton*, 4 Beav. 239; *Woodstock v. Shillito*, 6 Sim. 416; *Warrington v. Warrington*, 2 Hare, 54, and other cases, (see p. 368). The cases cited in favour of the construction that the legatees were to take *per capita*, and which are the material authorities on the point

were (p. 369), *Oates v. Jackson*, 2 Stra. 1172; *Blackler v. Webb*, 2 P. W. 383; *Dyer v. Dyer*, 1 Meriv. 414; *Lady Lincoln v. Pelham*, 10 Ves. 167; *Jeffery v. Honywood*, 4 Mad. 398; (see 2 Jarm. on Wills, 313); *Dowding v. Smith*, 3 Beav. 541; *Crockett v. Crockett*, 1 Hare, 451, reversed on appeal, *v. supra*; *Raikes v. Ward*, *ibid.* p. 445; *Rickabe v. Garwood*, 8 Beav. p. 579; *Lenden v. Blackmore*, 10 Sim. 626; and *Heron v. Stokes*, 2 Dr. & W. 89; 1 Conn. & Law. 270; and see *Turner v. Hudson*, 10 Beav. 222; and see *Thomas v. Hole*, Forrest. 251. The general subject has been investigated by Mr. Roper, p. 157, *et seq.* last edit.; and by Mr. Jarman, On Wills, ii. 47; and see *Mattison v. Tanfield*, 3 Beav. p. 131; and *Armstrong v. Stockham*, vii. Jur. 230. In each of which cases the claimants were held to take *per capita*.

(d) *Penny v. Turner*, 2 Phillips, p. 493; *Longmore v. Broom*, 7 Ves. 128.

(e) *Burrough v. Philcox*, 5 My. & Cr. 92.

(f) See additional note, No. 7.

the nature of Portions and when and how they are to be raised, and how and by whom they are to be enjoyed. We proceed to another branch of this subject, so important that it requires a separate discussion; namely, the doctrines of the Court of Chancery in regard to Double Portions.

ADDITIONAL NOTE.—No. I.—V. *supra*, p. 396.

Case of Poulet v. Poulet.—Portion to be paid at 21, or Marriage.

The case of *Poulet v. Poulet* (referred to in the *Lex Præc.* 264, 268, *sup.* p. 396), 1 Vern. 204, 321; S. C., 2 Ventris, 366, (which is cited as a leading case in *King v. Withers*, For. 122,) was this:—Lord Poulet, by settlement, limited a term to trustees for raising of 4000*l.* apiece for his younger children for their portions, *to be paid* them at their respective marriages, or ages of 21, which should first happen, and for paying them 100*l.* a year for maintenance in the mean time; and after the portions and maintenance raised then the residue of the term was to be in trust for the heir. The settlor then made a will giving portions in similar terms, but providing that they should not be double; though, in the event of his son having no issue male, the daughters were to have 2000*l.* apiece in addition. One of the daughters died when eight years of age; it was held, that as this was a charge on *real estate*, her portion ought not to be raised; but if it had been to be raised out of *personal estate*, it was clear the daughter's representative must have had it. In 1 Vern. 324, a distinction is taken between a will and a deed as to a charge on real estate. As to the point there decided, see *Yates v. Phettiplace*, 2 Vern. 216; S. C., *Prec. Chan.* 140, a case of a will affirmed in *Dom. Proc.*, where the Lord Keeper and Master of the Rolls would not recognize the doctrine of the civil law on the words *to be paid* at 21, &c. (*v. sup.* vol. i. pp. 542, 582, vol. ii. 395); holding that the intention was the same as where the gift was at 21; but see *Lord Rivers v. Lord Derby*, *inf.* next note. A gift of personal estate at 21 is so completely contingent that it will not be forfeited to the crown by a conviction for felony before 21; *Stokes v. Holden*, 1 Keen, 153.

ADDITIONAL NOTE.—No. II.—V. *supra*, p. 397.

Vesting of Portions.

“If,” says Lord Chief Baron Gilbert (*Lex Prætoria*, 270, citing *Lord Rivers v. Lord Derby*, 1 Eq. Ab. 268, pl. 7; 2 Vern. 74, affirmed in *Dom. Proc. ib.* 74, Raithby's note), “in a marriage settlement there be a term to raise 100*l.* apiece for younger children, and there be no time limited for the payment, there it is due and payable to such children as soon as ever they are born; and therefore, if they die before 21, it shall go to their executors or administrators, because if it had been raised immediately the money would have gone to their executors and administrators; and where it ought to have been raised immediately it is looked upon in Equity according to the rule of the civil law to be raised, for *Qui habet remedium ad rem, ipsam rem videtur habere.*” The daughter, in *Rivers v. Lord Derby*, had attained 17. The Lord Chancellor (Jeffreys) said he would not be bound by *Poulet v. Poulet*, (*supra*, preceding note,) though affirmed in the House of Lords; but the case before him does not appear to have interfered with that doctrine.

ADDITIONAL NOTE.—No. III.—V. *supra*, p. 402.

Time when Portion should be raised by means of Reversionary Term—Lord Thurlow's Doctrine.

Lord Thurlow stated the rule thus :—Where a man gives portions charged on a term to arise upon the death of a party, it shows that they are not to be paid till *after the death of that party*, and that though it be upon attaining 21 or marriage, yet it can only be where the term shall come into existence (1): but this doctrine is overruled; see *Michell v. Michell*, 4 Beav. 549.

ADDITIONAL NOTE.—No. IV.

Portion to be raised out of Rents—Ivy v. Gilbert, v. supra, p. 407.

“The natural meaning of raising a portion by rents, issues, and profits, is by the *yearly* profits; but to prevent an inconvenience, the word [profits] has, in some particular instances, (*Trafford v. Ashton*, 1 P. W. 418), been extended to any profits which the land will yield, either by sale or mortgage; but where there are subsequent words to explain and restrain it, as by leasing, I have not heard of any case which has said that any other method shall be made use of for the raising of it. It is as much the intent of the settlement to confine the manner of raising this portion to leasing, as to secure any portion at all; and consequently it would be a plain breach of trust to raise it any other way. And at the time of making this settlement, (which was in 1657,) I do not think that the word [profits] was extended to signify the profits which might be made of land by sale or mortgage. Here is no time appointed for the raising of this portion, and therefore the portion in this case is due, *when the profits can raise it*; (and see *Evelyn v. Evelyn, supra*; *Mills v. Banks*, 3 P. W. 8; *Okeden v. Okeden, supra*; *Small v. Wing*, 5 Bro. P. C.; *Gibson v. Rogers*, Amb. 95;) and it carries no interest; but when the sum of 1500*l.* is, or might have been, raised by the profits, then it becomes due, and the land is discharged, as having borne its burden.”—Lord King, *Ivy v. Gilbert*, 2 P. W. 19, affirmed in Dom. Proc., 1 Bro. P. C. 468, reversing Lord Macclesfield’s decree, Prec. Ch. 583.

ADDITIONAL NOTE.—No. V.—*Supra*, p. 408.

Direction for Sale when it Authorizes a Mortgage.

A direction to sell, unless there be an intention to convert out and out (as to which see *Haldenby v. Spofforth*, 1 Beav. 390, *supra*), will authorize a mortgage, and generally speaking, as a mortgage preserves the estate, it is the preferable mode. The fol-

(1) *Conway v. Conway*, 3 Bro. 271; however, in that case, he held that the portion appointed under a power given to the father in that case, was raisable during the life of the

widow, saying, “One would go as far as might be upon the *rule not to press estates*, but still such an intention can never be raised against *express* declaration.”

lowing is an abstract of the late case of *The Earl of Orford v. The Earl of Albemarle*, (xii. Jurist, 811,) on this point.—Estates in Dorsetshire were conveyed to trustees upon trust that they, or the survivor of them, or the heirs of the survivor should, at the request of A. and B., or the survivor of them, or, if both should be dead, at the discretion of the trustees or trustee for the time being, “sell and dispose of all and singular the same hereditaments and premises, either together or in parcels, and either by public auction or by private contract.” The trustees were directed to stand possessed of the proceeds upon the trusts and for the intents and purposes, &c., declared by a deed of even date. The deed of even date was a settlement of certain estates in Norfolk in strict settlement upon A. and B., and the son of B. in tail male; and the trusts thereby declared of the proceeds of the sale of the Dorsetshire estates were for payment of certain sums of money, some of which were charged upon the Norfolk estates. “And as to the residue (if any) of the money which should arise by such sale, remaining unapplied for the purposes aforesaid,” the same were to be applied in the purchase of lands to be settled to the same uses as the Norfolk estates. And it was declared, that the rents, issues, and profits of the Dorsetshire estates until the same should be sold, or so much thereof as should be remaining unsold, should be paid and applied to the same person, and for the same purposes, as the rents of the lands to be purchased with the residue of such trust money should be payable or applicable to, if such purchase were actually made:—It was held, that this trust for sale authorized a mortgage of the Dorsetshire estates for a sum sufficient to pay off all the charges thrown upon those estates.

ADDITIONAL NOTE.—No. VI.—*Supra*, p. 412.

Who is a “Younger Child.”

The following is an abstract of the late case of *Gray v. The Earl of Limerick*, xii. Jur. 817, referred to *supra*, p. 412.—By a settlement, 15,000*l.* was directed to be raised for the portions of the child and children of Henry Viscount Glentworth by Annabella, his wife, not being an eldest son, and besides an eldest or other son of Henry Viscount Glentworth by Annabella, who, at the death of Henry Viscount Glentworth and Edmund Henry Earl of Limerick, his father, should be entitled to the said estates. The portions were to vest in sons at the age of twenty-one years. When the settlement was executed Henry Viscount Glentworth had two sons, viz. Edmund Henry Pery, and William Henry Tennison Pery, his elder and second sons. Henry Viscount Glentworth died in the lifetime of the Earl, and Edmund Henry Pery became Viscount Glentworth, and Edmund Henry died also in the lifetime of the Earl. The Earl then died, and was succeeded in the title and estates by William Henry Tennison Pery, who became Earl of Limerick.

Edmund Henry Viscount Glentworth appointed executors, who claimed a share of the 15,000*l.*, on the ground, that although the father, Henry Viscount Glentworth, was eldest son at the time of the settlement, yet he died in the life of the Earl, and Edmund Henry Viscount Glentworth had attained twenty-one, but had died without succeeding to the title.

William Henry Tennison, Earl of Limerick, also claimed a share of the 15,000*l.*, on the ground that he had attained twenty-one while a younger son, and before the death of his father and grandfather:—It was held, that neither the representatives of Edmund

Henry Viscount Glentworth nor William Henry Tennyson, Earl of Limerick, were entitled to any share in the 15,000*l.* As to the claim of the latter, the Vice-Chancellor K. Bruce in giving judgment, said, "The letter, as I conceive, is plainly opposed to the present Earl's claim. He became heir apparent of the late Earl, and immediately on the late Earl's death the tenant for life in possession under the settlement. But the spirit is not, I think, in this instance, so clear, especially as I believe the present Earl attained his majority in his elder brother's lifetime. The letter is within the rule, unless it is at variance with the spirit. Of such variance, I am not thoroughly persuaded nor convinced. I cannot allow myself to depart from the letter. Abiding by it, I must hold, that the present Lord Limerick, as I have said, is not entitled."

ADDITIONAL NOTE.—No. VII.

*Rules of Equity as to Merger of Terms, from Gilbert's Lex Prætoria, p. 264 ;
v. supra, p. 420.*

"The rules touching Merger are, that if a man has the same interest and absolute dominion and property in the whole inheritance as he has in the term, or power for raising money out of the inheritance, there it must merge, for a man cannot have power to raise money for my benefit out of that which is mine ; but if there be any difference between the two interests, or any other person intermediate, then there can be no merger. For if there be any merger in the first case, it will change the intent of the conveyance, and in the other case, there being an intermediate estate, there is no merger at law, no more than there is in a Court of Equity in the case of a trust ;" and see *Smith v. Frederick*, 1 Russ. 174, 209, *et seq.* ; approved by Lord Chancellor Sugden, in *Walcott v. Blomfield*, 4 Dru. & W. 239.—As to merger, see the late case of *Law v. Urwin*, xii. Jur. 1012.

The late case of *Legh v. Legh*, 15 Sim. 138, may be referred to as an additional illustration ; p. 410, note (e).

§. 2.—Double Portions.—Satisfaction.

The Court leans against Double Portions.

Will First.

Lord Thurlow's Exposition.

Rule as to Ordinary Debt due from Father, (in note).

Settlement First.

Not to be extended in such Cases.

Graves v. Boyle.

Obvious Difference where Settlement first and Will afterwards.

No marked Consequence of the Distinction.

Exposition by Lord Cottenham.

Doctrine in case of Stranger.

Regard to be had to the Circumstances—Case of one only Younger Child.

Not every Advancement within the Rule.

Consideration towards Heir and Devisee.

The Presumption is a Presumption of Law, not to go to a Jury.

The Satisfaction may go in Part only.

Doctrine of Satisfaction depends on Intention.

If Intention can be collected from the Instrument that the first Provision is not final, Child may take both.

Where the Provisions are not ejusdem generis, intention to give both presumed.

Bellasis v. Uthwatt.

Mr. Sanders's Note, and Mr. Swanston's Note, as to the Difference between Performance and Satisfaction, referred to (in Note), et v. infra.

Holmes v. Holmes.

Davy's v. Boucher.

Effect of afterwards putting out a Son Apprentice (in Note).

Bengough v. Walker.

Second Gift not so Beneficial in Enjoyment as the First.

Legacy of a Residue.

Lord Glengall v. Barnard.

Distinction between Satisfaction and Performance, et v. supra.

Goldsmid v. Goldsmid, before Sir T. Plumer (in Note).

Trimmer v. Bayne, before Lord Eldon.

Gift of so much of Residue as shall amount to a Certain Sum.

Assumption of Debt of Son.

Effect of Material Differences.

Effect of Slight Differences.

In the First, Provision absolute; in the Second, settled on Child and Issue.

Weall v. Rice.

Booker v. Allen.

Wharton v. Lord Durham, in the House of Lords.

Portion adeemed not set up by mere Republication of Will.

Presumption may be rebutted by Extrinsic Evidence.

Debeze v. Mann.

When Evidence is admitted on one Side it must be admitted on the other.

Evidence of Declarations.

Those before and subsequent admitted, et v. supra, p. 246.

The Law settled as to Admission of Parol Evidence in some cases.

Admitted, where.

Legacy first, and then Advancement of Money without anything more.

Legacy given to Daughter who was Indebted to the Testator (in Note).

Admitted even where there is a Writing in which no Express or Implied Intention is to be found.

Evidence admitted in case of Provision by Husband for Wife, to explain Advancement.

Refused to shew Gift by Will to Wife was Satisfaction of Debt.

Fowler v. Fowler (in Note).

Not admitted.

Where Evidence would contradict Express Intent.

General Rule as to Admission of Parol Evidence in Legatory Matters.

Not admitted where Rule of Construction supports Apparent Intent.

But admitted in all cases where Rule of Construction raises a Presumption against Apparent Intent.

Even it seems where same Legacy given in one Instrument.

Rule that Will shall not be construed by matter dehors.

In Coote v. Boyd Evidence admitted by Lord Thurlow in case of two Legacies by separate Instruments.

Lord Alvanley's and Sir E. Sugden's Strictures on this Case.

Shudal v. Jekyl, before Lord Hardwicke, also objectionable (in Note).

Difference between the Cases last observed upon, and those in which Presumption arises against Double Portions on Distinct Acts—Will and Settlement.

Rather a Presumption of Evidence than of Law.

Primary Presumption may be met by Evidence of Intention.

Further Presumption arises where there is a Substantial Difference in the two Provisions which repels or extinguishes the Primary One.

Question whether Extrinsic Evidence can be admitted in such cases.

Cases bearing by Analogy.

Bigglestone v. Grubb.

Evidence received to explain the Nature of the Subsequent Advance.

Chapman v. Vernon.

Hartopp v. Hartopp.

Not strictly Competent in the First Instance.

But Competent to show from whom Consideration moved.

Effect of this Case.

Cases applying directly.

Weall v. Rice—Settlement first—Sir J. Leach.

The Differences in that Case held not to be substantial.

General Rule of Sir J. Leach.

Effect of his Dictum in that Case.

Hooker v. Allen—Will first.

Lloyd v. Harvey—Will first.

Dictum in Lloyd v. Harvey, and Sir E. Sugden's Strictures on it.

Hall v. Hill.

Evidence rejected, by Sir E. Sugden, where Differences held to be Material.

Wallace v. Pomfret, before Lord Eldon.

Evidence received against Construction and Presumption of Law—Contrary to

Fowler v. Fowler, 3 P. W.

Effect of this Case.

The Question stated, and Reasons in support of Sir J. Leach's Rule.

Effect of the Presumption may be to destroy Contingent Gift over.

Twining v. Powell.

Election.

Additional Notes.

1. *Judgment of Lord Cottenham in Lady E. Thynne v. Earl of Glengall, August, 1848, in the House of Lords.*

2. *Statute for Extinction of Satisfied Terms.—Remarks upon.*

It frequently happens, that after a parent or a person standing in *loco parentis* has made a provision for a child by his will, the marriage of the child or an opportunity for his advancement in life, causes the parent to make a provision for the same child during his life: or the converse may take place; the parent, on the marriage of the child or on some other occasion, may engage to make a certain provision for his child, and afterwards by his will give to the child a legacy or provision without reference to his previous engagement; thus in each case making, in terms, a Double provision for the same child. The Court of Chancery, in legal phrase, leans strongly against double portions, so that generally the second provision in the former case is treated as an ademption of the first, in the second as a satisfaction, unless an intention to the contrary is shown.

This leaning of the court appears partly to have had its origin, with other doctrines, from the favour which was, in early times, in this court as well as in the courts of law, shown to the heir; portions being in those days usually charged on the lands, double portions would have brought a greater burthen upon the head of the family (a). This doctrine had the additional recommendation—which, with our early Chancellors, would have great weight—that it was in a great degree in conformity with the doctrines of the Roman Law. It is the general nature and the application of the doctrines in regard to double portions, which were adverted to in the former volume (b), that we are now to consider.

The doctrine of the Court of Chancery on this subject was ex-

(a) Lord Hardw. 2 Atk. 518; Ambl. 326; *Barret v. Beekford*, 1 Ves. 520.

(b) Vol. i. p. 568.

pounded by Lord Thurlow, after Lord Hardwicke and others of his predecessors (a), who were desirous of founding the doctrine on reasonable principles independently of mere authority, as follows:—As regards an advancement following a gift by will, a legacy by a father, or person standing *in loco parentis* to a child (b), is considered as a portion; it therefore carries with it these qualities, that it is a deliberate distribution amongst his children of such portions as he thinks fit: crediting him for that deliberation, if he advances in his life that sum which he had adjudged to be the due and proper portion for that child; the presumption of law is that he has satisfied that intent, and consequently that it is no longer a ground for any further demand; and the law intends that every testator knows that such is the law, as it intends every man to know its rules (c).

The same presumption arises upon a gift by will subsequent to a provision by settlement; but in *Graves v. Boyle* Lord Hardwicke said that cases of satisfaction of portions secured to a child by subsequent gift by will ought not to be extended further than they had gone (d); and Lord Thurlow observed, that Lord Cowper and Lord Hardwicke had turned the stream of the decisions in regard to satisfaction, and had fixed the law (e). There is indeed an obvious difference in the case of an ademption of a legacy by a subsequent advancement, and of

(a) Lord Thurlow seems to have thought, but without looking into it very closely, that this doctrine was adopted from the Roman law (see 1 Bro. 427), and that it was not in accordance with the genius of the law of England, and he did not approve of it (1 Ves. J. 109). The principle may no doubt be found in the Roman law, a circumstance that, as has been remarked in the former volume, would favour its introduction in the view of our early Chancellors. Mr. Justice Story has adverted to this subject: he remarks (§ 1108), “that the doctrine of Satisfaction, and also of the Performance of Covenants by bequests in wills, was well known to the Roman law, and that it was probably derived from that source, with some variations, into our system of jurisprudence;” instancing the case (Dig. xxx. 1. l. 84, § 6) of a portion satisfied by a subsequent legacy of equal amount, and that Parol Evidence of an intention to satisfy the portion was held to be admissible (Dig. xxx. 1. l. 123): and see § 1114, n. (2). The above remarks of Lord Thurlow are also there observed upon, and the rules of the Roman law, as to ademption, and the admission of evidence of intention, are stated, and the differences and agreements in the rules of the Roman law, and those which prevail in the Court of Chancery, are noticed: but favour to the heir on this, as on

other occasions, as has already been observed, appears to have had a material influence on the minds of the early Chancellors. A similar doctrine prevails, as already noticed (vol. i. p. 570), in regard to Debts, namely, that, generally, a legacy by a debtor is presumed to be a satisfaction of a debt equal to or less in amount than the legacy; though this rule also has been disapproved (*v. int. al. Chancy's case*, 1 P. W. 408-10, where the early cases are collected); *Clark v. Sewell*, 3 Atk. 97; *Mathews v. Mathews*, 2 Ves. 635; *Hinchcliffe v. Hinchcliffe*, 3 Ves. 527; *Stocken v. Stocken*, 4 Sim. 152. Where an ordinary debt is due by a parent to a child the same rules apply as between strangers: *Tolson v. Collins*, 4 Ves. 491. *V. infra*, add. note, No. 1; and *Plunkett v. Lewis*, 3 Hare, 323-4.

(b) *V. supra*, and 2 Atk. 518: every other person, even a grandfather, a brother, or a sister, is out of the rule.

(c) Lord Thurlow, *Ellison v. Cookson*, 1 Ves. Jun. 107-10; Lord Hardwicke, to same effect, *Shudal v. Jekyll*, 2 Atk. 517; *Watson v. Lord Lincoln*, Ambl. 326.

(d) *Graves v. Boyle*, 1 Atk. 509. The Lord Chancellor, in *Cuthbert v. Peacock*, 2 Vern. 593, had said the same of satisfaction of debts by legacies.

(e) *Powel v. Cleaver*, 2 Bro. 516.

a legacy given after an advancement, for a legacy of itself imports bounty to the legatee (*a*); and if the testator takes no notice of the settlement, the presumption can hardly be considered so strong as where he does not advert to his will in a subsequent settlement, which he could hardly be expected to do even if the will were present to his mind; but no very marked consequences of this distinction as regards portions are to be found in the later authorities (*b*), indeed the rule was established as to cases where the will followed the settlement before it was settled as to the converse (*c*).

Lord Eldon has characterized this as a sort of artificial rule, in the application of which legitimate children have been very harshly treated, upon an artificial notion that the father is paying to them a debt of nature; for natural children being in the light of strangers, in case double provisions by will and by advancement are made in their favour, neither the reason of the rule nor the rule itself applies, but the legacy is considered to proceed from mere bounty, and therefore has its effect whether it precede or follow the advancement (*d*).

This doctrine has, in later times, been the subject of much discussion, the more so perhaps from Lord Thurlow, as well as other judges, having expressed some dissatisfaction at its adoption (*e*). In our time, Lord Cottenham, who has not unfrequently had to consider it, has thus laid down the rule: "All the decisions," says his Lordship, "upon questions of double portions depend upon the *declared or presumed intention* of the donor. The presumption of equity is against double portions (*f*), because it is not thought probable, when the object appears to be to make a provision, and that object has been effected by one instrument, that the repetition of it in the second should be intended as an addition to the first; the second provision,

(*a*) Lord Thurlow, *Powell v. Cleaver*, 2 Bro. 517; *Clark v. Sewell*, 3 Atk. 97; *Eastwood v. Vinke*, 2 P. W. 616.

(*b*) It is, however, to be observed that Sir E. Sugden's rule for the exclusion of parol evidence, as I understand it, only extends to where the will is last; v. *infra*, p. 449, note; and see the next note.

(*c*) Lord Thurlow seems to have made a distinction between cases where the will was first and where the settlement was first. Upon this Lord Alvanley observed, in *Hinchcliffe v. Hinchcliffe*, "I wish this case to be considered as different from the cases of a will and a subsequent advancement. The cases before Lord Thurlow were of the latter kind. I take the rule never to have been departed from, that *primâ facie* a portion to a child, by the will of

the parent, if there is any prior provision, is a satisfaction, unless it is shown clearly that it is not so intended," *Hinchcliffe v. Hinchcliffe*, 3 Ves. 527-9; and his Lordship notices (p. 527) that Lord Thurlow had intimated a doubt, in *Warren v. Warren* (1 Bro. 308), whether the rule was established where the will was first, and the provision by settlement afterwards, but in subsequent determinations he had said it was too late to question the rule, though it had been carried too far; *ibid.* p. 526.

(*d*) See *Ex parte Pye*, 18 Ves. 151.

(*e*) V. *supra*; and *int. alia*, 2 Bro. 517; *Powell v. Cleaver*.

(*f*) V. *supra*; and see the judgment of Vice-Chancellor Wigram, *Suisse v. Lowther*, 2 Hare, 433; and, as to satisfaction, 3 Hare, 324.

therefore, is presumed to be intended as a substitution for, and not an addition to, that first given; but when the gift is mere bounty, there is no ground for raising any presumption of intention as to its amount, although such amount be comprised in two or more gifts" (a), "and although in some instances the presumption may defeat the intention of the donor, in most cases it is calculated to effect it" (b).

Where it is provided in a settlement, as is frequently the case, that if any advancement be made by the parent on marriage or otherwise to the child in his *lifetime*, such advancement shall be deemed, according to its amount, in part or in whole of the portion provided by the settlement unless the contrary appear in writing, it has been settled by decision that a legacy given to the child by the *will* of the parent shall be considered as a satisfaction *pro tanto* or in full, according to the amount; and it seems that in such case a residue equally as a particular legacy will be held to be a satisfaction (c). The will, being silent in that respect, is not, *per se*, equivalent to a declaration that a legacy shall not be towards such satisfaction (d). But a share which the child takes on the intestacy of the parent is not held to be a satisfaction, for the share does not go to the child by any act that has been done by the parent in his lifetime (e).

It is to be remarked that in these cases, as in those relating to the raising of portions for younger children (f), Lord Hardwicke considered that the court *might* take into consideration the circumstances of the case. As for instance, where there is an eldest son (g) and more

(a) *V. supra*. "I have gone through all the cases," said Lord Thurlow, "and it appears to be the result of them, that where a Stranger gives a legacy by will, and afterwards gives a sum, without any evidence that it is intended for the same purpose, it is not taken as a satisfaction; to make it so, it must appear, at the time of the gift, to be meant as an ademption of the legacy;" *Powel v. Cleaver*, 2 Bro. 517. And in another case Lord Thurlow said, "Where the question arises upon two provisions for a stranger, the only ground on which a decree can be made is that the intent of the testator, collected on fair grounds," (and as it is presumed from the instruments themselves), "was that the party should not have both," *Jeacock v. Falkener*, 1 Bro. 296; as where a legacy is given in a will for a particular purpose, and another bounty is afterwards given for the same purpose, (*Debeze v. Mann*, 2 Bro. 521; and see *Roome v. Roome*, 3 Atk. 183, to same effect). So that in the case of a stranger the onus is upon those who contend that the two provisions are to be considered but as one; see also *Wetherby v. Dixon*, G. Coop. Rep.

279; and Sir J. Wigram's observations, *Suisse v. Lowther*, 2 Hare, 434-5.

(b) *Pym v. Lockyer*, 5 My. & Cr. 34-5-8; Sir J. Leach, in *Weall v. Rice*, 2 Russ. & M. 267, also expressed his approbation of the rule as founded on the intention.

(c) Lord Eldon, *Leake v. Leake*, 10 Ves. 477, 489-90, a very peculiar case; *Onslow v. Michell*, 18 Ves. 494, Sir Wm. Grant, who considered that the question was first settled by *Leake v. Leake*: the cases are collected in the arguments and judgment; they are examined, Roper on Leg. 95, 104; and see *Golding v. Haverfield*, 13 Pri. 593; *Fazakerly v. Gillibrand*, 6 Sim. 594, 602, a case of money directed to be raised out of real estate.

(d) *Golding v. Haverfield*, 13 Price, 593; 1 McClell. 345; *et v. Papillon v. Papillon*, 11 Sim. 642.

(e) See the cases in the preceding notes; and *Twisden v. Twisden*, 9 Ves. 413, 427.

(f) *V. supra*, *int. al.* p. 398.

(g) So, as will be remembered, defects in the execution of powers would not be aided, nor would surrenders of copyholds have been

children, and the demand is made of such double portions to his prejudice, there the court, said Lord Hardwicke, inclines in favour of satisfaction; but it is otherwise where there is an only younger child, and no intention is expressed by the father (*a*). Lord Thurlow also appears to have considered that some difference in construction might take place where it was not an eldest son who was to be burthened; where, said he, portions are charged on an estate which will go to the *eldest son*, additional portions on condition shall be like laws made after others, and repeal the former (*b*); but Lord Loughborough and Lord Alvanley considered that the general representative in respect of land or money, upon whom the burthen of the portions would fall, was entitled to the same consideration as the heir (*c*).

It does not follow that every sum of money which a parent may give in his lifetime is to be considered as a portion. The court has never added up small sums in order to show that if the child claims those sums as well as the larger provision made for him by the parent he would be taking a double portion (*d*); and parol evidence of the circumstances under which the advances were made may, as will hereafter be more particularly mentioned, be let in: if the second gift is accompanied by an instrument in which it is described as a portion or provision or by any similar word, there it will be taken as a portion so as to found the presumption (*e*). This presumption is a presumption of law—a presumption which the law makes upon the general facts; therefore it is not to be sent to a jury, as was for a time contended (*f*): but, as we shall see, it is not so unbending as is the presumption arising from a *rule* of law or of construction.

This presumption may be applied so that the portion shall be treated

supplied to the disherison of the heir-at-law; *Pike v. White*, 3 Bro. 286; *Rodgers v. Marshall*, 17 Ves. 294; *Carter v. Carter*, Mosely, 365.

(*a*) *Bellasis v. Uthwatt*, 1 Atk. 427.

(*b*) Lord Thurlow, *Jeacock v. Falkener*, 1 Bro. 296.

(*c*) *Hinchcliffe v. Hinchcliffe*, 3 Ves. 529; a devisee is put upon the same footing as the heir in *Jennings v. Looks*, 2 P. Wms. p. 276, so the *hæres factus* is equally as the *hæres natus* entitled to have the general personal estate applied in exoneration of the real estate, *Gower v. Mead*, Prec. Chan. 2; even a devisee of a part of the estate only, *Galton v. Hancock*, 2 Atk. 436: *et v. supra*.

(*d*) Vice-Chancellor Wigram, 2 Hare, 434.

(*e*) *Ibid.*; but there is no technical sense attributable to the word "provision," unless where found in a gift by a parent or person in

loco parentis, *ibid.* 435.

(*f*) See *Ellison v. Cookson*, 1 Ves. J. 103, 188. Lord Eldon, when Attorney-General, in arguing *Powell v. Cleaver*, 2 Bro. 514, said, "I am content to agree that the rule of satisfaction, as between parent and child, is a rule of evidence and *not a rule of law*." Lord Thurlow, in the same case, said, "With respect to the question of ademption, the case of parent and child is a presumption of evidence only, not a presumption of law;" *ibid.* 516. But in *Ellison v. Cookson*, 3 Bro. 63, Lord Thurlow said, it was a presumption of law, and he added, "I say a presumption of law, because it is put that it is proper to go to a jury, but that would be to send to a jury a presumption of law;" at the same time he said, "It is a presumption capable of being rebutted by evidence: the evidence in this case may be drawn from the language of both gifts," &c.

as satisfied *in part* only. If, said Lord Eldon, a portion is given to a child by will, or a gift is so constituted as to acknowledge the legal relation, and afterwards an advancement is made on marriage, that is *primâ facie* an ademption of the whole or *pro tanto*. His Lordship, however, proceeded to say that “in some cases it has gone the length consistent with principle,—but shewing the fallacy of much of the reasoning—that the portion, though much less in amount than the legacy, has been held a satisfaction in some instances (a); upon this ground, that the father, owing what is called a debt of nature, is the judge of that provision by which he means to satisfy it, and though at the time of making the will he thought he could not discharge that debt with less than 10,000*l.*, yet on a change of his circumstances, and of his sentiments upon that moral obligation, it may be satisfied by the advance of a portion of 5000*l.*” (b).

On this latter dictum of Lord Eldon, Mr. Roper (c) had stated the rule to be that an advance by a father to his child, though less than the legacy given by his will, would be a complete ademption of the legacy (d). In a late case Lord Cottenham examined this doctrine, and he came to the conclusion that there was not sufficient authority to support the supposed rule, and that on the contrary the weight of authority was decidedly against it; and as it could not be supported on authority, and was in its operation generally destructive of the provisions which parents have intended for their children, his Lordship declined to adopt or to follow it, and therefore declared in the case before him that the advancements were to be taken as adempments *pro tanto* only of the legacies before given (e): and the law on this point may now be considered as settled.

As the doctrine of satisfaction depends, as we have seen, on the intention, and that intention is to be collected, if possible, by the ordinary rules applicable to construction and evidence, from the instruments; the vigilance of the judges has naturally been directed in the first place to the consideration of the instruments themselves, in order to see whether they afford any indication of an intention one way or the other. If the portions are consistent, and if neither of them can on the face of

(a) Referring probably to Lord Hardwicke's dictum in *Shudal v. Jekyll*, 2 Atk. 518 (though his Lordship, in a preceding passage in the same page, adverts to a satisfaction *in part*), and to *Hartop v. Whitmore*, 1 P. W. 681; but the report does not accurately state the facts, (see Cox's note); and to *Clarke v. Burgoine*, 1 Dick. 354; but that case is misreported; see 5 My. & Cr. 41.

(b) *Ex parte Pye*, 18 Ves. 148, 151; and see 1 Ball & B. 304.

(c) On Legacies, p. 318; see p. 366, last edition.

(d) It had been held that a legacy might go in *part satisfaction* of a *previous portion*; see *Warren v. Warren*, 1 Bro. 305; 1 Cox, Rep. 41-2; Fonbl. 326.

(e) *Pym v. Lockyer*, 5 My. & Cr. 55.

the instrument be considered as the ultimate provision intended by the testator to be made for his child, the presumption will not arise, and the child may take both (a): it is the same if a distinct view or purpose for giving the second provision be pointed out (b).

It has always been considered of material importance in reference to the intention, particularly by those judges who have disapproved of the rule, to examine whether the portion subsequently given is of the Same Nature as the portion originally given; for if of a different nature, or in legal phrase not *ejusdem generis*, it has been presumed that the subsequent gift could not have been intended as a substitution for the first, unless there should be an express declaration or a clear inference from other parts of the instrument, and more particularly in cases of Satisfaction, that such was the intention of the donor.

“When a bequest,” said Lord Hardwicke, in a case as to a portion, “is to be taken to be by way of satisfaction for money before due, the thing given in satisfaction must be of the same nature, and attended with the same certainty (c) as the thing in lieu of which it is given; land is not to be taken in satisfaction for money, nor money for land;” and in the case before him, (which was the case of an only child,) his Lordship held that a legacy of 10,000*l.*, payable on the contingency of the child attaining 18, was not, especially as it was the case of an only child, to be considered as a satisfaction for the portion absolutely vested, which was an absolute interest in 300*l.* per annum Exchequer Annuities (d). So in *Holmes v. Holmes*, a bequest by way of portion of

(a) See *Hanbury v. Hanbury*, 2 Bro. 352, 533: in that case Lord Thurlow decided that the provisions were cumulative on this principle; and see *Baugh v. Read*, *ubi infra*.

(b) *Baugh v. Read*, 1 Ves. J. 357; stated in Lord Brougham's judgment, *Wharton v. Lord Durham*, 3 My. & K. 479.

(c) And see *Barret v. Beckford*, 1 Ves. 521; *Masters v. Masters*, 1 P. W. 423-4; *Crompton v. Sale*, 2 P. W. 555.

(d) *Bellasis v. Uthwatt*, 1 Atk. 426; *Chaplin v. Chaplin*, 3 P. W. 247; *Bengough v. Walker*, 15 Ves. 512. In *Forsight v. Grant*, (1 Ves. J. 298,) a testator gave a bond to pay 2000*l.* three months after his death, in trust for his wife and children; if no children, for the wife absolutely: by his will he devised all his real and personal estate, in trust for his wife for life, then for his children, if any, if none then over to the plaintiffs; and he expressly revoked all former settlements and wills made by him; Lord Thurlow clearly held the widow might take both. See *Plunkett v. Lewis*, *infra*.

Mr. Sanders, in his note to *Bellasis v. Uth-*

watt, has collected and arranged the cases down to his time, on the subject of Satisfaction. First, where the portion or provision is secured to a child by marriage settlement, and the parent or person *in loco parentis* afterwards gives a legacy to the child without express directions; Secondly, where the parent or person *in loco parentis* bequeaths a legacy to a child, and afterwards gives a portion to or makes a provision for that child in his lifetime, without expressing it to be in lieu of the legacy, (noticing the cases as to the introduction of evidence of intention in either case to repel the presumption). As to the first point, he collects the cases as to the *certainty* required in the provision given by the will. As to the legacy and the provision being *ejusdem generis* (as applicable to the second as well as the first description of cases), he states what *variances* in the time of payment are material—noticing the distinction in this respect between debt and portion—also the cases where a contingent legacy has been held not to satisfy an absolute portion: he also refers to the cases on the then doubt-

500*l.* was considered (a) not to be adeemed by an advancement by way of gift by a trader of half of a stock of jewellery made on the occasion of the parent subsequently taking his son into partnership (b); and Mr. Baron Alderson held that where annuities were given to daughters by will, and a subsequent advancement was made on their marriage; to the one by an advance of money by bond, and to the other by a settlement of land (c) and advance of money, the portions were not adeemed (d).

But a legacy which of itself would not be considered as *ejusdem generis*, may be coupled with such words as will bring it within the rule. In *Bengough v. Walker* the son was entitled to 2000*l.* as a portion under his father's marriage settlement; the father by his will bequeathed to him a share of his powder works and such a sum of money as should, together with the value of such share in the works, make up to him the full sum of 10,000*l.* It was contended that this was not an advancement *ejusdem generis*; but Sir Wm. Grant clearly held that this must be considered as a money legacy, and therefore an advancement of so much as the value of the works fell short of 10,000*l.*, and which on inquiry turned out to be much more than 2000*l.* (e). In this

ful question, whether a residue was a satisfaction. The cases applicable to the second description of double provisions are next collected.

Mr. Swanston — whose accuracy and research, equally as his judgment, are always to be relied upon — in his note to *Goldsmid v. Goldsmid*, (1 Swanst. 221.) — a case where the widow's share of a residue was held to be a satisfaction — has collected the principal cases on the question whether a benefit accruing under intestacy or will of the covenantor is a performance of a covenant for securing a sum of money at his death; distinguishing those where such a benefit was held to be a performance or satisfaction, and where it was held to be neither a performance nor a satisfaction.

(a) 1 Bro. 555, Lords Commissioners; 5 My. & Cr. 48.

(b) In *Norton v. Norton*, (3 P. W. 317, n., A. D. 1718,) it was held by the Lords Commissioners that a father's buying an office for his son, though but at will, as a gentleman pensioner's place, or a commission in the army, were advancements *pro tanto*, within the custom of London; but in *Hinder v. Rose*, *ibid.* it was held that putting out a child as apprentice was not. In *Rosewell v. Bennett*, 3 Atk. 77, v. *infra*, a sum advanced to put out a son as an apprentice was held by Lord Hardwicke, under the circumstances, to be an advancement. What is to be considered as an ad-

vancement within the Statute of Distributions, 22 & 23 Car. II. c. 10, (v. *supra*, vol. i. p. 579,) from which analogies applicable to this subject may be drawn, will be the subject of consideration hereafter.

(c) See *Goodfellow v. Burchett*, 2 Vern. 298.

(d) *Davys v. Boucher*, 3 Y. & Coll. 411; and see *Grave v. Earl of Salisbury*, 1 Bro. 425, 427; *Bengough v. Walker*, 15 Ves. 512. Mr. Baron Alderson, after observing that he could find no case in which the principle had been extended to devises of real estates, said, "he thought that so to extend it would repeal the provisions of the Statute of Frauds then in force, as to the revocation of wills of real estate," 3 Y. & Coll. 411. In *Hoskins v. Hoskins*, Prec. Chan. 263, the father, after giving 750*l.* to his son by will, purchased a cornetcy for him for 650*l.*; evidence was let in to explain the act of advancement, and to show that this was intended as a satisfaction *pro tanto*; and it was decreed accordingly. *Thelluson v. Woodford*, 4 Mad. 436, is a similar case.

(e) *Bengough v. Walker*, 15 Ves. 514: in reference to the necessity for resorting to parol evidence to inquire into the amount, Sir Wm. Grant said, "You cannot refer to extrinsic evidence to construe a will, but you may to show with reference to what the will was made;" *ibid.* 514. Lord Alvanley used similar expressions in *Hinchcliffe v. Hinchcliffe*, 3 Ves. 525; and see Lord Eldon's observations,

case an objection was also raised that the subsequent provision was not equally beneficial, as the provision was subject to an annuity of 20*l.* to another person, and therefore was not taken so beneficially as the portion which was not subject to any burthen; but Sir W. Grant disposed of this objection also by saying, "If I see that the bequest is so large, so far exceeding the portion, that the diminution by the burthen imposed upon it cannot affect the relative proportion, it would be against common sense to say that if a bequest of ten times the amount of the portion is burthened with a charge not the extent of a tenth part, though greatly exceeding the portion, shall not be a satisfaction. The child will have the portion clear, and in as beneficial a manner as by the articles" (a).

There are cases in which, on the principle now under consideration, it has been held that a legacy of a Residue cannot be considered as a portion. A legacy of a portion (b), said Lord Rosslyn, means a legacy of a *definite sum*, that being, as Lord Rosslyn expressed it in the case before him, its meaning *ex vi termini*; hence, said his Lordship, a bequest of a residue does not fall within the rule; and he accordingly held, that a bequest of a residue was not satisfied or adeemed by an advancement of a specific sum on the marriage of a child who was one of the residuary legatees (c).

If Lord Rosslyn's doctrine were to be considered as binding, it would seem to follow that a gift of a residue ought not to be considered as an ademption of a portion previously secured. In a case before Lord Thurlow, it had been provided in the articles which secured portions to the younger sons, that if the father should at any time during his life or at his death give to any of his younger children so entitled to portions, money or lands, for or in advancement on marriage or otherwise, the value thereof should be deducted from the portion, unless he should by writing declare the contrary; the testator by his will gave to a son a sum smaller than his portion subject to a life-

Pole v. Lord Somers, 6 Ves. 325; and Lord Thurlow's, *Jeacock v. Falkener*, 1 Bro. 296; and *supra*, vol. i. p. 557-8.

(a) 15 Ves. 515; there were other circumstances in this case tending to the same conclusion; and see *Plunkett v. Lewis*, 3 Hare, 322.

(b) Lord Thurlow considered that "portion" meant no more than "fortune," with which it was coupled, in the case before him; *Powel v. Cleaver*, 2 Bro. 516.

(c) *Freemantle v. Banks*, 5 Ves. 85; Lord Rosslyn's opinion was chiefly founded on the case of *Watson v. Lord Lincoln*, Ambl. 325-7;

but as to this point, as appears from Mr. Blunt's note, Lord Hardwicke, in his decree, reserved his judgment; the case of *Rickman v. Morgan*, v. *infra*, was cited before Lord Rosslyn. Lord Cottenham, adverting to this question, said, "A testamentary gift of a residue or part of a residue is said not to be adeemed by a subsequent advancement, because the amount is uncertain; but," added his Lordship, "in that case the child, if sole residuary legatee, takes as advancement part of what it would, if no such advancement had been made, have taken as residue," 5 My. & Cr. 48.

interest to the widow, and the residue of his estate absolutely; Lord Thurlow having first sent it to the Master to inquire into the value of the residue, was of opinion that in this case the pecuniary legacy and the bequest of the residue must go in satisfaction (a). Lord Thurlow observed, that supposing there was a residue of 100,000*l.*, 500*l.* being in cash, and the rest in various articles outstanding, it would be ridiculous to insist that the residue would not have been a satisfaction of the gift; he added, a point is made that if this residue is considered as a satisfaction, supposing the child was bound to take it as a satisfaction he might wait many years for it; but this was answered by the fact that the child would be immediately entitled to the charge created in his favour by the settlement in all events, and it would only be in the event of the child claiming the whole of the residue when got in, in addition to his portion, that the question would arise, so that he could not be prejudiced in the manner insisted upon (b). These observations appear to evince an opinion on the part of Lord Thurlow that a substantial residue might be considered as a satisfaction, though the case itself depended upon the construction, and the terms of the settlement in reference to the fact of advancement. There seems to have been no doubt that a gift of so much of a residue as shall amount to a sum named ought to be taken as a satisfaction (c).

(a) *Richman v. Morgan*, 1 Bro. 67.

(b) 2 Bro. 296; and see the same case before Sir J. Buller (2 Bro. 389), under the name of *Pearson v. Morgan*. In *Smith v. Strong*, 4 Bro. p. 493, though that was a case of strangers, illegitimate children, Lord Thurlow seems to have thought that a residue, from its uncertain nature, could not be taken as a satisfaction. Lord Kenyon seems to have considered it as settled that a residue should not be taken as a satisfaction of a *Covenant*; see *Devese v. Pontet*, 1 Cox, 191-2; *S. C. Prec. Ch. note*, p. 240, supposed to have been corrected by Lord Kenyon, (and it is so treated by Lord Langdale, *Earl of Glengall v. Barnard*, 1 Keen, 789,) in the case of an ordinary creditor. But his Lordship considered that provisions secured by husbands for their wives, were subject to other considerations, and that a distributive share of the husband's personal estate, payable to the widow on an intestacy, might be taken, if not as a satisfaction of the provision secured to her, yet as a performance of the obligation to make it; citing *Blandy v. Widmore*, 1 P. W. 324; but see 1 Swanst. 219; *Lee v. D'Aranda*, 3 Atk. 419; *Garthshore v. Chalie*, 10 Ves. 1, see particularly p. 13; and *Goldsmid v. Goldsmid*, 1 Swanst. 211, 218. In the last case Sir Thos. Plumer made the following important observations:—

"An important distinction exists between satisfaction and performance; Satisfaction supposes intention; it is something different from the subject of the contract and substituted for it; and the question always arises, Was the thing done intended as a substitute for the thing covenanted? a question entirely of intent; but with reference to Performance, the question is, Has that identical act which the party contracted to do been done?—what sum was the widow to receive, and when? If she has received the sum stipulated and at the time stipulated, namely, on the death of her husband from his assets, the contract is performed; that is the principle of the cases of *Blandy* and *Widmore*, and the rest of that class." *Goldsmid v. Goldsmid*, 1 Swanst. 219—*Haynes v. Mico*, 1 Bro. p. 129, and *Devese v. Pontet*, *ubi supra*, Sir Thomas Plumer observed, were cases of testacy, and as a legacy implies bounty they admitted of the presumption that the testator intended to augment the wife's provision by the settlement, and not to satisfy it, *ibid.* 221, where Mr. Swanston has subjoined his valuable note, before referred to, of the principal cases on the question whether a benefit accruing under the intestacy or will of the covenantor is a performance or satisfaction; and see *Plunkett v. Lewis*, add. note, No. 3.

(c) 15 Ves. 514. The question whether a

The question as to whether a substantial residue, or what the testator treats as such, can be considered as a satisfaction, lately came before Lord Langdale, and his decision was carried by appeal to the House of Lords (a). In that case the testator Mr. Mellish entered into a bond on the marriage of one of his daughters with Lord E. Thynne, under which he bound himself, his heirs, executors, &c., to secure 2000*l.* a year during his life, and by the same bond he came under an obligation that 66,666*l.* 13*s.* 4*d.* £3 per Cents. should be transferred at his death to the trustees of the settlement, in case his daughter or any child of the marriage should be then living, upon the trusts of the settlement, which was of contemporaneous date. Mr. Mellish then made his will, dated in 1833, by which he gave the residue of his personal estate to trustees upon trust to sell his ships, cargoes, and such other parts as they might think advisable (b) and invest the proceeds, and after providing an annuity for his wife out of the dividends, he directed that one moiety of the interest should be paid to his daughter, Lady E. Thynne, for her separate use, with remainder to her children if any, subject to appointment, at 21 or marriage; and in default for his other daughter, afterwards Lady Glengall; the other moiety was settled in a similar manner for the benefit of the testator's daughter, Margarette (Lady Glengall), and her issue in like manner; and he desired that there might be inserted the usual powers with respect to the maintenance and advancement of his daughter's children during their minorities. One question was whether the share of the residue given for the benefit of Lady E. Thynne and her issue should be taken as a satisfaction for the provision secured by the testator's bond given on her marriage in 1830. Lord Langdale, putting aside as inapplicable the cases that related to a gift of a residue as affecting ordinary debts (c), decided, chiefly on the authority of Lord Thurlow's dictum in *Richman v. Morgan* and *Bengough v. Walker*, that, in this case, the residue being admitted to exceed the value of the sum secured by the bond, must be taken as a satisfaction (d); and this decision has been affirmed by the House of Lords. An assumption by the parent of a debt which a son was bound to pay, larger in amount than the portion, will be considered as a satisfaction (e).

subsequent gift might be taken as a satisfaction *pro tanto* only was not then settled; if it had probably Sir Wm. Grant would have expressed himself with less of hesitation.

(a) Had the judgment of the House of Lords been pronounced when the above was written, I should not have entered upon the subject so much at length; see the additional note to

this section, No. 1.

(b) These words and those which follow are material to show that the testator considered that he was giving a substantial residue.

(c) Page 789.

(d) 1 Keen, 790-3; see additional note, No. 1.

(e) *Anseley v. Bainbridge*, 1 Russ. & M. 657.

Where there are material differences in the limitations or as to the mode or time of enjoyment in the provision subsequently given, though *ejusdem generis*, and where the thing given and alleged to be in substitution is less beneficial either in amount or certainty or substantial value than the thing for which it is to be substituted, these circumstances have been held to be sufficient to show from the latter instrument itself, as compared with the former, that the provision so subsequently given was not intended to be a substitution or satisfaction for the former; but in the case of portions the differences have not been scanned with critical accuracy; the inquiry has rather been whether the two provisions are substantially the same (*a*); though in the case of the satisfaction of a debt by a legacy, almost any little circumstances are laid hold of by the court to take it out of the rule (*b*). Satisfaction in respect of double portions, said Lord Eldon, differs from the performance or satisfaction of a covenant (*c*) or of a debt (*d*) in this, that the court overlooks small differences in the circumstances of that which is proposed to be given, and that in satisfaction of which it is intended to be given (*e*): the court does not

Mr. Roper, who has entered fully into the consideration of the satisfaction and release of debts, (vol. ii. p. 28, *et seq.*; p. 68, *et seq.*; p. 1026, *et seq.*), and of the satisfaction of portions by legacies, (p. 1071, *et seq.*, last edit., 1847, by Mr. White,) to which the reader is referred, states, (p. 1071, last edit.,) that the inclination is so strong against double portions, that it has been decided that although no legacy is given by a will, yet if by the intestacy of the parent, a distributive share of his personal or any real estate devolves upon the child, of equal or greater value than the portion, it shall be a satisfaction of the portion. This would be an important proposition if established as here laid down, (see *Twisden v. Twisden*, 9 Ves. 427, *supra*, p. 428;) but the only authorities he cites are in Sect. IV., which are cases of performance, and generally not cases of children. *Wilcocks v. Wilcocks*, (2 Vern. 558,) to which he particularly refers, is the case of a covenant by the father to settle lands of the value of 200*l.* per annum, on his first and other sons in tail, remainder to his daughters; he purchased lands of that value, and suffered them to descend upon the son; and this was evidently considered as equivalent to performance as between him and the son, who was the claimant, and therefore a satisfaction, but not because it was a portion; and a covenant to leave a sum of money to a child, as well as in the case of a widow, may be considered to be performed through the intestacy; but satis-

faction in its ordinary sense supposes intention, (Sir T. Plumer, 1 Swanst. 219, *Goldsmid v. Goldsmid*); intestacy can hardly of itself imply intention; *v. supra*, p. 428.

(*a*) *V. infra*; and *Atkinson v. Webb*, 2 Vern. 478; *Blandy v. Widmore*, 1 P. W. 324, and Cox's note (1); *Lechmere v. Lord Carlisle*, 3 P. W. 225-6. If the thing is clearly of much greater value and more beneficial to the decree, the presumption will prevail; see *Bengough v. Walker*, 15 Ves. 514; *Rickman v. Morgan*, 2 Bro. 394; *supra*, p. 434; and the cases 1 Roper on Leg. 317-336; 2 Roper on Leg. 58-108; *Weall v. Rice*, 2 Russ. & M. 267-8.

(*b*) Lord Alvanley, *Hinchcliffe v. Hinchcliffe*, 3 Ves. J. 529; *et v. Monck v. Monck*, 1 Ball. & B. 298; *Earl of Durham v. Whar-ton*, 3 Cl. & Fennelly, 155.

(*c*) *Haynes v. Mico*, 1 Bro. 132; *Hales v. Darell*, 3 Beav. 332; but the authority of *Haynes v. Mico* has been questioned; *v. inf. at* 4 Mad. 331; and 1 Swanst. 219; *et v. sup.* p. 434, note.

(*d*) See *Hanbury v. Hanbury*, 2 Bro. 352; 1 Keen, 782; *v. infra*, p. 454, add. note.

(*e*) Lord Eldon, *Trimmer v. Bayne*, 7 Ves. 515. The same principle applies in the case of double portions, by a settlement and a subsequent will; it must be shown, from the different nature of the provision, that the one is not intended to be in lieu and satisfaction of the other; see *Hinchcliffe v. Hinchcliffe*, 3 Ves. 528; *Sparkes v. Cator*, 3 Ves. 535.

inquire whether the portion by the will (a) is entirely and absolutely to the child; or which is afterwards advanced in the form of a settlement upon marriage (extending to the children), which not being a performance of a covenant or satisfaction of a debt, yet is a presumed satisfaction of the intended portion (b); although the bequest be not a performance, still it may be inferred that the testator intended it as a satisfaction of the covenant so as to raise a case of Election (c); a gift of a rent-charge may be a satisfaction (d).

Sir J. Leach, in *Weall v. Rice*, stated that the following principles were to be extracted from the cases, most of which bearing on the point had been cited:—"Where the two provisions are of the same nature, or there are but slight differences (e), the two instruments afford intrinsic evidence *against* a double provision." "Where the two provisions are of a different nature, the two instruments afford intrinsic evidence *in favour* of a double provision (f). It is not possible to define what are to be considered as slight differences between two provisions. Slight differences are such as in the opinion of the judge leave the two provisions substantially of the same nature; and every judge must decide that question for himself." However, it may be useful to state some of the instances in which differences have been considered substantial or the contrary.

In the case before Sir J. Leach the difference between the provision by the articles and that made by the will was that Mrs. Rice (the Wife) by the articles was entitled to an estate for life for her separate

(a) Even in the case of a covenant, as between parent and child, the slight circumstance of the portion given by the will being payable three months after the death of the wife, instead of immediately on her death, was not allowed the effect of showing the testator did not mean a satisfaction of a covenant, which was literally performed and more, though as regards Strangers it might not have been held to be a satisfaction; *Sparkes v. Cator*, 3 Ves. 535; and *Lee v. D'Aranda*, 3 Atk. 419; 1 Ves. 1, there cited.

(b) Lord Eldon, *Trimmer v. Bayne*, 7 Ves. 515-16; and see *Baugh v. Read*, 1 Ves. J. 263, Lord Thurlow; 5 Simons, 314; and 2 Russ. & M. 315, *Lloyd v. Harrey*.

(c) Per Lord Chief Baron Alexander, *Adams v. Lavender*, 1 M'Clel. & Y. 50.

(d) *Walcott v. Blomfield*, 4 D. & War. 239.

(e) *Et v. int. alia, Hartopp v. Hartopp*, 17 Ves. 191, Sir Wm. Grant.

(f) *Weall v. Rice*, 2 Russ. & M. p. 266; and see *Hartopp v. Hartopp*, 17 Ves. 191, where Sir W. Grant considered the differences as not being such as to exclude the presump-

tion; and *Lord Glengall v. Barnard*, 1 Keen, 793, a like decision by Lord Langdale. On the other hand, in *Booker v. Allen*, also before Sir J. Leach, where the will was first, the settlement afterwards, and by each 4000*l.* was given; the differences were that under the will the husband took nothing, and the wife took an immediate estate for her separate use; the settlement gave the husband a life interest, and gave the wife nothing till after his death; under the will the children, on the death of the mother, became entitled to the 4000*l.*, in equal shares; under the settlement their interests were postponed till the death of their father, and were subject to a power of appointment; under the will also there was an alternate limitation over on the death of all the children under 21; (see the argument 2 R. & M. 289, and judgment, 298;) these differences were held to be *substantial*, and consequently that the presumption did not arise; 2 Russ. & M. 299. In *Jones v. Morgan*, (2 Y. & Coll. 403, 412,) Lord Abinger said, "he knew no distinction as to this point, whether the portion was by deed or will."

use without restriction ; the will imposed the clause against anticipation : as to Mr. Rice (the Husband), though he had an estate for life, equivalent to what he might have claimed under the settlement, the duty of maintaining the children was annexed to it : as regards the Children, under the articles they had an interest by way of cross-remainders in the shares of the other children ; under the will they took only their respective shares, the testator having expressed an intention to give them cross-remainders by an executory devise which was void in law. Sir J. Leach was of opinion that, in this case, the two provisions were substantially of the same nature, the differences being only slight (a). He then proceeded to say that the extrinsic evidence was conclusive of the question ; but, as before observed, the propriety of adverting to extrinsic evidence at all, where the intrinsic evidence, as it is called, is clear on the point to which that evidence is addressed, has been seriously questioned (b).

The question as to what are to be considered as substantial differences lately came before the House of Lords in the case of *Wharton v. May*. Lord Cottenham has observed (c) that the decision of the House of Lords in that case has settled, that variations such as existed in that case, cannot be relied upon as being substantial. The variations in that case were as follow :—By the will, by which 10,000*l.* was given to Mrs. Wharton for life with remainder to her children, the power of appointing the shares was given to the wife alone ; by the settlement, which was afterwards made and by which she took a portion of 15,000*l.*, the power of appointment was given to the husband and the wife : by the will the 10,000*l.* was settled on the wife and children without the interposition of any interest in the husband ; by the settlement the payment of the portion (15,000*l.*) was postponed till after the father's death : all the children of every marriage which Mrs. Wharton might contract would have been entitled to shares of the 10,000*l.* ; by the settlement portions were provided for the younger children only of that marriage, so that if there had been an only son, nothing would have been raised. Lord Brougham had considered these variations as substantial, though the decision did not turn on that point only. The House of Lords reversed the original decree which Lord Brougham had affirmed (d).

(a) *Weall v. Rice*, 2 R. & M. p. 268 ; and see *Carner Bowles*, *ib.* 303 ; and *Lloyd v. Harvey*, *ib.* 315 ; *Copley v. Copley*, *infra*, p. 453 ; and *Sheffield v. Earl of Coventry*, 2 R. & M. 335.

(b) See vol. i. p. 568-9, *et v. infra*.

(c) 3 My. & Cr. 374.

(d) 3 Cl. & Finell. 146 ; 10 Bli., N. S. 538 ; first reported in 5 Simons, 297 : the testator was liable to pay to his daughter 5000*l.* ; the settlement expressly declared that the 15,000*l.* was to be taken in satisfaction of this sum (*v. infra*, additional note, No. 3) ; the question was as to the 10,000*l.* This case is also

A provision which is thus extinguished by a subsequent provision, will not be set up by a mere republication of the will. In *Powys v. Lord Mansfield* the testator, after he had made the advance which was held to have adeemed the portion given by his will, made a codicil by which he confirmed his will; but Lord Cottenham held that this did not revive the portion given by the will; the codicil, said his Lordship, can only act upon the will as it existed at the time; and at the time, the legacy which was revoked, adeemed, or satisfied, formed no part of it; any other rule would make a codicil merely republishing a will, operate as a new bequest (*a*).

The presumption of satisfaction of a prior by a subsequent provision, though it is, as above noticed, stated to be a presumption of law (*b*), is liable to be rebutted by evidence (*c*); "and," said Lord Thurlow, in reference to a subsequent settlement, "the kind of evidence for that is, any demonstration from the conduct and language of the author of both gifts, that he considered the gift by the will as still a subsisting benefit" (*d*). And where evidence for this purpose is tendered and is admissible, whatsoever instrument may be the first, the business of the judge is duly to determine whether the parol evidence, in each particular case, has sufficient weight and power to overthrow the presumption, which it is admitted must *prima facie* be applied (*e*).

In *Debes v. Mann*, before Lord Thurlow, which has already been cited, and which is often referred to as a leading case on this subject, the father of the wife told the father of the husband he could only give his daughter 1000*l.* on her marriage, but she would have more thereafter: this was considered sufficient to repel the presumption that the legacy given by the previous will was satisfied, as the only explanation of it was that the daughter would have more at his death (*f*): it showed in fact that the provision by the settlement was

reported 3 My. & K. 472; where (see p. 480,) many of the previous authorities, as to the effect of differences, and what shall be considered as substantial, are stated. Some analogy may be observed in the cases of gifts over in the event of a devisee becoming entitled to a particular estate; see *Taylor v. Earl of Harewood*, 3 Hare, 372.

(*a*) 3 My. & Cr. 376; (the Vice-Chancellor had considered that the republication of the codicil was a material circumstance as regards the intention, (6 Ves. 560):) and see *Izard v. Hurst*, 2 Freeman, 224; *Drinkwater v. Falconer*, 2 Ves. Sen. 623; *Crosbie v. M'Doual*, 4 Ves. 610; *Monck v. Monck*, 1 Ball & B. 293.

(*b*) *V. supra*, p. 429, note.

(*c*) *V. supra*, vol. i. p. 568; *et v.* 3 Hare, 324.

(*d*) *Ellison v. Cookson*, 3 Bro. 61; 1 Ves. J. 108; Lord Eldon, *Trimmer v. Bayne*, 7 Ves. 515. It was equally settled that a legacy given to an executor, though perhaps "originally a stretch," raised a presumption of law against him, that he was intended to be trustee, as otherwise it would be giving him a part and the whole; but the executor also was allowed to rebut this presumption by parol evidence of the real intention; *v. int. al. Urquhart v. King*, 7 Ves. 229.

(*e*) Lord Eldon, *Trimmer v. Bayne*, 7 Ves. 515.

(*f*) 2 Bro. 165; see 7 Ves. 517-8; and 11 Ves. 548-9; and see *Shudal v. Jekyll*, 2 Atk. 516; 1 Dru. & W. 120. *Ellison v. Cookson*, 1 Ves. Jun. 100, also reported 2 Bro. 306,

not intended to be final; though Lord Thurlow, on giving his ultimate judgment, seemed disposed to decide the case on construction only, without reference to the evidence.

"When" said Lord Thurlow, "it is laid down that the evidence is admissible on one side, it must be so on the other" (a), and referring to the case of an executor as one instance of the application of this rule, he said, "it cannot be admissible for the executor to show that he was intended to have the residue beneficially as against a presumption to the contrary, and not admissible against him" (b), and this is a settled rule.

In regard to Declarations by the testator, the common evidence produced in these cases, it has been urged that a distinction should be taken between declarations made at the time of executing the will and any other time; for evidence of the intention at one time can hardly be considered as indicating what was the intention at another (c). But as regards the effect of these declarations to repel presumptions, Lord Eldon observed, "To take it in the case where the executor is a trustee for the next of kin, I fear there is no possibility of saying parol declarations, both previous and subsequent, are not admissible, though Lord Coke would hardly have been brought to let them in, as well as declarations at the time; but there is a very great difference, as also upon these marriage treaties, upon the point whether they are all alike weighty and efficacious. A declaration at the time of making the will is of more consequence than one afterwards, and a declaration after the will as to what he had done (I am speaking as to the time merely) is entitled to more credit than one before the will of what he intended to do, for that intention may very well be altered: but he knows what he has done, and is much more likely to speak correctly as to that than as to what he purposes to do; though these parol declarations are all alike admissible, whether consisting of conversations with people who have nothing to do with it, people making impertinent

on the original hearing before Lord Kenyon, and 3 Bro. 61, and 2 Cox, 220, which turned on a nice question of intention, is a case where the same judge held the evidence not to be sufficient, confirming Lord Kenyon's decree. *Trimmer v. Bayne*, 7 Ves. 508, before Lord Eldon, is a similar case; in both the doctrine is very fully gone into, and it is fully admitted that the rule does not apply to a niece or other stranger, (see the cases, 1 Ves. Jun. 102,) unless the donor has placed himself *in loco parentis*.

(a) And see *Baugh v. Read*, 1 Ves. J. 260, 3 Bro. 192, Lord Thurlow; *Mascal v. Mascal*,

1 Ves. 323, Baron Powel.

(b) *Coote v. Boyd*, 2 Bro. 527; *sup.* vol. i. p. 566: "The question, whether by giving two legacies, in two instruments, the testator did not intend the legatee to take both, is a question of presumption, *donec probetur in contrarium*, and will let in all sorts of evidence;" Lord Thurlow: this doctrine will be observed upon hereafter; and see the observations of Lord Alvanley and Sir E. Sugden on this dictum, 1 Dr. & W. 125-6.

(c) See 7 Ves. 514; and *supra*, p. 246, of this volume.

inquiries, and drawing from him angry answers, or in whatever form, they are all evidence, but they are entitled to very different credit and weight according to the time and circumstances" (a). Where the evidence of conversations or declarations, in reference to a subsequent advancement, is let in, in order that it may be acted upon, it ought to show that the testator meant the previous provision to be a subsisting gift (b).

The law is well settled as regards some of the cases in which parol evidence may be admitted in cases of double portions; but as regards others, the authorities have left the law in a state of considerable uncertainty.

In the instance of a legacy first and then an advancement, that is where the first act is testamentary and the second, on the common presumption, operates by way of ademption, where the act of advancement is not accompanied by any written instrument, evidence may clearly be admitted, to show the real intention as against the presumed intention. Thus, where the father, after giving a portion by will, advances a sum of money for putting out his son as an apprentice to a trade, or as clerk in the navy office, or the like, or simply by payment of money, evidence may be admitted; for in such cases the evidence is not given to explain or affect the will, but to show what was meant by the subsequent advancement (c), which, taken by itself, affords no express declaration of intention.

Indeed, in all cases of double provisions of the same nature, even where the second provision is by a written instrument, which does not contain any indications of intention, express or implied (d), and when consequently the presumption of satisfaction arises, evidence may be received to show that the intention was that the child should take both provisions, particularly where the first is given by will, and the

(a) Lord Eldon, *Trimmer v. Bayne*, 7 Ves. 518; and see *Weall v. Rice*, 2 Russ. & M. 263; *Povey v. Lord Mansfield*, 3 My. & Cr. 374.

(b) Lord Thurlow, *Ellison v. Cookson*, 3 Bro. 63. A paper, written some time after, showing the state of the testator's property, but not having reference to his intention, was rejected in *Weall v. Rice*, 2 Russ. & M. 251.

(c) *Rosewell v. Bennett*, 3 Atk. 77; *Biggleston v. Grubb*, 2 Atk. 48; *Monck v. Monck*, 1 Ball & B. 303; and see 2 Dr. & War. 118. Where a father had advanced money to his daughter, for which he took a bond from her, and then by his will bequeathed her a legacy, evidence was admitted, but without reference to the doctrine as to portions, to show that the bond was in effect given up by the testator,

so that it ought not to be deducted from the legacy; this is rather a strong case, for the testator in his will had adverted to the advances; but the evidence was adduced simply in reference to the subsistence of the debt on the bond, *Wilmot v. Woodhouse*, 4 Bro. 227: the evidence, though admitted, was not considered sufficient to repel the evidence that the testator still considered the debt as a subsisting debt, he having kept the bond in his possession, so that the advance was not by way of portion but as a loan; if the bond had been given up, then the question of double portions might have arisen, but on the case as it stood no distinction was made that the debtor was a child.

(d) As to which, v. *infra*.

second by advancement by way of settlement during life, for the evidence in each case supports the apparent effect of the will and of the settlement against the presumption which would destroy their apparent effect (a).

Even in cases of a provision by the husband for the wife (b), evidence has been admitted, where such evidence has been considered not to affect the will itself, but only to explain the nature and purpose of the advancement *inter vivos*. John Mascall agreed to settle 100*l.* per annum on his intended wife, but being ill, he before marriage made his will, and left her 100*l.* per annum: the testator having recovered, the marriage was had and a settlement was executed in pursuance of the agreement.. On his death, the wife having claimed both provisions, evidence was tendered to prove that the testator intended but one provision. If this were a question only on a will, said Baron Clarke, who sat for the Chancellor, no doubt but the declaration of what he intended by will could not be read; but as this is not to construe a will, but a question whether or no one is a satisfaction for the other, I should at present think that if you allow parol evidence on one side, you must on the other (c). Baron Clarke afterwards said the evidence was proper to be read; and both the instruments being left subsisting, it was impossible, he said, to come at the facts by which the court is to judge, but by being made out by evidence; nor can the party's intent be proved. He ultimately decided that the widow must make her election, "not that the gift by will was a satisfaction of the previous agreement, but was a completion of the act, and the settlement was a corroboration of the will" (d). So that although direct evidence of the intention of the testator to make the provision a substitute could not be given; yet the court having before it the will and the settlement, and each containing a provision of a similar kind, it was considered that further

(a) See *Shudal v. Jekyll*, 2 Atk. 519; dict. of Lord Hardwicke; that having been a case of a stranger, as hereafter more particularly noticed, the evidence appears to have been introduced without any necessity: but if a stranger gives a legacy, to be applied for a particular purpose, and then simply advances money for the same purpose, that is a proper case for evidence; see 1 Ball & B. 303; 2 Bro. 166, 521; Roper, 381, 392; *Hurst v. Beach*, Sir J. Leach, 5 Mad. 351; *Pile v. Pile*, (cited in *Haynes v. Mico*, 1 Bro. p. 131); 1 Eq. Ab. 204; 1 Chan. Rep. 199: there the will was made after the settlement, the testator had declared, after making the settlement, he would add to his daughter's portions: all the decided cases where evidence has been admitted, that

I have met with, or at least observed, except the last, are cases in which the will was first and the settlement afterwards.

(b) *V. infra*.

(c) As far as appears the only evidence that had been produced was the will, and the wife had relied upon its being uncanceled, as showing her right to both provisions.

(d) *Mascal v. Mascal*, 1 Ves. 334. In *Fowler v. Fowler*, 3 P. W. 353, on an attempt being made to give evidence to show that a legacy was given to a wife exclusive of a debt then due from the testator to her, Lord Talbot held that a wife was within the general rules, and he refused to admit evidence, saying, for then the witnesses, not the testator, would make the will.

evidence might be given to show that the will was in substance what was incompletely effected by the agreement, and to show that the subsequent settlement was a complete execution of the previous agreement for which the will was a substitute, thus making the whole consistent.

If the evidence would contradict the express words of the instrument, there can be no doubt that parol evidence cannot be admitted (*a*), for it would be a violation of the settled rule of law. The difficulty arises where there is something in the instruments as compared with one another from which an intention may be implied.

Before entering into this specific subject, it may be useful, though at the expense of some repetition, to recur to the subject of parol evidence as affecting presumptions of law arising upon a will, or a will and codicil, taken by themselves.

Where the presumption of law in legatory cases arises upon the will taken by *itself*, it would seem, though the *dicta* are not quite uniform on this subject (*b*), that evidence cannot be adduced to aid the construction in any case where there is a positive rule of construction which *supports* the apparent effect; but the general rule is, that it may be admitted in all cases where a presumption of law is raised *against* the apparent effect of the instrument (*c*); even, it seems, where the rule of construction applies to the same legacy being repeated in the same instrument (*d*), for the presumption there arises against the apparent effect (*e*).

In the case of legacies given by two different instruments, no pre-

(*a*) See *Brown v. Selwin*, Forrest. 240, *supra*, vol. i. p. 567, 570. Lord Hardwicke disputed the authority of this case in *Ulrich v. Litchfield*, 2 Atk. 272; but it was affirmed by the House of Lords; and see *Hurst v. Beach*, 5 Mad. 359; *supra*, vol. i. p. 567, n. (*a*).

(*b*) "No person can read Lord Thurlow's reported judgment on this subject without observing that he is often made to contradict himself," Sir J. Leach, 5 Mad. 358; and see Sir E. Sugden's judgment in *Hall v. Hill*, *infra*.

(*c*) See *Hurst v. Beach*, 5 Mad. 360, 361; *Hall v. Hill*, 1 Dr. & War. 94; and 1 Conn. & L. 139, 140-1; and *supra*, vol. i. p. 566-7; and see the note as to evidence in cases of constructive trusts, 1 Conn. & L. 139.

(*d*) *Hurst v. Beach*, *ubi sup.* See Roper on Leg. p. 1025; but whether, according to Sir E. Sugden's doctrine as to the rules of construction, Evidence ought to be received in such case is at least doubtful: *v. supra*, vol. i. p. 566, and Lord Thurlow's dictum,

Coote v. Boyd, 2 Bro. 521, *supra*, 442, and p. 446.

(*e*) By the Roman law, where two pecuniary legacies were given by the *same* will the presumption was considered to be against the legatee and he had to establish by evidence that the legacy was intended to be doubled, so that evidence might be given to repel the presumption so made against the apparent effect of the will. Lord Chancellor Bathurst, *Hooley v. Hatton*, note to 1 Bro. 390, notices this rule, and in the Report in 1 Dickens, 462, he states that it is the rule of the Court of Chancery, as this court in legatory matters follows the ecclesiastical courts, which adopted the Roman law on this subject, *supra*, vol. i. p. 194. By the Roman law, where equal sums are given in *two distinct writings*, both shall pass (Dig. xxii. 3, l. 12, and Gothoffred's note *In Dicens Scripturis*, Dig. xxx. 1, l. 4); but there nothing is said as to evidence, and on inquiry Sir J. Leach found there was no rule on the subject in the ecclesiastical courts, 5 Mad. 360.

sumption arises against the apparent effect, so that if parol evidence should be admitted, the will or the codicil itself would be construed by the evidence; whereas the rule is clear and almost universal, that a will cannot be *construed* by anything *dehors*, that is, extrinsic to the instrument (a); though, as has been observed in the former volume and will be noticed hereafter, extrinsic evidence of the circumstances under which the will was made may be gone into as to collateral points (b).

However, in the case of *Coote v. Boyd* (c) before cited, Lord Thurlow said he had hitherto understood the result of the cases to be that *primâ facie* both instruments speak for themselves, but that the probable inference that the testator meant two legacies may be repelled by circumstances; the question whether the testator did not intend the legatee to take both is a question of presumption *donec probetur in contrarium*, and will let in all sorts of evidence (d). Lord Thurlow therefore seems to have considered the presumption in favour of cumulation not as a rule of law, that is, a rule of construction to be applied to each instrument, but a presumption only. In the case itself Lord Thurlow, before however he had decided on the effect of the instruments themselves, let in evidence to show that the legacies were cumulative, though on the construction of the instruments they were, as he in his final judgment held, clearly repetitions. If the evidence had been sufficient to prove that it was intended that the legacies should be cumulative, the court would have been called upon to come to a decision inconsistent with the clear construction of the instruments themselves, which Lord Thurlow would hardly have done. But if the actual admission of the evidence in this case were to be taken as establishing the course to be pursued in similar cases, it would go some way to remove any doubt as to the admissibility of evidence in cases where the court has to collect the intention as to whether or not portions are to be considered as cumulative or substitutional where there are differences in the two provisions, affording a precedent for evidence being introduced to repel the presumption which arises from

(a) Lord Cowper, in *Dyose v. Dyose*, 1 P. Williams, 305, looked to the evidence of the state of the testator's property at the time of making his will to construe what was the intent; not to ascertain what was the particular property given (as to which it may be received, see vol. i. p. 556), but to determine the interests which the parties took under the will, on the assumption that the testator at the time of making his will must have known what

his residue would amount to, and that he meant the surplus as a legacy to his eldest son; but this case may be considered as overruled. *Fonnereau v. Poyntz*, 1 Bro. p. 478; *Page v. Leapingwell*, 18 Ves. 466; and see *Herbert v. Reid*, 16 Ves. 486.

(b) V. *supra*, vol. i. p. 557.

(c) V. *supra*, p. 440.

(d) 2 Bro. 526-8; but v. *sup.* vol. i. p. 567; and *Lee v. Pain*, 4 Hare, there cited.

such differences; though as Lord Thurlow's doctrine was applied to two testamentary instruments which make but one will, it would not directly affect the case of a will and a settlement.

But the accuracy of the report in regard to Lord Thurlow's doctrine, and the propriety of the rule laid down, if accurately reported, have been questioned. Lord Alvanley, in *Osborne v. Duke of Leeds* (a), examined the question of admissibility of evidence, where the court on construction applies a positive rule. The question in the case before the court was somewhat similar to that in *Coote v. Boyd*, namely, whether legacies given by the will and codicils were cumulative. Lord Alvanley held in that case upon the construction that the legacies were not cumulative, as Lord Thurlow had done in *Coote v. Boyd*, and therefore that there was no occasion to resort to the parol evidence which was tendered to establish the same conclusion. His Lordship, referring to *Coote v. Boyd*, remarked that Lord Thurlow had admitted evidence on that side on which, in Lord Alvanley's judgment, it was not necessary; namely, for the side in whose favour the presumption arose (b). Lord Alvanley seems clearly to have been of opinion that evidence ought not to be received to induce the court to decide against the conclusion of law. If, said his Lordship, it is an established rule that two legacies are cumulative if given by two instruments, it would be a violation of it to admit evidence to raise a presumption against it (c). Sir E. Sugden also, in noticing *Coote v. Boyd* and other cases on this subject, observes (d), To admit parol evidence to raise a presumption against a positive rule of construction is to construe a will by parol evidence (e).

(a) 5 Ves. 369, 380.

(b) But is this a correct view of the case? v. sup. p. 446; *Coote v. Boyd*, it is to be observed, was a case of father and child.

Some of the cases had previously gone to the extent of allowing parol evidence to be received, to fortify a presumption of law in the first instance, no evidence having been tendered to repel the presumption, as in *Rosewell v. Bennett*, 3 Atk. 77; and Lord Hardwicke cites three cases in which such evidence had been received (p. 78), but the only objection taken was that it was against the Statute of Frauds; see also *Monck v. Monck*, 1 Ball & B. 305; and see *Plunkett v. Lewis*, add. note, No. 3.

(c) In *Hurst v. Beach*, 5 Mad. 351, and *Guy v. Sharp*, 1 My. & K. 589. Lord Brougham and Sir J. Leach affirmed this principle, and it is strongly supported by Sir E. Sugden; v. sup. vol. i. p. 567.

(d) 1 Dr. & W. 126; *et v. sup.* vol. i. 567.

(e) In *Shudal v. Jekyl*, 2 Atk. ubi sup., Lord Hardwicke, referring to previous cases (p. 518), admitted evidence which was offered to show that an advancement by a stranger was intended to be a satisfaction of a legacy previously given: when it was established that this case was to be considered as that of a stranger, and not one of double portions, the reference to the evidence appears to have been open to objection, for, by the general rule of law, every legacy by a stranger implies bounty, and a subsequent gift, without any expression of intent to adeem,—as Lord Hardwicke laid down in the same case,—ought not to be considered as a substitution for a prior gift. It is however to be observed that Lord Hardwicke only referred to the evidence to show that it imported quite the contrary of what it was intended to support, which was that the testator intended the second gift as a satisfaction; see 2 Atk. 518; v. inf. add. note, No. 3.

Perhaps, therefore, it may be assumed in all cases relating to legatory matters, as a general rule, that where the application of the ordinary rules of construction will give to a single instrument or to the several instruments, where there are more than one, their apparent effect, no extrinsic evidence ought to be introduced on the one side or on the other; if evidence is to be admitted in the case of a repetition of the same legacy in the same instrument, it is because the rule of construction, or rather the presumption of law against both being payable, is *against* the apparent effect of the instrument.

In the cases last observed upon, the objection to the reception of parol evidence was that it was sought to be introduced to affect the construction of the words in a testamentary act, whether by will alone or by a will and codicil, which are so far one that they are comprized in one probate, and in fact make one testament. But the presumption against double portions arising upon distinct acts, as upon a will and a settlement, neither referring to the other, does not arise upon either of the instruments taken alone, each of itself gives a single portion only; it is only by going out of the instrument and giving evidence of the existence and contents of the other, which is of a distinct nature and character, that the presumption arises, so that it is, as Lord Thurlow first called it, rather a presumption of *evidence* (a) than a rule or presumption of law, and accordingly this primary presumption may, as we have seen, be met by evidence of intention. But another presumption arises where there are such differences between the two provisions (which fact also can only be ascertained by going out of each of the instruments to examine the other) that the court will presume that the one was not intended to be substitutional for the other; so that the presumption which would have arisen from the portions, if *ejusdem generis*, is repelled or extinguished upon the face of the two instruments. The question arises whether in such case evidence of the actual intention can be given as against the apparent effect of the two instruments.

In order to ascertain how this question stands on the authorities connected with this subject, I proceed to give a short analysis of them with short explanatory remarks, reserving the general conclusion till the cases have been laid before the reader.

A bill was filed by a husband in right of his wife for a legacy of 500*l.* given to her by her father; the father had advanced an equal sum to the *husband* as a portion; parol evidence was admitted to show that the 500*l.* was given as a satisfaction of the legacy, and the bill

(a) *V. supra*, p. 431, n. (f); and see the dictum of Lord Eldon, 7 *Ves.* 516.

was dismissed (a). The case is very shortly reported, but it is to be observed that the only circumstance which prevented the same result upon the mere presumption of law was that the 500*l.* was given to the husband; but evidence being given of that fact in order to raise the presumption that they were distinct gifts, evidence on the other side was let in to prove the actual intention; in this case, however, the presumption was raised and repelled upon parol evidence only, which was addressed to explain the nature of the advance, and to show that though the legacy was admitted to have been given, it was in fact adeemed, therefore in this case the question above adverted to did not pointedly arise.

In the case of *Hartopp v. Hartopp* (b), before Sir W. Grant, 3500*l.* was provided by will, and afterwards the same sum by a settlement. There were what were considered slight differences only, so that the presumption of satisfaction arose (c). To meet this, it was contended that the settlement was the act of the son as well as the father, so as to exclude the case from the rule; on the other hand, parol evidence was tendered of the actual intention that the second provision was to be a substitute for the first. Sir W. Grant doubted whether it was strictly proper in the first instance to give evidence of intention to substitute one provision for another, but he held that extrinsic evidence might be read to show from whom the consideration moved, provided it did not contradict the deed; and on the evidence to this point Sir W. Grant held that the father was really the author of both provisions; and having thus brought the case to one within the ordinary rules, he excluded the evidence of intention, and decided on the ordinary presumption that the first provision was satisfied by the second (d). This case would seem to establish that where evidence is legitimately introduced to prove that one of the gifts is not a portion, so that the presumption of law does not arise, it is not competent to adduce evidence directly to prove that the one was intended to be

(a) *Bigglestone v. Grubb*, 2 Atk. 48: the bill was dismissed, and with costs, because the husband had refused a fair offer of accommodation. In 2 Vernon, 646, there is a case (*Chapman v. Salt*.) to the following effect:—Mrs. Salt devised 50*l.* to Mary, the wife of Leonard Chapman; afterwards the testatrix gave a note to Leonard Chapman, the husband, for 50*l.*, payable on demand. Evidence was tendered to show that the note was intended as a satisfaction: the judgment, as reported, is this:—"Master of the Rolls: a testamentary question; evidence may be received;"

and he dismissed the bill for the legacy. The Master of the Rolls, it is presumed, was referring to the laxity with which evidence of intention was received by the Roman law, which was generally followed in the Ecclesiastical Courts: v. *supra*, vol. i. p. 574, n. (4).

(b) 17 Ves. 184.

(c) P. 191.

(d) If the evidence so let in had established that one of the provisions was not a portion, of course a question similar to that in *Shudal v. Jekyll*, (*supra*.) would have arisen.

substitutional, or, in other words, to do directly what the presumption would have effected if both had been portions.

The cases which follow directly affect the question now under consideration. In *Weall v. Rice* (a), which was the case of a settlement first (b) and then a will, the strongest case against the introduction of parol evidence, Sir John Leach is reported to have said, speaking of portions, "Where the two provisions are of the same nature, or there are but slight differences, the two instruments" (that is, together) "afford intrinsic evidence against a double provision—where the two provisions are of a different nature the two instruments afford *intrinsic evidence* against a double portion, but in *either* case *extrinsic evidence is admissible of the real intention of the testator*" (c). The case itself, which has before been referred to, turned upon whether the differences in the limitations in the settlement and those in the will were substantial. Sir J. Leach held that they were not, so that the primary presumption prevailed, and no objection is made to the *decision* in this case. But the importance of the case, in reference to the present subject, is in the dictum it contains, which seems to import that evidence of intention may be given in *all cases* and by either party where there are differences in the two instruments, whether those differences are considered to be substantial or the contrary, and whether the will be first or last.

In *Booker v. Allen*, also before Sir J. Leach, where the will was first and the settlement afterwards, that learned judge was of opinion that the differences were such that the provisions given by the two instruments could hardly be considered as substantially of the same nature so as to afford *intrinsic evidence* against a double provision; but, acting upon the principle of the dictum in the last-cited case, he admitted *extrinsic evidence* of the intention, which evidence, in his opinion, excluded the intention of a double provision; and accordingly he declared that the provision by the settlement was a satisfaction (d). So that the apparent effect of the two instruments taken separately,

(a) 2 Russ. & M. 251, 263.

(b) In a settlement it is to be remarked the testator cannot allude to his will; where the will follows the settlement he may advert to it in his will, and his not doing it is something of an argument that he did not mean to interfere with it; v. *sup.* p. 427.

(c) *Weall v. Rice*, 2 Russ. & M. 251; this doctrine is cited with approbation by Lord Langdale, in *Lord Glengall v. Barnard*, 1 Keen, 793; *et v. supra*, vol. i. p. 568-9: his Lordship, in another case, in the same volume, (*Clementson v. Gandy*, p. 316,) refused to ad-

mit parol evidence to raise a case of election upon a will, saying, "Parol evidence is not to be resorted to, except for the purpose of proving facts which make intelligible something in the will which, without the aid of extrinsic evidence, cannot be understood:" the instance referred to is perhaps another exception; but the presumption of satisfaction arises upon an extraneous fact, which must be looked to—the fact on which the case of election is sought to be made out is not necessarily brought before the court.

(d) *Booker v. Allen*, 2 Russ. & M. 270.

and on a comparison of their respective contents, was defeated by extrinsic evidence: this is a direct decision upon the point where the evidence applies to a subsequent settlement (a).

In the case of *Lloyd v. Harvey*, before the same judge, the testator entered into a bond to pay 5000*l.* to the trustees of his daughter Louisa's settlement within 6 months after his death. By the settlement the 5000*l.* was secured for the benefit of the husband and wife and their children. The testator afterwards by his will, after reciting the bond and that he had paid 2000*l.* part of it, gave to his daughter 5000*l.* in addition to what he had secured on her marriage, without declaring any trusts of that sum; he then recited the provision he had made for one of his other daughters, and gave a legacy to each of his other daughters. Afterwards the testator, reciting that he was desirous of making a further provision for his daughter Louisa (b) and her husband, by deed, dated 18th June, 1823, indorsed on the settlement, entered into a covenant to pay within 6 months after his death 5000*l.* to the trustees of the settlement. The testator then made a codicil, in which he declared that the portions he had secured to his daughters Maria and Emma were to be considered as in lieu of the legacies given to them by his will. The testator's daughter Louisa claimed the 5000*l.* mentioned in the settlement of the 18th June, 1823, and also the legacy of 5000*l.* given by the will. Evidence of conversations was tendered to show that the testator intended that each of his daughters should be provided for equally, and that the plaintiff, Mrs. Lloyd, should have no preference, which intention would have been defeated if the claim had succeeded. Sir J. Leach, referring to *Trimmer v. Bayne* (c), considered that it was questionable whether the difference in the interests under the two provisions would defeat the primary presumption; but he admitted the evidence, and upon it he decided that it was not the intention of the testator to make a double provision for his daughter Louisa (d): here again the apparent effect was defeated by parol evidence (e).

(a) Sir E. Sugden, following the dicta of previous judges, does not object to the admission of the evidence in this case, it being used to explain the act *inter vivos*, though in writing, and not directly to affect the will; but as it is to affect the settlement, which is also in writing, I confess that I do not see the ground of the distinction; see 1 Conn. & L. 155.

(b) See p. 312 of the report.

(c) *Sup.* p. 443.

(d) *Lloyd v. Harvey*, 2 R. & M. 316. Sir J. Leach, in that case, going beyond his dictum in *Weall v. Rice*, said, "The evidence of Miss Perceval appears to me admissible, not upon

the ground of fortifying or repelling a presumption, but as extrinsic evidence that it was not the intention of the testator to make a double provision for his daughter Louisa." On this Sir E. Sugden says, "According to that, without reference to any rule, extrinsic evidence may be received in all cases in order to construe a will; I do not myself see therefore how it is possible to maintain the rule there laid down." 1 Conn. & L. 156. It is to be observed that Sir J. Leach considered that the codicil rather confirmed the presumption that the testator intended equality.

(e) It is to be observed that *Hurst v. Beach*

These decisions, as has been observed in the former volume and in the preceding notes, were lately reviewed by Sir Edward Sugden in the case of *Hall v. Hill* (a). In that case one Boyle Hall executed a bond for securing to John Hall 800*l.*, payable by instalments, and executed a warrant of attorney to confess judgment on the bond; the 800*l.* was for a marriage portion for Boyle Hall's daughter Charlotte. John Hall, on the same day, executed a bond to the trustees of the settlement in the same amount, and by the settlement, that sum was secured for the husband, the wife, and the children of the marriage. Boyle Hall then by will made various devises and bequests to his other children, and gave "to his daughter Charlotte Hall, otherwise Hill, the sum of 800*l.*:" the question was whether this 800*l.* was a satisfaction for the 800*l.* secured to the husband by the bond. Parol evidence was tendered which would have proved, conclusively, that the 800*l.* given by the will was intended as a satisfaction, but Sir E. Sugden, Lord C., rejected it; and though he considered the claim as against honesty, he decided that the legacy could not be considered as a satisfaction, even if the bond were to be treated as a proper portion; because the husband gave a bond to secure the money, and the legacy to the daughter could not be a satisfaction for the husband's bond, nor could it be of the father's bond, for the bond by the father was in consideration of the bond by the husband to the trustee; and even considering it as a debt in the nature of a portion, this security to the son-in-law on the marriage could not be satisfied by a legacy to the wife of the same sum. There the apparent intent was supported, and evidence of intention to the contrary, which probably Sir J. Leach would have admitted, was rejected (b).

There is a case before Lord Eldon (c), which is observed upon by Sir E. Sugden in the last case, which, though not directly in point, in principle very materially affects the question now under discussion. In that case the question was whether a legacy of 1000*l.* was to be considered as a satisfaction of a debt for wages to the amount of 125*l.* 12*s.* 6*d.* Lord Eldon said, that the *presumption*, not upon the rule of law (which holds that a debt is satisfied by a legacy to an equal or greater amount, and equally beneficial (d)), but *upon the whole will*, was that the legacy in question was *not* in addition to wages, the testator having expressly directed that another legacy to a servant

was not referred to by Sir J. Leach in any of these cases; see 1 Conn. & L. 137.

(a) 1 Dr. & War. p. 94; 1 Conn. & L. 137, *et seq.*

(b) V. *supra*, vol. i. p. 569.

(c) *Wallace v. Pomfret*, 11 Ves. 546.

(d) See *int. al. Brown v. Dawson*, Prec. Ch. 240. A gift of an unliquidated residue is not a satisfaction, *Devese v. Pontet*, 1 Cox, p. 192; Prec. Ch. p. 240, n.

should be in addition to wages. Evidence of declarations by the testator was tendered to establish that the legacy was intended to be in addition to the debt for wages, the reception of which was objected to. On the first hearing, Lord Eldon said the question turned on this point, whether the inference from the express direction that the other legacy should be in addition to wages was strong enough *to require a decision*, that as to the legacy, the subject of the dispute, the addition to wages was upon the face of the will *necessarily* excluded. "If it is not," said his Lordship, "then upon the rule as to the satisfaction of portions, &c., this evidence may be admitted; but if admitted, it was," said his Lordship, "to be looked at with great attention to see whether the necessary effect is *to beat down the fair inference from the written context*, which is the most solemn declaration he can make, particularly as the parol declaration is not cotemporary." At a subsequent period Lord Eldon, on the authorities—particularly *Debeze v. Mann* (a), which his Lordship stated from his own note—admitted the evidence, and held on that evidence that the legacy was in addition (b). It is to be presumed that the evidence was admitted, because his Lordship did not consider that the inference was strong enough to require a decision that the legacy was not in addition; but even then there was the presumption of law that the debt was satisfied; so that this case, if unimpeached, would go far to establish the admission of evidence of intention in all cases of satisfaction, whether arising upon the rule of presumption or upon the words of the will, where the testator has not expressly declared that the particular gift by will is intended to be a satisfaction for the antecedent debt, and would be a strong authority for the rule laid down and acted upon by Sir J. Leach in the case of double portions, but this is one of the cases which Sir E. Sugden considers as not having been rightly decided (c).

The question appears to resolve itself into this, Is the rule that differences in the nature of two provisions shall be considered as excluding the ordinary presumption of satisfaction a positive rule of construction or only a rule of presumption? If the former, evidence must be excluded; but if the latter only, then evidence may be admitted, either to repel or to fortify the presumption, for then the evidence

(a) *Supra*, p. 439. Lord Talbot, in *Fowler v. Fowler* (3 P. W. 354; *supra*, p. 442, which was also cited by Lord Eldon), had held that even the presumption of satisfaction, arising upon the technical rule of law in the case of a debt and subsequent legacy, could not be repelled by evidence; in the case before Lord

Eldon evidence was received, not in respect of any presumption, but against the construction, which was in accordance with the presumption of law, without reference to any mere technical rule.

(b) 11 Ves. 549.

(c) 1 Conn. & L. 148.

that will be let in on the other side in the latter case will only be such as might have been given directly to repel the presumption. That it is not a rule of law, but a presumption of evidence only, may be contended upon the ground that it does not arise upon the instrument itself, but upon the *evidence* (a) afforded by a comparison of the provisions in an instrument foreign to that the effect of which has to be determined: the construction of the two instruments taken by themselves is not affected by the evidence, each of them is silent (b) as to what is to be the effect of the one upon the other, the apparent effect of the two is broken down in the ordinary case by the primary presumption, which is raised by resorting to an extraneous fact; the rule of presumption that the two provisions are so different in their nature as that the one shall not be considered as an ademption or a satisfaction of the other is founded on something *dehors* the instrument—that is, on extrinsic evidence—equally as is the primary presumption, where there is no such difference. If the conclusion upon the difference of the provisions is arrived at by the introduction of evidence, as it would seem to be, for setting one instrument against the other is introducing extrinsic evidence as to each; it will follow, according to the ordinary rule, that evidence on the other side ought to be let in; and though the letting in such evidence goes to defeat the apparent effect of the instrument as ascertained by the presumption arising from the established differences, the direct evidence of intention in this respect does no more than is effected by the primary presumption in cases where there are no differences. But with such high authorities on each side we must wait for a final decision on the subject.

The effect of the presumption, especially when coupled with evidence of the intention as to the act of advancement, may have the effect of extinguishing the legacy, so as to deprive those to whom it may have been given over, on certain contingent events, of the benefit originally intended for them. A testatrix gave to her dear adopted child, Lydia Mosse (to whom she stood *in loco parentis*), if residing with her at her death or not permanently absent, 10,000*l.* money, and if she should have no children at her death, the testatrix wished that the property she had so left should be given to charity. The testatrix afterwards transferred 12,000*l.* Consols into the joint names of herself and Lydia Mosse; the question was whether this was an ademption or

(a) *V. supra*, p. 431, and p. 448.

(b) The case before Lord Eldon, *Wallace v. Pomfret*, *supra*, p. 452, would go to the extent

of letting in evidence when the instrument itself would afford the means for its construction, where there is no express declaration.

satisfaction of the 10,000*l.* legacy. There was evidence to show that the transfer had been made to save the legacy duty on the legacy—the testatrix had also erased the legacy, but the erasure was not introduced into the probate, not being attested. It was held by the V. C. Knight Bruce that the legacy was absolutely adeemed, so that Lydia Mosse took the 12,000*l.* stock absolutely, and the legacy was extinguished both as regards her and the intended charitable purpose (a).

Where a portion is secured by settlement, and a portion in satisfaction is subsequently given, the child has the option to take one or the other at his pleasure. In *Copley v. Copley* (b) a daughter, under the settlement of the grandfather, was entitled to 5000*l.* charged on the father's estate. The father after the grandfather's death charged his estate with 8000*l.* for his daughter, and he by will devised his estates to the defendant, charged with 8000*l.* for his daughter, without saying whether it was to be in satisfaction of the portion she was entitled to by the settlement. Although the three provisions were given in different modes as to enjoyment, Lord Harcourt decreed that the daughter was entitled to only one sum of 8000*l.*; but that she might make her election under which instrument she would take. Where a benefit is given to a child in satisfaction of an obligation of the father under a covenant in a settlement or bond, if the child elects to take under the settlement or other obligation, she must give up all the benefits she would take under the will (c); such a case does not admit of the doctrine of compensation being applied, as in the ordinary cases of election (d).

(a) *Twining v. Powell*, 2 Coll. 263. It will be observed that the parol evidence was here admitted, not to raise or fortify the presumption, but to explain the act of advancement; v. *supra*, vol. i. p. 568, note (c); and see *Sanford v. Sanford*, 1 De G. & Sm. 67.

(b) Cited Mosely, pp. 108, 111, reported 1 P. W. 146, (2 Roper on Leg. 70); *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516.

(c) *Graves v. Boyle*, 1 Atk. 509. In this case the testator, on his daughter's marriage, had given a bond to leave, at his death, 5000*l.* amongst her younger children; by will he created a term of years in his real estates, in trust to apply the rents for the maintenance of the children of his daughter till they came of age; he then gave his personal estate, in

trust for the benefit of his wife for life, and on her death to pay 1500*l.* to one daughter, 3500*l.* to the others, and he declared that the legacies so given to his daughters' children should go in satisfaction of his bond. Lord Hardwicke, on the authority of *Jenkins v. Jenkins*, before Lord Talbot, and *Sheppard v. Phillips*, there cited, decided that if the plaintiff (a daughter) insisted on the bond, she "must give up all benefit under the will;" his Lordship at first had entertained doubts whether she was bound to give up the interest given her by the will in the real estate, but ultimately decided as above.

(d) As to election in such case by a married woman, see *Wall v. Wall*, 15 Sim. 521, 1 Rop. H. and W. 30, *et v. infra*, *Election*.

ADDITIONAL NOTE.—No. I.

The Lord Chancellor delivered judgment, in the case of *Lady E. Thynne v. The Earl of Glengall*, Aug. 21, 1848, and commenced by stating, that, as to Lord Glengall's appeal, the decree appealed from was clearly right; that there was no concluded

contract at the time of Mr. Mellish's death, and no part performance, even if there had been a concluded contract; that the appeal must, therefore, be dismissed, the result of which, supposing the decree of the Master of the Rolls upon the appeal of Lady Edward Thynne to be affirmed, would be to divide the property equally between the two daughters of Mr. Mellish, which was certainly his object and intention. His Lordship, after observing that no case could more satisfactorily exemplify the wisdom of the rule of equity against double portions than the present, proceeded as follows:—

“Before I consider the authorities as applicable to the facts of this case, I think it right to throw out of consideration all the cases which have been cited in which questions have arisen as to legacies being, or not being, held to be in satisfaction of debts; for, however similar the two cases may, at first sight, appear to be, the rules of equity as applicable to each are, in fact, quite different. Equity leans in favour of a legacy being taken in satisfaction of a portion; but not so in the case of a debt, the feeling being, that it is improbable that a parent intends a double portion for one child to the prejudice of other children. In the case of debt, therefore, small circumstances of difference between the debt and the legacy are held to negative any presumption of satisfaction; but, in the case of portions, small circumstances are disregarded. Thus it is that a smaller legacy is not held to be in satisfaction of part of a larger debt, but it may be satisfaction *pro tanto* of a portion. So also a gift of the whole or part of the residue cannot be considered as satisfaction of a debt; because the amount being uncertain, it may prove to be less than the debt. In considering, then, whether this rule applies to portions, the reason of the rule, as applicable to debts, must not be lost sight of; because, as a portion may be satisfied *pro tanto* by a smaller legacy, the reason given for the rule, as applicable to debts, cannot apply as to portions; and, on the contrary, as the residue must be supposed to have been considered by the testator as of some value, it would appear, upon principle, that it ought to be considered as satisfaction altogether, or *pro tanto* according to the amount. For why should not a sum given as residue have the same effect upon a larger portion as the same sum given as a money legacy? All reasoning seems to be in favour of satisfaction; but the point must be decided by the authorities. *Blandy v. Widmore* (1 P. Wms. 324) was a case of intention and performance; so was *Lee v. Cox*, (3 Atk. 419, and 1 Ves. Sen. 1); so was *Goldsmid v. Goldsmid*, (1 Swanst. 211). If there are no cases deciding this question in terms, there are several from which the rule of the court may be deduced. In *Linguen v. Souray*, (Prec. Ch. 400,) a provision for a wife contracted for, of a life interest in 1400*l.*, was held to be satisfied by a gift by will of the residue, the interest from which exceeded the interest upon the 1400*l.* In *Barret v. Beckford*, (1 Ves. Sen. 519,) the gift of the residue was held not to be a satisfaction, upon the ground of the claim being a debt; and Lord Hardwicke drew the distinction between that case and double portions, seeming to imply, that, in the latter case, the decision would be otherwise. In *Rickman v. Morgan* (1 Bro. C. C. 63, and 2 Bro. C. C. 394), there was a provision of 8000*l.* in the settlement, with a condition as to deducting any advancement which the father might make; and Lord Thurlow says, in 2 Brown, that it would be ridiculous to say that a gift of residue would not be satisfaction for the 8000*l.*; that it would be strange to say that the gift of the whole residue, being uncertain, shall not be a satisfaction when a moiety of that residue given as a legacy will. In *Weall v. Rice*, (2 Russ. & My. 251,) Sir John Leach lays down the rule as to portions generally, without making any distinction between money legacies and gifts of residue. It is satisfactory to find the doctrine in these cases so consistent with, and so conformable to, principle; they leave no doubt as to the general rule. It now remains to consider

how far the facts of the present case bring it within that general rule. The testator was here bound after his death to transfer to four trustees (two of whom are also trustees and executors under the will) 66,666*l.* 13*s.* 4*d.* £3 per Cents., to be by them held upon the trusts of the settlement made on the marriage of his daughter, the appellant, and by his will he gave to the same two individuals half the residue of his personal estate for the benefit of the appellant, Lady Edward Thynne, and her children, the difference between the two being, that, by the settlement, the appointment amongst the children was to be joint by the husband and wife, and under the will by the wife alone, and that under the settlement the children of the marriage were the only objects of the appointment, and under the will the children of the daughter generally—differences which, according to the rule applicable to double portions, do not negative the presumption of satisfaction. The case of election has been disposed of by the Master's report. It appears to me, therefore, that the Master of the Rolls came to the right conclusion, and that both the appeals ought to be dismissed, with costs," xii. Jur. 807.

ADDITIONAL NOTE.—No. II.

As to satisfied Terms created for securing Portions, &c.

It has already been stated (see vol. i. p. 516), that by analogy to the case of mortgages, when terms for years were created for securing payment of jointures, portions for children, or for any other purpose, they did not without a special provision for this purpose determine by the performance of the trust for which they were raised; but the owner of the fee was entitled to the beneficial interest. It has also been stated that satisfied terms have been extinguished; but that purchasers are entitled under certain circumstances to the same benefit as if the terms affecting the estate purchased had been assigned for his protection. In *Doe dem. Cadwalader v. Price*, xi. Jur. 131, (see particularly p. 133-4,) Mr. Baron Parke said, the act 8 & 9 Vict. c. 112, threw on the courts of law the duty of a Court of Equity, without the adequate machinery (Mr. Williams's Treatise, p. 133, had been quoted); but he said this was not the only case in which the courts of law had to judge of equitable as well as legal rights, as in questions of Title, assignees of bankrupts and insolvents taking all property and rights both at law and in Equity. The defendant in the case above cited did not want the protection of the term, but if he had, the judges doubted whether he must not have gone to the Court of Chancery for relief, or have applied to the Court of Exchequer to strike out of the declaration the demise in the name of his trustee, *ibid.* 131.

It had been settled, though for some time controverted, that a dowress should have the benefit of a satisfied term against the heir, 2 Fonbl. 112; but that a purchaser, with notice of the wife's title to dower, by obtaining an *actual assignment* of a satisfied term, might defeat the title of a dowress, 2 Fonbl. 113, note (q), *Maundrell v. Maundrell*, 7 Ves. 567, 10 Ves. 246. Sir Edward Sugden observes in regard to the act above quoted, that the protection given is limited, for that it does not give such protection as a further assignment of it for a purchaser would have conferred, Vend. and P. 651. A trustee of a term assigned to attend the inheritance more than 20 years before the passing of the stat. 2 & 3 Will. IV. c. 27, (Stat. of Limitations of Actions, &c.) is

within the 3rd section of that statute, *Doe v. Phillips*, xi. Jur. 692. "The doctrine of adverse possession," said Mr. J. Patteson, *ibid.* 693, "is at an end." And see on this subject xi. Jurist, part ii. p. 310.

ADDITIONAL NOTE.—No. III.

Satisfaction of Father's Obligation by Subsequent Settlement—V. *sup.* pp. 428, 436.

In the late case of *Plunket v. Lewis, 3 Hare, 324*, the Vice-Chancellor Wigram examined the cases where a particular consideration has been expressed in one of the latter instruments, from which it has been argued that the father could not have intended that the portion given should be taken as a satisfaction of his previous obligation towards his child; particularly *Wood v. Briant, 2 Atk. 521*, where Lord Hardwicke went fully into the law upon the broad principle of satisfaction; *Seed v. Bradford, 1 Ves. 501*, and *Chave v. Farrant*, before Sir W. Grant, 18 Ves. 8. "They clearly decide," said his Honour, "that neither the expression of natural love and affection as the reason of the gift, nor the ignorance of the husband of his wife's rights, will necessarily prevent the application of the doctrine of satisfaction," though the expression of natural affection may have some weight, 3 Hare, p. 326. The principal authorities on the subject of satisfaction by subsequent advancement are cited, p. 321. His Honour observed, that where the advance was exactly equal in amount to the debt, the expression of natural affection as the motive of the subsequent advance might be very material, at least in conjunction with other circumstances, as shewing that it could not have been made in satisfaction of the debt; but it would rather appear that his Honour would have let in evidence even in such a case. In the same case a point was made that the husband became a purchaser under the settlement by agreeing to settle his own estate; to this his Honour replied: The observation of the Vice-Chancellor of England in *Wharton v. Lord Durham, (5 Simons, 314,)* is, that where the husband in consideration of his wife's portion settles his own estate, that is the same thing, *quoad* satisfaction, as if the daughter's fortune were settled, *ibid.* p. 327.

In this case also his Honour examines the distinction supposed to have been taken by Lord Lyndhurst in *Wharton v. Lord Durham, 10 Bli. N. S. 546-7; S. C. 3 Cl. & Fin. 156*, that "it was necessary as far as related to this debt (the 5000*l.*, v. *supra*, p. 440, note (d),) that the provision in satisfaction of it should be in terms expressed, but as far as related to the provision by the will it was not necessary, because that effect is produced by law;" which his Honour considered as applicable to that particular case, and that it was not to be taken as a general rule; V. *ibid.* p. 328-9. His Honour also held in this case that advances made *simpliciter* to the son, whilst the trust stock, to a portion of which he was entitled, yet stood in the name of the trustee, and therefore, before any debt in that respect had arisen as against the father, could not constitute any answer to the claim of the representatives of the son for his share in the proceeds of the stock, *ibid.* 330. There was another point as to the son's share, arising out of the special circumstances, *ibid.* p. 329.

His Honour recognized the statement of the general rule, as to satisfaction by subsequent advance, 2 Roper on Legacies, p. 57, as correct; but said that it was a presumption that might be rebutted by evidence, *ibid.* 324, and his Honour held, p. 329, that evidence was clearly admissible to support the presumption, that is, as I presume, where necessary—that is where there are any circumstances that *primâ facie* would repel the presumption, v. *sup.* p. 447.

SECTION VIII.—*Gifts to Parents and others for the Maintenance of Children—Where the Father, though of ability to maintain his Children, may apply the Income of their Property for that Purpose—Undefined Interests given to Parents and Children—General Rules as to Maintenance.*

General Rules.

Maintenance and Education and Bringing-up generally have reference to Minority. But Maintenance and Education may extend for Life.

Soames v. Martin, 10 Sim.

Maintenance directed to be paid to the Father for his Life to maintain his Children. Child forisfamiliated.

Interest of Legacy or Portion given for Maintenance, from what Time it runs.

Trustees not authorized to break in upon Capital, sometimes done by the Court.

State of the Family will be considered.

Maintenance given though not apparently authorized by Will.

Bequest in Trust for Infant, to Apprentice him, absolute.

Annual Sum given for Maintenance apportionable.

Discretion given to Trustees in some cases exercised by the Court.

Generally Fund may be paid to the Trustee.

Gifts to Parents for the Maintenance of Children, and to Parents and Children for undefined Interests.

Gift to Wife for the Support of herself and her Family.

Other Instances.

Where Property is given to one, at his Disposal for the Maintenance of Children, he may sell.

Surplus.

Where Children are the Occasions of Bounty only, not the Objects.

Rule that the Father is bound to maintain his Children.

Cases in which he may insist on having the Interest, &c. of Child's Property applied for that Purpose.

Stocken v. Stocken.

Thompson v. Griffin.

Implied Absolute Gift to Donee in particular Cases.

Where Children will be entitled in Remainder.

In Joint Tenancy—Difference between Gift and Contract.

As Tenants in Common.

Where Children take by Substitution.

Question as to whether the Parents and Children are to take per capita or per stirpes.

SOME of the general rules of the court in regard to maintenance have already been incidentally adverted to, and the doctrine in regard to maintenance out of the interest of a portion or legacy directed to

be accumulated has been particularly noticed (a). It is now proposed to enter upon the leading doctrines relating to maintenance provided by settlements and wills.

The words maintenance, education, and *bringing up*, standing together, have reference to minority (b). But where the interest of a fund is directed to be applied for the maintenance and education of a person, though at the time an infant, he is, generally speaking, entitled to the interest during his life (c). In *Soames v. Martin* (d), a testator directed the interest of a sum of money to be applied for the maintenance and education of his nephew (who was an infant), the testator had made no disposition of the capital. The Vice-Chancellor of England, remarking on the absence of the words "bringing up," held that the child was entitled to maintenance during his life. "All persons," said the Vice-Chancellor, "who have attained 21 are not in a state in which they do not want education, and there is no period of life in which a person does not require maintenance." Education includes maintenance (e). Where maintenance is given *during minority*, as a general rule it does not cease on the marriage of the child (f).

Where a fund was given to the children born and to be born of a particular person, to be divided between them at 21 or marriage, and the dividends were directed to be paid to the father *during his life*, and after his death then, during the minority of each child, that the dividends should be retained by the trustees, and should be applied by him or them as the events should happen, in the maintenance, clothing, and advancement of each child in such proportion, &c., as the father, or, as the event might happen, the trustees should think fit: it was held that this was a trust in the father of the income for the maintenance, &c., of his children, which trust did not terminate upon all or any of his children attaining majority during his life: that he might apply the income to the support of the children without reference to his ability to maintain them: and that on any child coming of age he could not claim his distributive share of the capital, not only because it was not clear that after-born children would be entitled to participate, but because the father would be justified, if circumstances called for it, in distributing the income unequally as between the different children (g).

(a) The general rules are stated *supra*, p. 185. The doctrine, where there is a trust for accumulation, and where there is a gift over, is stated, pp. 186-190.

(b) *Badham v. Mee*, 1 Russ. & M. 631.

(c) *Kilvington v. Gray*, 10 Sim. 297; and see *Alexander v. McCulloch*, 1 Cox, 391.

(d) 10 Sim. 287, and see *Kilvington v. Gray*, 10 Sim. 293, 297; *Webb v. Kelly*, 9 Sim. 469.

(e) *Foley v. Parry*, 5 Sim. 145.

(f) *Conolly v. Farrell*, 8 Beav. 347.

(g) *Bateman v. Foster*, 1 Coll. 118, 126; and see *Langmore v. Elcum*, 2 Yo. & Coll.

Where the income of property is given to the mother for the maintenance of herself and her children, what is intended is that she shall receive the whole income, and shall maintain the children out of it so long as they form part of her family; but when they are forisfamiated, as by marriage, they lose the right to maintenance (a).

Where provision for the maintenance of infants is made by a parent or a person *in loco parentis*, as before noticed, interest will be given from the testator's death (b), unless a contrary intention is shown, as where the parent has by his will made a distinct provision for the maintenance of the child (c): and where a legacy is given to children, *provided* they shall attain 21, with a gift over if the children should die before 21, if the testator appoints trustees and guardians to the children, particularly with a request that they will attend to their education, the children will be entitled to the interest of the legacies for their maintenance and education until they attain 21, or die under that age (d).

It has been stated to be the settled rule of the court that trustees for infants shall not be permitted of their own authority to break in upon the capital for the maintenance of the infants; the court itself has very rarely broken in upon the capital for the mere purpose of maintenance, though frequently for advancement (e), where the property has been small (f): but Sir A. Hart held, treating the case of *Walker v. Wetherell* as overruled, that whatever act done by the trustee spontaneously was such as the court would have ordered to be done, that is rightly done, and will be sustained (g).

As the court will allot maintenance for the infant out of the produce of his estate, it will also in so doing consider the circumstances

C. C. 363, 370; there the trust was to permit the wife to receive the rents, &c. for her own use and for the maintenance, &c. of the testator's children, "so long as she shall continue my widow;" it was held that these words applied equally to the duration of the trusts for maintenance as to the interest of the widow; and see *Sheppard v. Wilson*, 4 Hare, 395.—"What," said the Vice-Chancellor, in the first-cited case, "I should do, if the father were to commit a breach of trust or of duty towards either of the children, it is unnecessary to say."

(a) *Bowden v. Laing*, (1844,) 14 Sim. 115, where most of the material antecedent cases are cited.

(b) *Supra*, p. 186, and see *Hill v. Hill*, 3 Ves. & B. 183, a case of grandchildren; they were described as infant orphans, and some of them illegitimate, *Leslie v. Leslie*, Lloyd & G. temp. Sugd. 1; also a case of grandchildren,

and see *Heath v. Perry*, 3 Atk. 101; *Crickett v. Dolby*, 3 Ves. 10; *Raven v. Waite* is also in 1 Wils. C. R. p. 204, *et v.* 1 R. & M. 343.

(c) *Donovan v. Needham*, 9 Beav. 164.

(d) *Mills v. Roberts*, 1 Russ. & M. 555; *S. C.*, Tambl. R. 476; and see *Pett v. Fellows*, 1 Swanst. 561, cited as *Pell v. Fellows*, *sup.* p. 186; *Boddy v. Daves*, 1 Keen, 368; and *Brown v. Temperley*, 3 Russ. 263; and *Ex parte Bowden*, Rolls, 1835, cited 1 Keen, 366.

(e) *Walker v. Wetherell*, 6 Ves. 473.

(f) *Ex parte Green*, 1 Jac. & W. 253; *Harvey v. Harvey*, 2 P. W. 22; *Barlow v. Grant*, 1 Vern. 255; *Ex parte Swift*, 1 Russ. & M. 575; *Clay v. Pennington*, 8 Sim. 359. The cases are collected by Mr. Hill, *On Trustees*, 399, 400; and see *Fentiman v. Fentiman*, 13 Sim. 171.

(g) *Carmichael v. Wilson*, 3 Molloy, 84; see Lewin on Trusts, 84.

and state of the family; as where there is an elder son, an infant, and younger children who have no provision, the court will allow a more ample maintenance to the guardian of the eldest son, by which the younger children may be maintained (*a*). And as the court will, where the legacy is vested (*b*), order maintenance where none is directed by the will, and though the interest is directed to accumulate (*c*); so on the other hand, as will be more particularly noticed hereafter, it will refuse to apply the fund for maintenance, though so directed, if the father be living and of sufficient ability to maintain his child, unless it be given to the father (*d*).

If a bequest be to or in trust for a legatee to apprentice him, or the like, it is an absolute gift to the legatee; so that if he die before it be so applied it will belong to his representatives (*e*).

As maintenance is given for the daily subsistence of children, therefore, as a general rule, though a sum be directed to be paid half-yearly at stated times for maintenance until the portion of the child shall become payable, the child will be entitled to a proportionate part of the sum directed to be applied during the interval which elapses from the last payment down to the time of the portion becoming due (*f*). Where an annuity charged upon land is given for the maintenance of children down to the time when the eldest shall have attained 21 or any other definite period, such provision being given for maintenance of children, the children, contrary to the general rule, are entitled to an apportioned part of such annuity for the time between the last payment and the period at which the charge ceases (*g*).

A question as to apportionment under the late statute came before Lord Langdale a short time since, which it may be well here to introduce. A testator gave his residuary estate to his executors upon trust to apply a competent part, at the discretion of his trustees, of the interest and dividends, for the maintenance and education of his son during his minority, and from time to time to accumulate the residue of such interest, &c., and after he should attain 21 to apply a moiety of such

(*a*) *Harvey v. Harvey*, 2 P. W. 21; *Lanoy v. Duke of Athol*, 2 Atk. 447; *Petre v. Petre*, 3 Atk. 511; *Roache v. Garvan*, 1 Ves. 160; *Style v. Style*, July, 1799, Mad. MS.; *Burnet v. Burnet*, 1 Bro. 179; 2 Fonbl. 234-5.

(*b*) See *Descrimes v. Tomkins*, 1 Cox, 133.

(*c*) *Supra*, p. 187. *Mole v. Mole*, Dick. 310; *Stretch v. Watkins*, 1 Mad. 253; 2 Fonbl., *ubi sup*.

(*d*) *Hughes v. Hughes*, 1 Bro. 387.

(*e*) *Nevill v. Nevill*, 2 Vern. 430; *Barlow*

v. Grant, 1 Vern. p. 254; *Cope v. Wilmot*, Ambl. 704, and other cases cited Roper on Leg. 1497.

(*f*) *Hay v. Palmer*, 2 P. W. pp. 501-2; the Master of the Rolls also referred this case to the general intention appearing upon the instrument, *Reynish v. Martin*, 3 Atk. p. 330. The rent of a mortgage is of course apportionable, as it is due from day to day; see the notes 2 P. W. 502.

(*g*) *Sheppard v. Wilson*, 4 Hare, 395; *Reynish v. Martin*, *ubi sup*.

interest, &c. for his support until he attained 25, and on his attaining 25 to pay such residue to his son; if he should not attain 25, then in trust for his children, if any. On the 11th January, 1844, 548*l.* was received for a half-year's dividends; the son attained 21 the 31st Oct., 1843; the son claimed the whole of the dividends on the ground of their having been received after he attained 21; it was contended that under the Stat. 4 & 5 Will. IV. c. 22 (*a*), the son was only entitled to an apportioned part of the dividends which accrued in Jan., 1844; for the children of the son, if they should become entitled to the funds, might insist that the son was only entitled to half of that portion of the dividends which accrued after he attained 21; but Lord Langdale was of opinion that this was not a case for an apportionment (*b*).

Where the testator has imposed it as a duty on trustees to take care of an infant, and to provide for him in some business or profession and his future maintenance, and has designated the fund out of which the provision is to be made, the court will, in the event of the execution of the trust devolving upon the court, exercise the discretion which the testator has reposed in the trustee (*c*).

Where a gift is made to a person and a trust created in that person, the court may, unless in special cases, properly pay over the fund to the individual who is such trustee; but the person to whom the payment is made in that character is of course answerable for the fund to those for whose benefit the trust is created (*d*).

Bequests are of frequent occurrence in wills, by which property is given to a parent for the support or towards the support of his children, or to enable him to provide for his children, and the like, and the court has had to define what is to be considered the intention in such cases, and to what extent a trust is imposed, or a gift is to be implied to the father, or to the children, or to both. It has been objected in such cases that the bequest, being only the better to enable the party to perform a given duty, is absolute in the donee; and so it is held where, to enable the father to afford to his children a proper maintenance is only a motive for the gift (*e*), as will be seen hereafter. It has also been objected, in some of these cases, that as

(*a*) By that statute where an annuity or dividends of stock are given to one for life, with remainder over, as between the tenant for life and persons in remainder, an apportionment now takes place, which, by the general law, would not be the case; see 3 Hare, 180-4.

(*b*) *Campbell v. Campbell*, 7 Beav. 482.

(*c*) *Kilrington v. Gray*, 10 Sim. 296; and see *Foley v. Parry*, 5 Sim. 138; *S. C.* on Appeal, 2 My. & K. 138, *supra*, p. 457.

(*d*) *Woods v. Woods*, 1 My. & Cr. 409; *Cooper v. Thornton*, 3 Bro. 96, 98; *S. C.*, on Appeal, *ib.* 186, *Robinson v. Tickell*, 8 Ves. 142; *Raikes v. Ward*, 1 Hare, 449.

(*e*) *Benson v. Whittam*, 5 Sim. 22, *et v. inf.*

the donee has the power to dispose of the fund at pleasure to an extent not defined, it brings the case within the rule above adverted to (a), namely, that there is not sufficient certainty as to the subject to enable the court to imply a gift or to raise a trust; but the court has considered itself competent to measure the extent of the benefit thus intended to be conferred on the children, and accordingly the children or other objects have, in many cases, upon the intention, been held to take an interest either by way of direct gift or of trust.

A gift to a wife to support herself and her family (b), or to the end that she may give the testator's children such fortune as she shall think proper or as they best deserve, and suchlike expressions, raises a trust for the objects so pointed out. So a gift by a man to his wife to the intent that she may dispose of the same "for the benefit of herself and our children as she may deem most advantageous" is a trust, but the wife may appoint to some of the children to the exclusion of the others (c).

Where a gift was upon trust to pay into the hands of the father 1000*l.*, to be laid out by him in the education of his two eldest sons for the time being who should be alive at the testator's death; if only one, 500*l.* only to be paid: it was held that the children took a direct interest in the legacy, so that the father having died in the lifetime of the testator it did not lapse (d).

A sum of money was appointed by a married woman to trustees upon trust that they should in the mean time (*i. e.* before the children should become actually entitled to the property under the appointment) after her decease pay the income of the share of each of her children unto her husband, "in order the better to enable him to support, maintain, and educate each such child until his or her share should become transferable;" if the husband should not be alive, then the trustees were at their discretion to apply the income of each

(a) *V. supra*, p. 69.

(b) A direction to a son (who was appointed executor) to take care of his sister Ann, who had an express legacy of 5*l.* a year, and to whom the residue was given, subject as aforesaid, was held to give the sister a right to a sufficient maintenance, *Broad v. Bevan*, note to 1 Russell, 511.

(c) *Burrell v. Burrell*, Amb. 660; *Raikes v. Ward*, v. Jurist, 1008; *S. C.*, 1 Hare, 445; *Crockett v. Crockett*, vi. Jurist, 531; 1 Hare, 451: as to which case *v. infra*. All the most important cases are cited in those two cases; and see *Hadow v. Hadow*, 9 Sim. 438; *Hodg-*

son v. Green, Vice-Chancellor Wigram, 26th June, 1842, vi. Jur. 819.

(d) *Hodgson v. Green*, *ubi sup.*; and see *Leach v. Leach*, 13 Sim. 304; there the court held that the father was a trustee to the extent of being bound to apply the income for the maintenance of the children; see p. 308; but the Vice-Chancellor was considerably influenced by the circumstance, that in the event of the death of the father, another person was appointed to apply the income in the same manner as the father was directed to do.

child's share for his or her maintenance and education respectively. The wife died, leaving her husband and an only child, an infant, her surviving. Mr. Wetherell, the husband, had assigned all his personal estate to trustees for the benefit of his creditors. The question in the cause was, whether the income of his daughter's property so appointed, or any part of it, passed under that deed. It was insisted by the daughter that a trust attached for her benefit on the whole income: the trustees for the creditors insisted that the whole income was given absolutely to the husband: the M. R. held that there was a clear intention to create a trust for the benefit of the children to the extent of the *entire income*, which was ordered to be paid to the father, to be applied by him for the maintenance of the daughter accordingly (a).

In a case where the testator in substance gave to his wife and two other trustees all his residuary property in trust to pay over the rents, &c. to his wife for the education and advancement in life of any children she might have born by him, *after her death* the whole of the said property in trust, or arising out of the management of this trust, to be divided amongst his children, and the testator gave his furniture, plate, &c., to his wife absolutely; the V. C. of England was of opinion that the natural construction of the will was, that the whole income should be paid to the wife subject to the burthen of maintaining and educating the children out of it; and he so declared accordingly (b).

Where a testator gave to his wife a sum of money in addition to other property previously settled upon her, "in consideration of the expense and care she will incur in the maintenance of our children," the court held that this was a trust for the children to the extent of maintaining them whilst at home, and the Master, in computing what was proper for maintenance for the children, was directed to have regard to the circumstance that their mother's house was their home; but the Lord C. held that the mother was not liable for the expense of their education, so that she might not be induced to keep them always at home, as the testator could not have meant that she should be laid under a temptation to spoil the boys by keeping them at home (c).

A testator gave all his estate, real and personal, to his wife to hold to her, her heirs, &c. absolutely, "and at her own disposal, for the

(a) *Wetherell v. Wilson*, 1 Keen, 86; and see *Hammond v. Neame*, 1 Swanst. 35.

(b) *Gilbert v. Bennett*, 10 Simons. 373;

the children sought to exclude the mother from any beneficial interest.

(c) *Collier v. Collier*, 3 Ves. 33.

maintenance of herself and bringing up of my children:" it was held that the widow might sell the real estate (a).

Where a fund is bequeathed to a parent, subject to a trust to maintain, or to maintain and educate, his children, the surplus will belong to the parent; it is a gift subject to a charge: it may be difficult in some cases to determine whether the gift is to the children or in such terms as to constitute an implied gift to the parent: this, like every such question, must be determined on the intention to be collected from the instrument (b).

In the cases already adduced the children were held to be the objects of bounty; but if they are only the occasions of bounty, the donee will be held to be beneficially entitled, and not to be a trustee; therefore if the motive of an absolute gift to a parent is expressed to be that he may be enabled to maintain his children, no trust will arise; for a mere motive will not constitute a trust (c): at least this will clearly hold if there should have been no children, more especially if it was known to the testator that there were none, at the date of the will (d).

Though the father is undoubtedly bound to maintain and educate his children (e), and he cannot in ease of himself, when capable of properly maintaining them, appropriate their property for that purpose, it is competent for him on his marriage to stipulate that certain property shall be applied to those purposes, and if there be a contract to that effect, the property, the subject of the contract, must be applied for that purpose, notwithstanding the father may be of ability to maintain his children (f). So in the case of a legacy given by a stranger, the interest of it may be so given or directed to be applied expressly for maintenance, as to be in substance a gift to the father, or rather for

(a) *Wood v. Richardson*, 4 Beav. 174; and see *Pratt v. Church*, Rolls (1830), *ibid.* p. 177, to same effect.

(b) See *Hamley v. Gilbert*, 1 Jac. 354; *Gordon v. Rutherford*, Turn. & R. 373, 377; and other cases stated Roper on Leg. 1144-5; *Bateman v. Foster*, 1 Coll. 121.

(c) *Hammond v. Neame*, 1 Swanst. 35-8. This was a gift to a mother, who, as Sir Wm. Grant observed in his judgment, was under no legal obligation to support her children (*Berkeley v. Swinburne*, 6 Sim. 615-17, it is presumed, is to be referred to this principle): by analogous reasoning, the purpose for which a legacy is given will not prevent a legacy from vesting in the donee, though the purpose cannot be effected; see, *int. al.* *Bartlow v. Grant*, 1 Vern. 255; *Barton v. Cooke*, 5 Ves. 463; *Leckie v. Lord Kilmorey*, Turn. & R. 207.

(d) *Benson v. Whittam*, 5 Sim. 22, 30, 32. This was a gift to a brother (to enable him to assist such of the children of a deceased brother as the donee might find deserving of encouragement); these words were in a parenthesis in the will, and the Vice-Chancellor considered this to be a material feature, pp. 29, 30; it was held that no trust was created: this conclusion was fortified by other parts of the will, pp. 33-4; and see 3 Hare, 140-1; *Thorp v. Owen*, 2 Hare, 607; *Abraham v. Altman*, 1 Russ. 515.

(e) *Hammond v. Neame*, *ubi sup.*; *et v. sup.* p. 460.

(f) *Mundy v. Lord Howe*, 4 Bro. p. 223; *Meacher v. Young*, 2 My. & K. 490; *Stocken v. Stocken*, 4 My. & Cr. 98: *et v. Lucknow v. Brown*, xii. Jur. 1017; and *De Weever v. Rochport*, 6 Beav. 391.

his relief. Where a testator gave two fifths of his personal estate to the plaintiff in trust to apply the same for the maintenance and use of his children by the testator's late daughter, it was held that he was entitled to apply such interest for their maintenance, notwithstanding he was of ability to maintain them (a). "If," said Lord Cottenham, in a late case (b) on this subject, "the property of the children had been derived from the bounty of a stranger, there could be no doubt but that the father, being of ability to maintain his children, would not be entitled to any allowance out of the income of *their* property for that purpose; but the claim of the father rests upon the distinction which has been taken between the cases in which the property of the children is derived from the bounty of a stranger, and those in which they are entitled to it under the marriage settlement of their parents, such as *Mundy v. Lord Howe* (c), *Stocken v. Stocken* (d), and *Meacher v. Young* (e). It appears to me that the distinction between those two classes of cases has been carried quite as far as can be justified upon principle. In some of them it has been said that, in the case of marriage settlements, the father is a purchaser, and therefore entitled to an allowance for the maintenance of his children, and thereby to be relieved from the burthen which the law throws upon him of maintaining them himself. No doubt, he is so if the contract contained in the settlement gives him such a benefit; but, before he can be entitled to it, he must show that such was his contract. So, in the case of a legacy from a stranger, if the intention, to be found on the construction of the will, appears to have been that the father should have such a benefit, the court is bound to give it to him. In both cases, the question is one of construction and intention. In all the cases referred to, there were distinct and positive trusts to apply the income to the maintenance of the children, applicable, according to the construction put upon the whole of the provision, to the case of a surviving father."

In some special cases an absolute gift has been implied on a gift to one person coupled with the purpose of maintenance of another. A testatrix gave 1000*l.* to her nephew to bring up and maintain her

(a) *Hawkins v. Watts*, 7 Sim. 199.

(b) *Thompson v. Griffin*, Cr. & Phillips, 320. This was the case of a *power* given to trustees to apply the income of property settled for the separate maintenance of a married woman for life, for the maintenance of the children. The father contended that the court ought to compel the trustees to execute the power for his benefit. The Lord Chancellor

said he could not upon that settlement find any trust for the benefit of the father, or any contract that he should be relieved out of the settled property from the burthen of supporting his children.

(c) 4 B. C. C. 223.

(d) 4 Sim. 152; *S. C.* 2 My. & K. 489; and 4 My. & Cr. 95.

(e) 2 My. & K. 490.

natural son Frederick; she then gave the *residue* of her property for the benefit of her four natural children, including Frederick; the testatrix then gave directions for investing *the residue* and applying it for the benefit of the children: it was contended that a trust of the 1000*l.* for Frederick was created; but the V. C. of England held that the nephew took the 1000*l.* absolutely; when the testatrix meant to give money for the maintenance of her children, she had expressly done so; if Frederick had died in the life of the testatrix, the legacy would not have lapsed (a).

£7000 was given to a man to enable him to provide for his younger children, and if he should die without the testator having made any alteration, then the sum was given to the wife of the same donee for the same purposes, and if both should die before the testator, the testator gave the money to the younger children; it was held that the father (the original donee) was entitled to the 7000*l.* for his life, and that his younger children had an interest in the principal (b).

Where property is so given or settled as that children, either in respect of maintenance or otherwise, and the parents, respectively, have an interest in unascertained proportions, or for interests not defined, the extent and nature of the benefit which the children may be entitled to will of course greatly if not altogether depend upon the circumstances of each particular case.

In some instances where maintenance, or any immediate interest in the children, has not appeared to be the object of the instrument, the parent has been held to take a life interest, and the children to take in remainder; in other cases the parent and the children have been held to take as joint tenants; in others as tenants in common; in others the children have been held only to take in substitution for their parents as distinguished from by way of limitation. And first, as to the cases where the children have been held to take in remainder.

The case of *Chambers v. Atkins* (c) arose upon a settlement; the fund was to be transferred to the husband, if he should survive the wife, to and for the use and benefit of him and any child or children of the intended marriage. The Vice-Chancellor of England considered, though entertaining some doubts, that the direction to transfer the fund to the husband excluded the idea of joint tenancy with his children, so that he was held to be entitled for life, the children in

(a) *Ward v. Biddles*, 16 Law J., N. S. 455; xi. Jur. 624.

(b) *Brown v. Casamajor*, 4 Ves. 498; see 5 Sim. 31.

(c) 1 Sim. & St. 382.

remainder (a). In *Morse v. Morse* (b), the bequest was to "my daughter, Anne Morse, and her children, for their sole use and benefit, 5000*l.* ;" 3000*l.* was to be paid within a month after his death, the other 2000*l.* within a year after his wife's death ; and the testator appointed two persons trustees of those sums, for his daughter and her children : the Vice-Chancellor of England held that the daughter took for life, and that all the children she might have would take in remainder, for if not, different classes of children would become interested in the two portions of the legacy.

In a very late case (1848), Lord Langdale, in reference to *Wilde's* case, which had been cited, said, "he believed in all the instances where, in case of there being children living at the time of the gift, the parents had been held to take life interests, with remainder to the children, the gifts had not been simple, but had contained some intimation of an intention that they should so take (c) ;" a slight indication of such intention is sufficient (d).

As regards Joint Tenancy and Tenancy in Common (e), though it has been said that the advantages given to joint tenancy are against equity (f), and the leaning of the court has latterly been against it (g), yet where two or more persons become jointly interested by way of gift without any words of severance, there the same must be subject to all the consequences of law affecting such an interest (h). But where the question is how portions should be given in pursuance of articles, as joint tenancy is an inconvenient mode of settlement in reference to the time of the minorities of the children, the Court of Chancery will rectify the articles by the presumed intent of the contract, and will permit words that would be construed a joint tenancy at law to create in equity a tenancy in common (i).

A testator gave to Ann Wilson, "together with her little girl Louisa and her little boys, my adopted children, and for their joint mainte-

(a) In *Vaughan v. Marquis of Headfort*, 10 Sim. 641, the Vice-Chancellor of England held that on the words "to be secured for their use," following words, *per se*, of joint-tenancy, the court was justified in giving the father an interest for life, with remainder to the children, letting in all who should be born during the life of the father.

(b) 2 Sim. 487 ; and see *Jeffery v. Honeywood*, 4 Mad. 402, and the cases there cited.

(c) *Gordon v. Wheildon*, xii. Jur. 988 ; see *Wilde's* case, 6 Co. R. 16 b, and Co. Litt. 9 a, and 12 Sim. 188.

(d) *Crockett v. Crockett*, *infra* ; et vide 1 Conn. & L. 277, *Heron v. Stokes*.

(e) See particularly 3 Ves. 631, Lord Alvanley.

(f) *Arguendo*, *Barker v. Giles*, 2 P.W. 281 ; and see *Partriche v. Powlett*, 2 Atk. 55. Sometimes it may be the best way of leaving a legacy ; see *Morley v. Bird*, 3 Ves. 632 ; *Stuart v. Bruce*, *ibid.* 633.

(g) See *Morley v. Bird*, (*ubi sup.*) p. 631.

(h) *Campbell v. Campbell*, 4 Bro. p. 17 ; 3 Ves. 630 ; *Aston v. Smallman*, 2 Vern. 556 ; *Webb v. Webb*, 2 Vern. p. 668 ; *Jeffereys v. Small*, 1 Vern. 217 ; *D. of Norfolk v. Howard*, 1 Vern. 164.

(i) *Taggart v. Taggart*, 1 Scho. & Lef. 84 ; *Lewin*, 55.

nance—their mother to have the care of bringing them up to the best of her power till they are able to do for themselves—30*l.* a year, to be paid to the said mother, as above, half-yearly, or as may best suit, or as her conduct deserves,” &c.; there were three children. It was contended that the words “joint maintenance” applied to the children only, and that it was to last during minority only (a). The Vice-Chancellor K. Bruce held that the effect was to give an annuity of 30*l.* to these four persons for their joint lives and the life of the survivor, with a direction that whilst the three were minors, the fourth, being an adult, should receive it for their maintenance (b).

Where the gift was that all the property of the testator should be at the disposal of the testator’s wife “for herself and children,” with some special provisions; the Vice-Chancellor Wigram held that the children took an interest *in possession*, and would be joint tenants with the mother, though the whole income would be directed to be paid to the mother during the infancy of the children, she maintaining the children in a proper manner; and that these words did not give a power of appointment to the mother; consequently when any child attained 21 he would be entitled to receive his share (c). But Lord Cottenham reversed this decision; his Lordship said that, even on a gift to a mother and her children simply (d), a very slight indication of intention that the children should not take jointly with the mother has been thought sufficient to enable the court to decree a life estate to the mother with remainder to her children (e); and his Lordship held that the children had not a present interest in the fund; and said, that the mother, according to his construction of the will and the authorities he had referred to (f), had a personal interest in the fund; and as between herself and her children, she was either a trustee with a large discretion as to the application of the fund, or she had a power in favour of the children subject to a life-interest in herself (g).

(a) On the authority of *Badham v. Mee*, *supra*; and *Miller v. Woodward*, 2 Beav. p. 271.

(b) *Wilson v. Maddison*, 2 Y. & Coll. C. C. 375.

(c) *Crockett v. Crockett*, 1 Hare, 451; 5 Hare, 327-8; on a Petition by one of the children, praying payment of his alleged share.

(d) As in *De Witte v. De Witte*, 11 Sim. 41; *Paine v. Wagner*, 12 Sim. 184; *Beales v. Crisford*, 13 Sim. 592.

(e) *Morse v. Morse*, 2 Sim. 485. *supra*.

(f) Particularly the cases collected, Chance on Powers, i. p. 40; *Anon. Dulis*, 58, § 5: in that case a man devised lands to his wife to dispose and employ them on herself, or on his

or her son or sons, at her will and pleasure; it was held that the wife took a fee-simple, but that it was conditional, so that if the wife should alien to a stranger, it would be a forfeiture; and see 1 P. W. 152; *Daniel v. Ubley*, stated 1 P. W. 152; *Raikes v. Ward*, 1 Hare, 445; see 2 Phill. 558.

(g) *Crockett v. Crockett*, 2 Phill. 561. His Lordship there observed upon his judgment in *Woods v. Woods*, 1 My. & Cr. 401, *supra*, and the interpretation which the Vice-Chancellor Wigram had put upon that case. His Lordship, p. 556, sums up the circumstances which, in his opinion, were inconsistent with the interpretation put upon the will by the Vice-Chancellor Wigram.

A gift to W. S., his wife and children, confers a joint tenancy, there being children living; but the husband and wife take but one share (a).

In *Jubber v. Jubber*, on the words, "for the benefit of herself and unmarried children, that they may be comfortably provided for as long as my wife may remain in this life;" the Vice-Chancellor of England inclined to think that the children took as tenants in common with their mother, but as it would have been premature, no declaration was made as to whether they took as tenants in common or joint tenants (b).

The following are instances where issue have been held to take by way of Substitution.

In *Pearson v. Stephen* (1831), the testator *inter alia* gave the residue of his personal estate in trust for his five sons, "and their respective issue, if any such issue, to take *per stirpes* and not *per capita*, to be divided amongst them in equal shares and proportions, the shares of such of them as shall have attained 21 to be paid to them forthwith after his the testator's death;" the shares of those under age to be paid at 21. One of the sons was married at the date of the will, and at the death of the testator had living four children, the respondents in the appeal. The Lord Chancellor (Lord Brougham), in advising the House said, "This will cannot have a rational construction unless it creates an absolute gift to the five sons. If any of them should not be living at the time of the death of the testator the issue of such deceased son might take by *substitution*; that construction would fulfil the intent of the testator. If this decision stands (the Master of the Rolls, Sir J. Leach, had declared that the sons only took for life), *Butter v. Ommaney* must be overruled;" "but if any of the sons was at that time dead, his issue was to take as the *stirpes* would have taken, and not on a division *per capita*." Judgment was entered accordingly (c).

In the late case of *Dick v. Lacy*, (1845) (d), the bequest was to this effect: As to all the residue of my estate, real and personal, I give the same to Lady Mantell for her life. and after her death I give the same to her nieces, "the daughters of Captain Boyce, and their descendants *per stirpes*, to hold to them, their heirs and assigns for ever; Lady Mantell and the descendants paying unto Mrs. Le Plastres 50*l.* a-year for her

(a) *Gordon v. Whieldon*, *ubi sup.*, founded as to the last point on Lit. § 291; *Anon.* Skin, 182; 4 Vin. Ab. 154, pl. 10; and *Back v. Andrew*, 2 Vern. 120; and *Bricker v. Whatley*, 1 Vern. 233; and see add. note, No. 1.

(b) 9 Sim. 503-7.

(c) *Pearson v. Stephen*, 5 Bli. N. S. 218; 2 Dow. & Cl. 340; see Sir E. Sugden's observations on this case, Law of Prop. 372, 411-12.

(d) 8 Beav. 214; *v. supra*, 76, 155.

life." Capt. Boyce had three daughters only, one died in the lifetime of the tenant for life without issue, two of them had issue, whether or not at the date of the will or death of the testator is not stated; no act was done to sever any joint tenancy. Lord Langdale said the words *per stirpes* not only imported distribution, but also succession or some species of representation; the question then was in what species of succession they were to take, and his Lordship thought that they could only take by *substitution*, so that it was declared that the daughters took absolute interests in joint tenancy (a). The subject of when donees take *per capita* and when *per stirpes* has been considered in a preceding page (b).

If the father receives rents and profits for which he ought to account, and mixes them with his own moneys, and invests those rents and his own moneys so mixed up in land, though the land owing to such admixture cannot be followed (c), yet if the father devises those lands to his children a question of satisfaction will arise (d).

(a) *Hedges v. Harpur*, 9 Beav. 479, is another instance of children being held to take in substitution and not by way of limitation; see p. 485. In the foregoing cases all the principal authorities are cited; and see *Buckle v. Fawcett*, 4 Hare, 544; *Shailer v. Groves*, 6 Hare, 162; and *Chipchase v. Simpson*, xiii. Jur. 90.

(b) *V. supra*, pp. 419-20. See add. note, No. 2.

(c) *V. supra*, p. 221.

(d) *Stocken v. Stocken*, 4 My. & Cr. 99. His Lordship added, "All cases of satisfaction may raise a case of election in one sense, (that is, the child might claim the amount of the rents and profits, or take the benefit of the devise of the estate in which they were invested,) though not in the sense in which the word is usually understood in this court; as to which, *v. supra*, vol. i. 639; *et v. inf. Election*."

ADDITIONAL NOTE, No. I.—*V. supra*, pp. 469, 471.

Where Husband and Wife take as one Person.—*Bricker v. Whatley*, 1 Vern.—*Paine v. Wagner*, 13 Sim.—The words "*Husbands and Families*" rejected, *Robinson v. Waddelow*, 8 Sim.

The case of *Bricker v. Whatley* was this:—A man, by will, gave the residue of his estate to A., B., and C., and the wife of C., equally to be divided between them. It was proved that the wife only was of kin to the testator and not the husband. The Lord Keeper was of opinion that the husband and wife should take but one third part; and the rather for that he observed the two "ands" in this devise; and though a man may devise to ten persons, and add an "and" betwixt each person's name, yet it is not natural or usual to add an "and" till you come to the last person. In *Paine v. Wagner*, 12 Sim. 184, (*supra*, p. 470), the gift was "may be equally divided, share and share alike, Mrs. M., Mr. and Mrs. W. and children, likewise Hannah H.;" the Vice-Chancellor of England held that all persons named were to take as between themselves as tenants in common.

In *Warrington v. Warrington*, 2 Hare, 54, the Vice-Chancellor Wigram held that on a gift of a residue "equally between my brother T. W., my sister Anne C. widow,

my nephew W. H. W., and Emma his wife, their heirs and assigns," the husband and wife, who were *equally next of kin*, were each entitled to a share; "the number of shares must be determined," said his Honour, "by counting the legatees amongst whom it is *equally given*:" he thought that that case was not within Littleton's doctrine, by reason that the husband and wife were not the first named, as in Littleton's illustrations; and distinguishable from *Bricker v. Whatley*, because the word "and" did not occur before the husband's name: and see *Attorney-General v. Bacchus*, 9 Price, 30; 11 Price, 547, see 571. On a gift of a residue "to be equally divided between my said daughters and their husbands and families:" the latter words were rejected, and the daughters were held to take absolutely; *Robinson v. Waddelow*, 8 Sim. 137.

ADDITIONAL NOTE, No. II.—V. *supra*, p. 472.

When Children or Issue take per stirpes and when per capita.—"Issue" construed "Children."—Period to which Survivorship is to be applied.—"Survivors" construed "others."—*Cole v. Sewel*, in *Dom. Proc.*

The following cases may be referred to, in addition to those cited pp. 419, 420:—*Abbey v. Howe*, before the Vice-Chancellor Knight Bruce, xi. Jur. 765. In that case there was a gift by will, after a tenancy for life, unto and equally amongst all and every the children of S. W. and S. K., who should be living at the death of S. K., and the lawful issue of such of them as should be then dead: it was held that the donees were to take *per capita* and not *per stirpes*; some additional authorities are there cited: see also, on the same point, the late case of *Hawkins v. Hamerton*, (1848,) xiii. Jurist, pp. 2—4, which was elaborately argued, and where an ample collection of the authorities is to be found. This is also an important case as to the points of "issue" being construed "children,"—the period to which "survivorship" is to be applied;—on which points, see also *Buckle v. Fawcett*, 4 Hare, 536; *Taylor v. Beverley*, 1 Coll. 108; *Turing v. Turing*, x. Jur. 366; 15 Sim. 139; *Dorville v. Wolff*, 15 Sim. 510; *Shailer v. Groves*, 6 Hare, 162; and *Eno v. Eno*, *ibid.* 171:—and as to "survivors" being construed "others," v. *supra*, vol. i. p. 541; as to which point, see also *Cole v. Sewel*, 4 Dru. & W. 1; 2 Conn. & L. 344; S. C. in *Dom. Proc.* xii. Jur. 927.

In the case of *Cole v. Sewel*, the House of Lords affirmed Lord Chancellor Sugden's doctrine that where a limitation is by way of remainder which may be barred, the objection of remoteness does not apply; v. *supra*, vol. i. p. 533.

ADDITIONAL NOTE.—No. III.—*Supra*, p. 390.

Mathews on Portions.

I lament that I had not become acquainted with Mr. Mathews's useful Treatise on Portions until the whole of the Section VII. Chap. VII. *supra*, was printed off. I would particularly recommend it to the student. As to the vesting of portions in default of appointment, see in addition, *Reilly v. Fitzgerald*, 1 Drury, 122.

SECTION IX.—*Of some of the most usual Trusts of Real and Personal Property in Settlements and Wills in favour of Married Women,—of Settlements, Devises, and Bequests of Property to Married Women for their Separate Use,—Provisions against Anticipation,—The Wife's Equity to a Settlement,—and some other Incidental Topics.*

Rights of Husband, which he acquires by Marriage over the Real and Personal Property of his Wife.

Choses in Action.

Reversionary Interests.

Reduction into Possession.

Release.

Where the Husband becomes a Purchaser of his Wife's Fortune.

Rights which pertain to the Wife independently of Contract.

Equity to a Settlement.

Rights of Children.

How such Equity may be waived, or extinguished.

Rights which may be secured to the Wife by Contract or by Gift. Settlement.

Power of Appointment by Deed, or Will, or both.

Limitation to Executors and to Next of Kin in default of Appointment.

Agreement between Husband and Wife before Marriage.

Pin Money.

Gifts from Husband to Wife.

Doctrines of the Court of Chancery as to Separate Estate of Married Women in Real and Personal Property.

As to Real Estate.

Contract of Wife to sell or charge her Real Estate.

As to Personal Estate.

Agreement before Marriage.

Separate Interest acquired by Gift or Bequest.

Technical Words not necessary to confer Separate Interest.

What Expression will and what will not confer a Separate Interest.

Tyler v. Lake, before Lord Brougham.

Blacklow v. Laws, before the Vice-Chancellor Wigram.

Wife's Power of Disposition over her Separate Property.

Generally the Wife considered as a Feme Sole.

Liability of Separate Estate to Charges and Debts during her Lifetime.

Liability after her Death.

Restraints on Alienation by way of Anticipation.

Where Proviso against Anticipation is annexed to the Power of Appointment only.

Brown v. Bamford, before the Vice-Chancellor of England and Lord Lyndhurst.

Whilst the Original Trust exists, it comes into Operation on every successive Marriage, if not confined to a particular Marriage.

Deeds of Separation.

Observations on Suits for the Recovery of Wife's Separate Property, and on Suits by Creditors to enforce Demands against the Separate Estate of the Wife.

Additional Notes.

No. I.—*Power of Husband to sue on Wife's Bills of Exchange or Notes.*

No. II.—*Course of Practice when the Husband applies to the Court to obtain Principal or Interest to which he is entitled Jure Mariti.*

No. III.—*Case of Doswell v. Earl.—Power of Wife to pass Reversionary Interest by Consent.*

No. IV.—*Limitation to Wife's "Next of Kin," "Personal Representatives," &c. and of the Construction of those Words generally.*

No. V.—*What will amount to a Charge on a Married Woman's Separate Estate.*

No. VI.—*Bond given to remain in Force in the Event of Reconciliation.*

IN entering on this subject it (a) is proper to observe that the consequences of marriage are very different as regards the real, to what they are as regards the personal estate of the wife; as regards the former the husband has no power over the inheritance; his rights are confined to the interest which he acquires during the joint lives (b), and his contingent individual interest as tenant by the curtesy. But by the act of marriage, whether the husband survive the wife or no, the wife's own personal estate, in possession or capable of immediate and tangible possession, which she has at the time of the marriage or which shall come to her during the coverture, not being in either case her paraphernalia, passes to the husband. The husband also acquires the right to dispose of the wife's terms for years or chattels real, and they become his own if he survive (c). As regards Choses in Action the husband's right is only *sub modo*; in these he acquires the absolute interest only in case he *can* and actually *do*

(a) This section was in type before Mr. Bright's work came to my hands, so that I have not been able to make all the use of it which I otherwise should have done. I can refer to the work itself for an industrious collection of the authorities.

(b) See 10 Ves. p. 227; *et v. Robertson v. Norris*, Q. B. xii. Jur. 556; 17 Law J. 291.

(c) Co. Litt. 351, a. The husband may effectually dispose of the wife's reversionary interest in a term, though he die before the reversion falls in; *Donne v. Hart*, 2 Russ. & M. p. 360, and see *Ex parte Ellison*, 2 Y. & Coll. 528, 536; that is if it could fall into possession during his life; *Dalbiac v. Dalbiac*, 16 Ves. 122. Whether the property is bound by the husband's contract, has been doubted, see 2 Coll. 226; as to this point, see *Steed v. Cragh*,

2 Eq. Ab. 37, pl. 3; *Druce v. Denison*, 6 Ves. 385; *Jacob's R.* 76; *Bates v. Dandy*, 3 Russ. 72, note, 2 Atk. 207. The husband may assign a trust of a term belonging to his wife; *Turner's case*, 1 Vern. p. 7, in the House of Lords; *Packer v. Windham*, Prec. Ch. 418-19; *Incedon v. Northcote*, 3 Atk. 435; *Mitford v. Mitford*, 9 Ves. p. 99; (but not so as to exclude her from her equity to a settlement, *Hanson v. Keating*, 4 Hare, 1;) even without consideration, *ibid.*: the husband cannot however charge the chattel real of the wife so as to bind her surviving, Co. Litt. p. 351a. Sir J. Leach held, in *Donne v. Hart*, *ubi supra*, that the husband might, by analogy to law, assign the wife's reversionary interest in a trust of a term; but of course equally subject to the wife's equity to a settlement.

reduce them into possession (*a*). The rule is now fully established, though as regards purchasers it is only lately that it has been settled, that a married woman surviving her husband is entitled to her choses in action not actually reduced into possession, against the assignee of the husband, whether claiming by particular assignment for valuable consideration or his general assignee under the bankrupt and insolvent acts (*b*): as regards the wife's Reversionary and Contingent interests in choses in action; whether the husband dies in the lifetime of the tenant for life, whereby the chose in action *cannot* as against the wife be reduced into possession, or whether he survives and dies before it *is* reduced into possession, the same result will follow; it will belong to the wife surviving him; and that, as against the assignees of the husband for valuable consideration as well as against his representatives (*c*).

Even as regards bills of exchange and promissory notes belonging to the wife before marriage, though the husband may indorse them away (*d*), yet they are but choses in action, and if remaining such, they

(*a*) *V. supra*, vol. i. p. 180; Co. Litt. 351, and Butler's note; *Hornsby v. Lee*, 2 Mad. 16, 20; *Purdew v. Jackson*, 1 Russ. 1; *Watson v. Dennis*, 3 Russ. 90; *Stamper v. Barker*, 5 Mad. 157; *Stiffe v. Everett*, 1 My. & C. 37; *Ellison v. Elwyn*, *infra*, n. (*c*).

(*b*) *Purdew v. Jackson*; *Honner v. Morton*, *ubi infra*; and see *Box v. Box*, 2 Conn. & L. 606, and *Box v. Jackson*, 1 Drury, 55; *ibid.* 83, where the authorities are collected. In this case an application was made to Lord Chancellor Sugden, on appeal from the Master of the Rolls, to take the consent of a married woman, in court, to the sale of a trust fund in which she had a reversionary interest expectant on the death of her mother and payment to the mother, pursuant to an agreement entered into by all parties interested. The Lord Chancellor directed a bill to be filed to raise the point, and on the hearing called to his assistance the Master of the Rolls, who went into an elaborate investigation of the authorities (page 56, *et seq.*), as did the Lord Chancellor, (*ib.* 68, *et seq.*); both agreed that her consent could not be taken. There is a very useful collection of the cases by Mr. Jos. W. Smith, on the subject of the wife's reversionary interests, to which I would refer the student and the practitioner, in the *Jurist*, vol. x. part ii. p. 231.

(*c*) *Ellison v. Elwyn*; *Elwyn v. Williams*, vii. Jur. 338; 13 Sim. 309; followed in *Ashby v. Ashby*, 1 Coll. p. 554; and in *Wilkinson v. Charlesworth*, 10 Beav. p. 328; so that Lord Lyndhurst's dictum in *Honner v. Morton*, 3 Russ. n. 86, (see 13 Sim. p. 313,) as an able

writer in the *Law Review*, vol. iv. p. 249, has observed, is not to be depended upon; it was cited in *Ashby v. Ashby*. The Vice-Chancellor Knight Bruce would not say what would have been the effect of a release of a legacy for a valuable consideration; as to which, *v. infra*. In *Le Vasseur v. Scrutton*, 14 Sim. 118, the Vice-Chancellor of England adhered to his opinion in *Ellison v. Elwyn*; that was the case of a female who was an infant at her marriage; by marriage articles a chose in action, presently belonging to her, *int. alia*, was to be transferred to trustees, on certain trusts: after the marriage the husband executed a settlement, according to the articles; but the stock still remained in the names of trustees: the wife was held entitled to it by survivorship: Sir Thos. Plumer's dictum in *Johnson v. Johnson*, 1 Jac. & W. p. 472, was cited.

(*d*) See 1 Rep. H. and W. 225: *Smith v. Marsack*, xii. Jur. 1050; add. note, No. 1. The husband may also assign a mortgage for a term vested in the wife; but it was held, in *Burnett v. Kinaston*, Prec.-Ch. 119, 1 Vern. 396, not only that the husband could not assign the wife's mortgage in fee, but that the husband surviving was not entitled to the mortgage money, the legal estate in the security being in the heir of the wife. A distinction was formerly taken in such cases where there was a covenant to pay and where not, *Turner v. Crane*, 1 Vern. p. 170; *Boswell v. Brander*, 1 P. W. p. 460; but no such distinction now exists, in each case the mortgage forms part of the personal estate of the mortgagee; see Coote on Mortg. p. 617. Lord

will survive to the wife; whether the husband or his assignees in bankruptcy sue upon them the wife must be joined, and if execution be not levied in the lifetime of the husband, the benefit of it will survive to the wife: but as regards bonds, bills, or notes given to the wife during the marriage the husband may sue alone (a). It is the same, as it would seem, though there is a decision to the contrary, where there is a decree for payment of money to the husband and wife or to the husband in right of the wife, and that decree has not been acted upon (b), for decrees are only declarations of the court upon the rights of the parties when they began to sue (c). But where there is a decree or order for payment to the husband simply, that it is conceived will clearly give to the husband the absolute property (d).

Hardwicke expressly states that the husband may dispose of the wife's mortgage in fee, (*Bates v. Dandy*, 2 Atk. 208); but it must be got in, in order to exclude her right by survivorship, see *Rees v. Keith*, *ubi infra*. Although, where the mortgage is by a legal term, the wife, as I presume, would not be a necessary party to a bill for foreclosure, (see 3 Atk. 435, 436,) so that she would not have the opportunity of insisting on her equity for a settlement; *et v.* 1 P. W. 458; *infra*, 458; if the mortgage is in fee she must be a party; and, according to Sir J. Wigram's rule in *Hanson v. Keating*, 4 Hare, p. 5-7, she ought, in such case, to be at liberty herself to file a bill to enforce her equity. As regards the question of Survivorship in the event of the mortgage money not having been got in, Lord Cottenham seems to consider that *Walter v. Saunders*, (1 Eq. Ab. 58,) is not to be taken as establishing that a mere assignment of a term securing a mortgage debt, defeats the wife's equity, or her right by survivorship: see 5 My. & Cr. 106-7. Lord Hardwicke's expressions (3 Atk. 435,) would imply that the wife's title is excluded; and if the assignee can sue without joining the wife, it would seem that it is; but if it should appear on the proceedings that the mortgage was originally the wife's, and that she is living, would the court make the decree in her absence? this point, in the present state of the law, seems to require a direct decision. The husband may also, for valuable consideration, dispose of a Possibility that the wife is entitled to, (2 Atk. p. 208; and see 1 Bright, Husb. and Wife, 100,) and may transfer her Stock in the funds; see *Wildman v. Wildman*, 9 Ves. 176.

(a) See 2 Ves. Sen. 677; *Gaters v. Madeley*, 6 Mees. & W. 423; and *Yates v. Sherrington*, 11 Mees. & W. 42, where the resolution in the case of *Miles v. Williams* (1 P. W. 249; 10 Mod. 160, 243,) is observed upon. The Court of Exchequer had held that the

assignees might bring an action in their own names; this the Court of Exchequer Chamber reversed, that court holding that the assignment in bankruptcy was not a reduction into possession, and that the assignees did but stand in the place of the husband; and see *Holloway v. Lightburn*, 2 Mad. 135-6, n.; see also the Jurist, vol. ix. part ii. p. 105; and Clancy on Husband and Wife, p. 113, on the subject of actions by the husband to recover the wife's choses in action; and Lord Henley's note, 3 Bro. 362; and *Pierce v. Thornely*, 2 Sim. 178.

(b) *Nanney v. Martin*, 1 Ch. Ca. 27, (recognized in *Purdew v. Jackson*, 1 Russ. 46, and in *Pierce v. Thornely*, 2 Sim. p. 177). In the case of *Forbes v. Phipps*, 1 Eden, p. 507, Lord Northington states that a decree or an award (*Oglander v. Baston*, 1 Vern. p. 396,) operates to vest the property; and see 2 Sim. 148. In the principal case a decree had been made for payment of a legacy due to the wife, (who was indebted at the time of the marriage,) to the husband and wife; the husband survived. Lord Northington held that by the effect of the decree the husband was entitled to the legacy by survivorship, free from the claims of the creditors of the wife; the decision therefore did not directly touch the question under consideration. In *Heygate v. Annesley*, 3 Bro. 361, Lord Thurlow held that an order for payment of money to the husband in right of the wife changed the property; and see the cases cited 1 Vern. 396, and in Raithby's note, and those in note (d) *infra*.

(c) Lord Eldon, *Murray v. Lord Elibank*, 10 Ves. p. 90; Sir Wm. Grant, *Richards v. Chambers*, 10 Ves. 587.

(d) See *Hutchings v. Smith*, 9 Sim. p. 148; and *Forbes v. Phipps*, 1 Eden, 502; *Macanlay v. Philips*, 4 Ves. p. 19. A transfer into court of stock belonging to a lunatic's wife to the credit of the lunacy, was held by Lord Lyndhurst to be a reduction into possession, *Re Jenkins*, 5 Russ. 187; and see *Ryland v.*

Reduction into possession as regards choses in action means actual payment to the husband in his character of husband, not as trustee (*a*), or what is equivalent to it; if the property has been paid to *his* agent, or so dealt with that the property is no longer a chose in action of the wife, but under the exclusive control of the husband, or has been in the exercise of his exclusive control placed by him in the hands of or transferred to other persons upon some trust inconsistent with the existence of the wife's possible title by survivorship, that will be considered to be a reduction into possession. In case a married woman be entitled to a chose in action, whether legal or equitable, the mere circumstance of the legal title being changed, without more, does not in general affect her; for instance, if her husband, having a floating intention to have the property dealt with in the way of being settled or otherwise disposed of, procures the debtor to give a bond to certain persons to secure the debt, and dies before any trusts are declared: nor will a mere investment consistent with the wife's equities have the effect of a reduction into possession: but if contemporaneously with such a transaction, or with the transfer of stock into other names, a trust is effectually declared, that will be considered as a reduction into possession; it amounts to a receipt and a disposition at the same time (*b*). The receipt of part of what is due upon the wife's promissory note and of the whole of the interest is not a reduction into possession (*c*). A minor and her husband before their marriage covenanted to assign to the trustees of the settlement two sums of stock in which the minor had a reversionary interest; one of the sums came into possession and was transferred, that was

Smith, 1 My. & Cr. pp. 53, 56, 57; *Wall v. Tomlinson*, 16 Ves. p. 413; (see 14 Sim. 27; and 2 Coll. 260). Payment into court, under an order that it be laid out for the benefit of the husband and wife, is not a reduction into possession as regards the principal; *Bond v. Simmons*, 3 Atk. 20. In *Packer v. Wyndham*, (Prec. Ch. 418,) the Lord Chancellor seemed to think that where the wife's money is paid into court, by way of caution, to compel him to make a settlement, it must be considered as vested in him by law, though subject to be retained for enforcing the performance of the specific purpose.

(*a*) *Baker v. Hall*, 12 Ves. 497.

(*b*) See *Ryland v. Smith*, 1 My. & Cr. 53; *Burnham v. Bennett*, 2 Coll. pp. 258-260; ix. Jur. p. 888; *Rees v. Keith*, *infra*; *Hansen v. Miller*, 14 Sim. 22; viii. Jur. 210. "Reduction into possession means actual payment; but I think payment to the husband's agent would be a good payment to him;" *per Vice-*

Chancellor of England, *ibid.* 210, b. (and see 1 Roll. Ab. 342; Clancy, 112). "The effect of the transaction" (the payment of the moneys to trustees upon the trusts declared), said the Vice-Chancellor of England, in the last case, "destroyed entirely the character which the fund previously bore;" and see *Glaister v. Hower*, 8 Ves. 207; see also *Rees v. Keith*, 11 Sim. 388, a case relating to the wife's mortgage in fee, where the acts done were considered to be a reduction into possession; and *Adams v. Lavender*, 4 McClelland & Y. p. 41, where the acts were not so considered: and *Wombwell v. Laver*, 2 Sim. p. 360, but which the Vice Chancellor K. Bruce does not seem to approve; 2 Coll. 260.

(*c*) *Nash v. Nash*, 2 Mad. p. 139; *Hore v. Woulfe*, 2 Ball & B. 425; *Hart v. Stephens*, Q. B., ix. Jur. 225, where the authorities are collected; and see part ii. p. 502, of the same volume, where the subject is discussed.

considered as reduced into possession : the other remained outstanding ; it was declared that this reversionary interest was not bound by the settlement as against the wife surviving (a) : and where the brother of the wife covenanted in the settlement to pay a sum charged on his estate in favour of the wife to the husband, and he received the interest, but died leaving the principal outstanding, it was held that the wife was entitled by survivorship (b). It seems that if the husband proves the wife's debt in bankruptcy, and dies before a dividend is made, the wife is entitled by survivorship (c).

The husband surviving takes the wife's legal chattles real, and also at law any savings consisting of cash or notes, made by the wife out of her separate estate, in his marital right ; but to obtain her choses in action, which also survive to him, he must clothe himself with the character of her administrator (d).

In a late case the husband and wife had entered into a contract for the sale of the reversionary interest of the wife, to take effect in the event of the reversion falling into possession during the life of husband and wife ; it was part of the contract that the expence of the assignment should be paid out of the purchase money ; the price paid was 76*l.* ; the value set upon it by an actuary (who however had not taken into consideration the contingency that the husband might have died before it was actually reduced into possession) was 131*l.* The Vice-Chancellor Knight Bruce was of opinion that the objections were not sufficient to set aside the sale (e).

As the husband during the marriage "has all in her right" (f), he may Release any debt which is due to her, also a legacy (g), and as it

(a) *Cunningham v. Antrobus*, xiii. Jur. 28-9.

(b) *Howman v. Corie*, 2 Vern. p. 190 : the covenant of the brother was considered only as an additional security, not as making the husband a purchaser ; as to which, v. *infra*.

(c) *Anon.*, 2 Vern. 707.

(d) *Malony v. Kennedy*, 10 Sim. 254 ; *Betts v. Kimpton*, 2 Barn. & Adol. p. 273 ; and see *Jones v. Skipworth*, 9 Beav. p. 237 ; *Carne v. Brice*, 7 Mees. & W. p. 183 ; but in *Sir Paul Neal's* case, cited Prec. Ch. 44, it is said she may dispose of the money saved by her, and any jewels, &c. bought with it, by will ; and see the dictum in *Willson v. Pack*, *ibid.* 297 ; but there the wife had survived ; *et v. infra*, 502. If a woman grant a term to her own use, it will not it seems survive to the husband, but go to the wife's executors or administrators ; 2 Freem. pp. 62, 131 ; Co. Litt. fol. 351, a : *Turner's* case, *sup.*, which was decided against

the previous authorities, (see *Hunt v. Pitt*, Freem. p. 79,) does not touch this particular point. It may be observed that although the House of Lords will not rehear a particular case, it may review its own decision as a rule of law ; Sugd. Law of Property, p. 24.

(e) *Sewell v. Walker*, xii. Jur. 1041 ; as to valuations by actuaries in such cases, see Sugd. Law of Prop. 71-2.

(f) *Chamberlain v. Hewson*, 1 Salk. 115.

(g) *Sheph. Touch.* p. 333 ; *Adams v. Cole*, Forrest. 170 ; see *Clancy on Husb. and Wife*, 111 : other cases are adverted to by Sir Thos. Plumer in *Purdew v. Jackson*, 1 Russ. 49.

Lord Hardwicke, in *Bates v. Dandy*, (2 Atk. 208,) says, "that the husband may release the wife's bond without receiving any part of the money ; as he may gratuitously dispose of her chattels real." The Vice-Chancellor Knight Bruce, (*sup.* p. 476, note (c),) seems to point

has been held even costs awarded to her during the coverture in a suit instituted by her in the Ecclesiastical Court (a); but the husband cannot, at law or in equity, dispose of or release such part of the wife's personal property as cannot possibly accrue during the coverture (b): an agreement between the husband and the executors, coupled with a receipt, that the wife's legacy shall be set off against the husband's debt, will not defeat the wife's right by survivorship, the legacy not being released (c).

It has been held that the husband may, without the assent of the wife given in court, for valuable consideration absolutely pledge a fund standing in the name of the Accountant-General to the account of the wife (d), but this doctrine is hardly consistent with the later authorities.

The husband may by marriage-settlement become the purchaser of the whole of the wife's fortune of whatever it may consist so as to

at a distinction between a release of a legacy for a valuable consideration and a voluntary one. An assignment was always required to be for valuable consideration, in order to bind the wife; *Bates v. Dandy*, *ubi sup.*; see *Garforth v. Bradley*, 2 Ves. 678; 9 Ves. 99: a release extinguishes the debt or duty, an assignment is a transfer available in equity only, and therefore requires a valuable consideration to induce any court to enforce it; see *Ward v. Audland*, 8 Beav. 211: but a distinction has been taken (see Jacob's note, 2 Roper, Husband and Wife, p. 219,) between a release of a legal and of an equitable demand, to which the Vice-Chancellor probably referred. A trust of a term equally as a legal term may be assigned by the husband gratuitously, 9 Ves. 99.

(a) *Chamberlain v. Hewson*, *ubi sup.*

(b) *Gage v. Acton*, 1 Salk. pp. 326-7. In *Hore v. Beecher*, 12 Sim. 467, (where there was a valuable consideration,) it was decided that the husband might release an annuity secured to the wife by a bond; but see *Thompson v. Butler*, Moore's Reports, 522; Com. Dig. Baron and Feme, K.; there cited; and Mr. Jacob's observations on that case, pp. 517-18; and the cases referred to by Sir Thos. Plumer, 1 Russ. p. 49. What the wife was entitled to was an annuity, secured by the bond, and by an assignment of an annuity for the life of another person. If the husband and wife had brought an action on the bond, they could only, on the statute of Will. III., have had execution for the arrears, not as in the case of an ordinary debt for the full amount; and the judgment would have survived to the wife, for securing the payments which should accrue after the death of the husband. It is material

to observe that the wife was not the obligee, and that the obligees in the bond had not released the estate of the obligor, so that the legal liability subsisted; and the late case of *Sturgis v. Champneys*, *v. infra*, seems to have determined, at least as regards the wife's equity to a settlement, that it is of no importance how it happens that the legal interest is outstanding. I confess I cannot—after all the consideration I have been able to give to that case, and notwithstanding the very high estimation in which, in common with the profession at large, I hold the opinion of the Vice-Chancellor of England—convince myself that that case was rightly decided: it was heard as a short cause. I have handed to Mr. Bright, for the new edition of Mr. Roper's work, the completion of which I was obliged to transfer to Mr. Bright, a statement, more in detail, of the reasons which have induced me to doubt the correctness of this decision; see vol. ii. of that work, p. 436; and see *Stiffe v. Everitt*, 1 My. & Cr. 40; and *Whitmarsh v. Robertson*, 1 Yo. & Coll. C. C. 718.

(c) *Harrison v. Andrews*, 13 Sim. p. 595; see, on this subject, the dicta, 1 Dr. & W. 109-10, and 5 Hare, 325. As to the power of the husband to release the wife's equitable choses in action, see Mr. Jacob's remarks, 1 Bright, Husband and Wife, 75; *ibid.* vol. ii. p. 451, Appendix; *et v. sup.* 479, n. (g).

(d) *Sansum v. Dewar*, 3 Russ. 91; see the terms of the order, p. 93. The general reasoning in *Johnson v. Johnson*, 1 Jac. & W. 476, is against this doctrine, the dictum is in favour of it, *ubi sup.*; but that dictum, as will have been seen, has been overruled.

make it his absolute property whether he reduce it into possession or not; but it is now fully established that the husband does not by a settlement become a purchaser even of the wife's present choses in action, much less of those which may come to her after the marriage, as against the wife surviving, unless there be a contract to that effect either express or implied (*a*): if the settlement be expressed, or imports, to be (*b*) in consideration of the wife's present fortune or of her fortune as specified and described in the deed itself, property afterwards coming to her, and not reduced into possession by the husband, will survive to her (*c*): but if the settlement is in consideration of the fortune she is, or may be, entitled to, or the contents of the settlement plainly import that, as much as if it were expressed, in such case, if any thing comes afterwards during the coverture to the wife, the husband is considered as a purchaser, and he or his representatives will take it (*d*). Where the husband has entered into a covenant on his part to settle property on the wife, and he has become unable to perform his covenant, and yet claims the portion of the wife's property which he is entitled to under the articles, the parties who are entitled to claim the benefit of the covenant have, generally speaking, a right to insist on that portion of the fund being applied in satisfaction of his covenant; but if, when he makes his claim to the property, and an adjudication must take place respecting it, the time for the performance of his covenant has not arrived, for instance, where he has covenanted to leave property to a certain amount on his death, then, although he may have become bankrupt, yet, as such is the contract, his assignees representing him are presently entitled to have the wife's property under the articles; but if the time has arrived when the husband's covenant is to be performed and the consideration-money to be paid, the court will not permit the party to receive that which he has purchased without taking care that he pay the stipulated price for it (*e*).

(*a*) *Druce v. Denison*, 6 Ves. 395; *Corsbie v. Free*, Cr. & Ph. 72; and see *Newlands v. Paynter*, 10 Sim. 377; the appeal did not touch this point. A voluntary settlement after marriage cannot be considered as a purchase, *Lanoy v. Duke of Athol*, 2 Atk. 448; but see *Sykes v. Meynal*, 1 Dick. 368. In *Cleland v. Cleland*, Pr. Ch. 63, the Lord Chancellor seems to intimate, that even if there be an agreement, the fortune settled must be equivalent; but surely marriage is of itself a sufficient consideration to support an actual agreement; and see *Adams v. Cole*, Forrest. 170; though adequacy or inadequacy

may be material in a doubtful case of construction. In *Blois v. Hereford*, 2 Vernon, p. 501, the Lord Keeper said, "In all cases where a settlement is equivalent it shall be intended the husband should have the portion." The cases are collected in Hill on Trustees, 411.

(*b*) *Carr v. Taylor*, 10 Ves. 579.

(*c*) *Salwey v. Salwey*, Amb. 692; *Garrforth v. Bradley*, 2 Ves. 677; *Carr v. Taylor*, *ubi sup.*

(*d*) *Mitford v. Mitford*, 9 Ves. 95-6; *Carr v. Taylor*, *ubi sup.*

(*e*) *Basevi v. Serra*, 14 Ves. 317; *Corsbie*

Generally speaking the arrears due in respect of her separate estate before marriage will belong to the wife as separate estate (a).

A wife, by the general doctrines of the Court of Chancery, has equitable rights, independently of contract or gift, as regards real as well as personal property which it may be proper shortly to advert to, before entering upon the consideration of those rights and powers which she may acquire by contract or by gift; and a very late case before Lord Cottenham, where his Lordship reviewed the leading authorities, enables me to do this sufficiently for the present purpose without entering into any minute examination of the cases on this important subject.

It had long been settled that where the husband or his assigns required the aid of the court to get in an absolute equitable interest of the wife in Personalty (b), the court would refuse to interfere excepting on the terms of a competent maintenance being secured to her and her children out of that or other property, unless she already had a sufficient provision secured to her. The court afterwards recognized this equity as inherent in the wife, and therefore permitted her to enforce it by bill filed by herself; and it has been allowed to her even though she had left her husband, there being no imputation on her chastity (c): and though the decisions and dicta on the subject are conflicting, it seems now to be settled, at least in one branch of the court, that the wife's equity attaches to the life interest of the wife as against the husband, though he is living with and maintaining his wife, and consequently against his assignee for valuable consideration (d). If

v. *Free*, Cr. & Phill. 73-4-5; and see *Burridge v. Row*, 1 Y. & Coll. C. C. 583; and *Brett v. Forcer*, 3 Atk. 405.

(a) *Ashton v. M'Dougall*, 5 Beav. 67.

(b) *Johnson v. Johnson*, 1 Jac. & W. 477; *Like v. Beresford*, 3 Ves. 512; *Beresford v. Hobson*, 1 Mad. 373; *Lloyd v. Williams*, 1 Mad. 457; *et v. sup.* vol. i. p. 596; and see *Wright v. Morley*, 11 Ves. 18, Sir William Grant.

(c) *V. int. al.* 2 Atk. 97; *Eedes v. Eedes*, 11 Sim. 569; and *Lloyd v. Williams*, *ubi sup.* The court will not interfere to enforce the wife's equity where the property is under 200l. capital, or 10l. a-year; *Elworthy v. Wikstead*, 1 Jac. & W. 69; *Foden v. Finney*, 4 Russ. 428; though the husband has deserted her; *ibid.*

(d) Sir J. Leach decided that the wife could not claim a provision out of her life interest assigned for value by the husband, whilst maintaining his wife; *Elliott v. Cordell*, 5

Mad. 156, recognized in *Stanton v. Hall*, 2 Russ. & My. 182. The Vice-Chancellor of England, in *Vaughan v. Buck*, 13 Sim. 404, more fully reported vii. Jur. 338 (the appeal, 1 Phill. 75, was on a different point), ordered the whole of the income of a legacy given to the wife for life, including the arrears, to be paid to the husband, he living with his wife, though there was evidence of ill-treatment and of facts tending to show that he would squander it, and though he had received and wasted a considerable portion of her fortune: he observed that to order it to be paid to the wife would be equivalent to a divorce *a mensâ et thoro*. But on this case being called to the attention of Lord Langdale, in *Wilkinson v. Charlesworth* (see 10 Beav. 327, 328, and *Marsack v. Lyster*, *ibid.* 324), his Lordship disapproved of that case so far as it went to deny the wife's equity to a settlement out of her life interest in the legacy. Lord Langdale stated that

however the wife have an adequate provision made for her by settlement she can obtain no more out of a mere life interest, though the husband desert her or become bankrupt or insolvent (a). The court, as we have seen, from an early period restrained the husband from proceeding in the Ecclesiastical Court, for recovering his wife's legacy, by reason of the inability of that court to enforce a settlement, and for the same reason the courts of law repudiated the jurisdiction to enforce payment of legacies by action (b).

But though this equity was long since established as regards the wife's personal estate generally which the husband could not acquire at law, there was some doubt whether the rule applied to a *trust* estate in lands; and until the decision in the case above alluded to, an opinion seems to have prevailed that this rule would not apply to a case, where the assignees (c) of an insolvent husband had to come to the court to

he considered (referring to *Pryor v. Hill*, 4 Bro. 139; *Jacobs v. Amyatt*, 1 Mad. 376, note, and *Wright v. Morley*, 11 Ves. 12,) that notwithstanding the dicta, and even the late decision in *Vaughan v. Buck* to the contrary, it was now settled that the husband is not entitled to his wife's life interest otherwise than subject to her equity for a settlement (and see *Lumb v. Milnes*, 5 Ves. 517; *Brown v. Clark*, 3 Ves. 166); and on that ground his Lordship held, that the income of the wife's property being choses in action not reduced into possession, belonged to the wife by survivorship, and not to the representatives of the husband or his assignee; *Wilkinson v. Charlesworth*, 10 Beav. 327; and see p. 326.—His Lordship examined and observed upon *Macaulay v. Philips*, 4 Ves. 15; *Bond v. Simmons*, 3 Atk. 20; and *Sleech v. Thorington*, 2 Ves. p. 560; *Wright v. Morley*, 11 Ves. 17, and *Marsack v. Lyster*, reported by the name of *Malcolm v. Charlesworth*, 1 Keen, p. 63; his Lordship added, "considering it to be now settled" (see *Sturgis v. Champneys*, *infra*) "that the husband is not entitled to his wife's life interest, otherwise than subject to her equity to a settlement, I find nothing in these cases to induce me to consider that the ordinary practice of the court" (i. e. giving the wife her equity) "is erroneous as between the husband and wife, both living:" *Elliott v. Cordell*, and *Stanton v. Hall*, were cited, but his Lordship did not particularly notice those cases (see the add. note, No. 3). There never was any doubt as to the case of the assignees of the husband in bankruptcy, for when their title accrues, the husband has become unable to maintain his wife; see *Mitford v. Mitford*, 9 Ves. 100; *Morley v. Morley*, 11 Ves. 18. It is not competent to the husband and wife,

even by her consent in court, to dispose of such of the dividends of her life interest as may accrue after the death of the husband; *Stiffe v. Everitt*, 1 My. & Cr. 41; whether he can release such future payments of an annuity founded on a bond with a penalty, is considered in a preceding page, *sup.* p. 480, n. (b).

(a) *Aguilar v. Aguilar*, 5 Mad. 415. The general rule is that assignees stand in the same situation as the husband did, *Napier v. Napier*, 1 Dr. & War. 410.

(b) *Supra*, vol. i. pp. 194, 581, 676, *et v. inf. al. Meals v. Meals*, 1 Dick. 373.

(c) There have been cases where the court has restrained the husband from proceeding at law to recover the wife's choses in action; see *Clancy*, 466, 467, *et v. ibid.* 463-4. In *Winch v. Page*, Bunb. p. 86, the father had given a bond to his daughter for her portion; she married without his consent: the husband brought an action on the bond; the court in a suit by the father (the obligor) granted an injunction with a view to enforcing a settlement. Mr. Bunbury's objection to this decree is that the husband was a defendant and was not asking for equity. In *Mason v. Masters*, cited by Lord Northington, 1 Eden, 506, Lord Nottingham seems to have been induced to interfere by the demerits of the husband, he having stolen the marriage. In *Pierce v. Thornely*, 2 Sim. 178, the Vice-Chancellor is evidently referring to a suit in equity for recovering the wife's choses in action; but see *Story on Equity*, note (3) to vol. i. p. 851. In *Ex parte Blagden*, 2 Rose, 251, Lord Eldon held that, even in case of a legal debt, the wife, if brought into court, might insist on her equity; and see *Roper, Husband and Wife*, by Jacob, 257-8, and 1 Bright, 231-2, and 1 Fonbl. 99.

enforce their title to the rents of real estate to which the wife was entitled for her life, where the assistance of the court was required, not because it was a trust estate that the wife was entitled to, but merely by reason of the legal estate happening to be outstanding, for instance in a mortgagee, the wife therefore having an *equitable* as distinguished from a *trust* estate. It was contended that in such a case the wife's interest could not be considered as an equitable interest so as to come within the rule; it was not a trust estate that she was entitled to, but an estate which must be considered, it was insisted, in the same light as a legal estate and governed by the rules of law, the legal estate being out-standing merely by accident. Lord Cottenham has decided that the assignees are bound to make a provision for the wife out of such life interest. His Lordship examined all the principal authorities and dicta relating to enforcing the wife's right against assignees (a), and then proceeded thus:—"From these authorities and many others recognizing the same principle, it appears that the equity which this court administers in securing a provision and maintenance for the wife is founded upon the well-known rule of compelling a party who *seeks equity* to *do equity* (b); and it is not possible to conceive a case more strongly calling for the application of that rule than this. The common law gives to the husband the enjoyment of the life estate of the wife, upon the ground that he is liable to maintain her, and makes no provision for the event of his failing or becoming unable to perform that duty. If the life estate be attainable by the husband or his assignee at law, the severity of this law must prevail; but if it cannot be reached otherwise than by the interposition of this court, equity, though it follows the law and therefore gives to the husband or his assignee the life estate of the wife, yet it withholds its assistance for that purpose, until it has secured to the wife the means of subsistence: it refuses to hand over to the assignees of the husband, to the exclusion of the wife, the income of the property which the law intended for the *maintenance of both*. Upon the same principle, the ordinary interposition of this court in compelling a settlement of the property of married women was originally founded, although the wife is permitted actively to assert the equity as a plaintiff; and if such be the principle, what difference can it make, where the assignees of the husband are applying to this court for its assistance to obtain the pro-

(a) *Bosvil v. Brander*, 1 P. W. 458; *Burdon v. Dean*, 2 Ves. J. 607; *Oswell v. Probert*, 2 Ves. J. 682; *Ball v. Montgomery*, 4 Bro. 338; *Brown v. Clark*, 3 Ves. p. 168;

Freeman v. Parsley, 3 Ves. 421; *Mitford v. Mitford*, 9 Ves. 101; *Wright v. Morley*, 11 Ves. 21; *Elliott v. Cordell*, *supra*, p. 482.

(b) *V. supra*, vol. i. p. 422.

property, that the estate of the wife is *not a trust*, but that the recovery *at law is prevented* only by the existence of a prior legal trust estate. It happens, however, that in *Oswell v. Probert* (a), the estate of the wife was the same as in this case; the testator had devised his estate to trustees in fee upon trust to pay certain annuities and legacies, and the trustees were directed to stand seised to the use of his daughter, the wife of the bankrupt, for her life; the estate had, indeed, been sold to pay the prior charges, but it being evident that the trust was subsisting, and the legal estate in the trustee, the court said, that the assignees were in the place of the husband not maintaining the wife, and declared that a provision was to be made for her" (b).

As regards assignees in bankruptcy, if they have to come into equity to obtain any part of the wife's property, she will not be excluded from her right to a settlement, though part of her property may on the marriage have been settled for her separate use (c).

As a general rule the court will not settle on the wife the whole of the income of her property as against assignees (d) or against the husband, though he may have separated from his wife without a cause (e). However, under particular circumstances the wife may have the whole of the income of her remaining property settled upon her, as against the assignees of the bankrupt husband, as where the

(a) *Ubi supra*.

(b) *Sturgis v. Champneys*, Lord Cottenham, 5 My. & Cr. 105-6; and see 1 Rep. Husband and Wife, 172. In *Hanson v. Keating*, (4 Hare, pp. 1, 7; and see pp. 8, 9,) the Vice-Chancellor Wigram, though disposed to hold that equitable estates in land were not liable to the same equity as in cases of mere personalty, upon the broad principle of preserving a strict analogy between legal and equitable estates in land, (*v. sup.* vol. i. 502,) decided according to Lord Cottenham's doctrine, so that the question may be considered as at rest; and see *Neuenham v. Pemberton*, before Vice-Chancellor Knight Bruce, xi. Jur. 1071. In *Hanson v. Keating*, as before noticed, (pp. 5, 6, 7,) as in several other instances, the Vice-Chancellor Wigram treats it as an established rule, that a person may assert any equitable right he is entitled to by the doctrines of the court, equally as plaintiff or defendant, that is, where he is calling on another to do equity as where he is called upon to do equity, referring to *Brown v. Newall*, 2 My. & C. p. 558; and *Colvin v. Hartwell*, 5 Cl. & Finell. 484; *nom. Colvin v. Hartwell*; see however *Bosvill v. Brander*, 1 P. W. p. 458; *infra*, next note; and *infra*, title "Mortgages."

(c) *Burdon v. Dean*, 2 Ves. J. p. 607. It

would appear, from the case of *Bosvill v. Brander*, (1 P. W. p. 458,) that as regards debts due to the wife as mortgagee, the court will not interfere as against the husband or his assignees where the wife claims her equity by bill, but that it will where the husband or his assignees come to ask the assistance of the court to get them in; see *Sturgis v. Champneys*, 5 My. & Cr. 103, where Lord Cottenham states that this is the effect of the case: but according to Sir J. Wigram's rule (*Hanson v. Keating*, in the last note), as before mentioned, where the mortgage is in fee she ought to be able to assert her equity bill; *v. supra*, p. 477.

(d) *Beresford v. Hobson*, 1 Mad. 379; *Napier v. Napier*, 1 Dru. & War. 407, overruling *Brett v. Greenwell*, 3 Yo. & Coll. 230, and other cases noticed by Lord Eldon, 11 Ves. 20.

(e) See *Coster v. Coster*, 9 Sim. 597, 600, 605; one-fourth was given to the husband; and see *Wright v. Morley*, 11 Ves. 20; and the other cases, 1 Bright, 241. In *Bullock v. Menzies*, 4 Ves. 798, where the wife refused, without sufficient cause, to live with her husband, the whole income was given to the husband, though he declined to make a settlement.

husband has had large advances made to him by the wife's father, and has had the benefit of a provision made for his wife by her father's will (*a*). If the husband desert his wife or force her to leave him without a cause, if she be unprovided she will be allowed a maintenance out of her trust property (*b*). If the wife elope or be guilty of adultery the court will not interfere to *give* her any allowance (*c*). Where a person having no property marries a ward of court without the sanction of the court, the court will generally if not always settle the whole of the property of the wife on the wife and the children of the marriage, and exclude the husband from taking any benefit from the wife's property, unless in the event of there being no child, and then only under the appointment of the wife, and in the event of her dying in his lifetime leaving no child (*d*); but if the match be not unequal as regards the station and circumstances of the husband, and he is willing to bring an adequate proportion of his own property into settlement, then it becomes a question of discretion as to what interest he shall be allowed to take in his wife's property (*e*). If both husband and wife are subjects of, and resident in a foreign state the court will order payment of a legacy or other sum of money to the husband or wife as they may be entitled according to the law of their domicile (*f*).

This Equity in respect of property to which she is equitably entitled in possession may be relinquished by the wife by her giving her consent in court, she being first apprized of the amount of the fund and examined by the judge so as to ascertain that such consent is freely

(*a*) *Gardner v. Marshall*, 14 Sim. 575, 584, 587; but as to the general rule, see *Napier v. Napier*, 1 Dr. & W. 409, 410; *sup.* 485; the Lord Chancellor (Sugden) there said the assignees of an insolvent stand in the same situation as the husband: and see additional note, No. 4.

(*b*) *Watkins v. Watkins*, 2 Atk. p. 96; *Wright v. Morley*, 11 Ves. 23, and the cases there cited; *Oxenden v. Oxenden*, Prec. Ch. 239; and see 1 Bright, 256, *et seq.*, where the more modern cases are cited, and *Oxenden v. Oxenden* is observed upon.

(*c*) *Watkins v. Watkins*, 2 Atk. 97; *Sleech v. Thorington*, 2 Ves. p. 562; *Hunt v. Hunt*, MS. 1 Fonb. 95; and see *Eedes v. Eedes*, 11 Sim. 570; and *Duncan v. Campbell*, 12 Sim. 638. In *Ball v. Montgomery*, 2 Ves. J. 191, and *Alexander v. McCulloch*, *ibid.* 192, where the wife was living in adultery, the court would not give the dividends of her property to one or the other, but ordered them to be

paid into court.

(*d*) In such case a power for a wife to appoint *by will* in default of children ought, it seems, always to be introduced; *Birkett v. Hibbert*, 3 My. & K. 230; *et v. infra*, p. 492, dictum of Vice-Chancellor Wigram.

(*e*) *Ball v. Coutts*, 1 Ves. & B. 303; *Millet v. Rowse*, 7 Ves. 419; *Wells v. Price*, 5 Ves. 398; *Birkett v. Hibbert*, 3 My. & K. 227. "It is the ward's interest, and that alone," said the Lord Chancellor, "that is to be considered, unless the other and subordinate purpose of protection against the husband could be accomplished without any prejudice to the ward; where her interest would suffer, the *punishment* of her husband, or the restraining the husband from reaping any advantage, is not to be regarded in settling the wife's estate," *ibid.* 230.

(*f*) *Sawer v. Shute*, 1 Anst. p. 63; and see 1 Bright, Husband and Wife, p. 91: *v. sup.* pp. 13, 14.

and voluntarily given to the property being paid over to her husband or to any other person (a).

The Vice-Chancellor of England had decided in the cases of *Hall v. Hugonin* (b), *Creed v. Perry* (c), and *Bishopp v. Colebrook* (d), that where a married woman had a reversionary interest in personalty depending on an estate for life, if that estate for life were absolutely assigned to her, the whole fund might, on her consent in court waiving a settlement, be paid or transferred to her husband or any one else. "Suppose," said the Vice-Chancellor of England, in the first-cited case, "that a father gives a sum of stock to a trustee for his daughter Elizabeth for life, remainder to his daughter Mary, a married woman, absolutely, and that immediately after his death Elizabeth assigns her life interest to Mary, are not by that mere act both the life interest of her sister and her own interest in remainder vested in her? I do not put it as a case of merger;" and his Honour held that the married daughter in such case, having the whole interest, would be as capable of dealing with it in this event as if it had originally been given to her absolutely: but the two interests have a distinct character, different equities in favour of the wife attach to each; the transfer of the life-interest to the wife cannot on principle alter the character of the reversionary interest; and accordingly in the late case of *Whittle v. Henning* (21 Dec. 1848), on appeal from a decision of Lord Langdale (e), Lord Cottenham overruled the decisions of the Vice-Chancellor of England, affirming that of Lord Langdale: so that it may now perhaps be considered as settled that a wife cannot be enabled to part with her reversionary interest by this or indeed any other contrivance: we have seen that she cannot part with it by giving her consent

(a) *Edmonds v. Townshend*, 1 Anstr. p. 93; *Bourdillon v. Adair*, 3 Bro. 237, and the other cases; 1 Fonbl. pp. 95, 96; *Johnson v. Johnson*, 1 Jac. & W. 477. In *Ex parte Higham*, 2 Ves. 579, Lord Hardwicke refused to order the whole of the wife's fortune to be paid to the husband; he reserved 400l. for the wife, though she was in court, and desired that the whole should be paid to her husband: and see *Blackwood v. Morris*, cited Forrest, 43, to the same effect; but in *Willats v. Cay*, 2 Atk. 67, Sir J. Jekyll said, "That where the wife gave her consent, it was never referred to the Master to approve of a settlement, unless circumstances of fraud or compulsion appeared:" and see the other cases cited in Sanders' note, p. 68; and such is now the settled doctrine: see *inf. al.* 10 Ves. 90, Lord Eldon; *Johnson v. Johnson*, 1 Jac. & W. 475.

(b) 14 Sim. 595, which was decided after

Lord Langdale, in *Story v. Tonge*, 7 Beav. 91, had thrown out doubts upon the subject.

(c) 14 Sim. 592.

(d) Jur. xi. 793; and see xi. Jur. pt. ii. p. 405.

(e) Jur. xii. 1080, 2 Phill. The Lord Chancellor relied principally on the doctrine laid down by Sir W. Grant, in *Richards v. Chambers*, 10 Ves. 536-7, and by Sir T. Plumer in *Purdew v. Jackson*, 1 Russ. 1; his Lordship observed that there could not be a Merger (*Thorn v. Newman*, 3 Swanst. 603; *Nurse v. Yerworth*, *ibid.* 608); nor, indeed, had the Vice-Chancellor put it as a case of merger. The Lord Chancellor expressed his decided disapprobation of such attempts to deprive a married woman of the protection of the court, and dismissed the petition *with costs*: all the preceding authorities are there cited. See additional note, No. 3.

in court (*a*). The wife may put an end to a voluntary agreement made after marriage by the husband to settle property upon her and her children (*b*). Where a female ward has married without the authority of the court, she will not in general be permitted to waive a settlement being made out of her property (*c*).

If the husband has received the property, or it has been transferred to him before a suit instituted, it is too late for the wife to apply for a settlement (*d*); unless in a case of fraud (*e*).

Where the court directs a settlement to be made, the property is always secured not only for the benefit of the wife but also of her children: but the right of the children is not an independent right; in no instance are the children permitted to assert an independent equity of their own (*f*), it can only arise, as it has been said by high authority, out of contract or under an order or a decree (*g*). Sir J. Leach, however, was not disposed to confine the conferring of a right upon the children simply to a decree, and though denying the existence of any independent right in the children, he held that where a bill was filed by the trustees or any other person, so that the discretion of the executors was taken away, and the wife died before anything more was done, still that the children standing in her place were entitled to have a settlement; the decree, he said, does not give her the equity, she has it independently of the decree; the equity of the wife (and through her of the children), said that learned judge, attaches with the jurisdiction given by the filing of a bill (*h*): Lord Langdale, however, does not acquiesce in this doctrine, and he has held, contrary to the opinion of Sir J. Leach, that the mere filing of a bill, and even where the share of a married woman has been directed to be carried over to the account of herself and her children, does not of itself entitle the children to a settlement if the wife dies without any reference to the Master, especially if no claim has been made on her behalf for a settlement (*i*). This point lately came before the Vice-Chancellor Wigram. The question, said that learned judge, is not whether the

(*a*) *Box v. Jackson*, *supra*, p. 467, n. (*b*).

(*b*) *Fenner v. Taylor*, 2 Russ. & M. p. 190.

(*c*) See the cases, 1 Bright, 248. In *Bennett v. Biddles*, x. Jur. p. 534, the wife, who had married with the consent of her guardians, though without the leave of the court, was permitted, by the Vice-Chancellor of England, to waive a settlement; the case was not argued, nor were any authorities cited.

(*d*) *Murray v. Lord Elibank*, 10 Ves. 90; see Bright, i. 249, *et seq.*

(*e*) See *Colmer v. Colmer*, and *Watkins v. Watkins*, *infra*, p. 491.

(*f*) Lord Cottenham, *Hodgens v. Hodgens*, 11 Bli. 105; see *Lloyd v. Williams*, 1 Mad. 458.

(*g*) Sir Thomas Plumer, 1 Mad. 459, 466; *Scriven v. Tapley*, 2 Eden, 337, reversing the decision of the Master of the Rolls, Amb. p. 509, which reversal is approved by Sir Thos. Plumer, 1 Mad. 464, and by Lord Langdale, 6 Beav. 346.

(*h*) *Steinmetz v. Halthin*, 1 Glyn & J. 68.

(*i*) *De la Garde v. Lempriere*, vii. Jur. 590, 596; 6 Beav. 344; and see *Re Walker*, Ll. & Gould, temp. Sugd. 324-5.

wife was bound, but whether the husband was bound; if the husband is bound the children are certainly entitled (*i.e.* if the wife does nothing to intercept their right) (*a*), and the question whether the husband is bound must be governed by the ordinary principles of the court (*b*). His Honour said it is clear that an order referring it to the Master to approve of a settlement binds the husband (*c*), though it does not necessarily bind the wife (*d*). In the case before him the wife having required a settlement, and the fund having been carried over subject to the wife's equity to a settlement, if any, and it having been agreed that some third person should settle the amount, the Vice-Chancellor held that the transaction was so far complete as to entitle the children to enforce a settlement (*e*). So if there has been a decree for a settlement even on the wife only, without mentioning the children (*f*), and the wife has died before any proposal has been carried in, the children have been held to be entitled to enforce a settlement (*g*); but if the father in such case die before the settlement is complete, it seems that the children have no right to enforce the order as against the mother (*h*). According to some early cases, though the wife survive the husband, and a decree has been actually made, and the fund be in court in order to enforce a provision for the wife, the husband's representatives will be entitled to it on the death of the wife without children (*i*). The wife, as will have been seen, is not bound by a decree for a settlement though followed by a reference to the Master to approve of a settlement (*k*); she may still, whilst the settlement remains *in fieri*, and the terms are unascertained, waive it, and as the children have no substantive right, her waiver will bar them (*l*); but if she do not waive an order for the husband to lay proposals for a settlement before the Master, the children are entitled to the benefit of the order, which they

(*a*) See *Fenner v. Taylor*, on appeal, p. 193, cited *Lloyd & G. temp. Sugd.* 324.

(*b*) *Lloyd v. Mason*, 5 Hare, 153: if this be the principle, the mere filing of a bill can hardly be brought within it, nor any thing short of some recognition of the wife's equity.

(*c*) See *Hodgens v. Hodgens*, 11 Bli. 101; *Anon.* 2 Ves. Sen. p. 671; *Martin v. Mitchell*, cited 1 Mad. 465.

(*d*) See *Hodgens v. Hodgens*, 11 Bli. 103-104, Lord Cottenham; *Fenner v. Taylor*, 2 Russ. & M. p. 190; *Re Walker*, *Lloyd & G. temp. Sugd.* 325; *Lloyd v. Williams*, 1 Mad. 458.

(*e*) And see *Lloyd v. Williams*, 1 Mad. 457.

(*f*) For it is the constant course of the court to give interests to the children as well

as the wife; *Johnson v. Johnson*, 1 Jac. & W. 480; *Lloyd v. Williams*, 1 Mad. 457; 10 Ves. 90; *Hodgens v. Hodgens*, 11 Bli. 103.

(*g*) 6 Beav. 345; *Groves v. Clarke*, 1 Keen, 138; *Rowe v. Jackson*, 2 Dick. 604; *Murray v. Lord Elilbank*, 10 Ves. 84.

(*h*) *Phipps v. Lord Anglesea*, 1 Fonbl. 97, n.; cited 1 Mad. 461.

(*i*) See 1 Fonbl. 97, and cases there cited: it seems that if a settlement were directed to be made of the wife's property, it would be in those terms; *Wytham v. Cawthorn*, 1 Eq. Ab. 392, pl. 1.

(*k*) *V. supra*.

(*l*) *Groves v. Clarke*, 1 Keen, 139; *Lloyd v. Williams*, 1 Mad. p. 458; and see 10 Ves. p. 91.

may enforce by a supplemental bill (a). If however the wife has insisted on her equity in a suit and her right has been established and the amount ascertained, and nothing remains to be done but the execution of the settlement, it cannot be waived by her. In a suit by assignees of the husband, where the amount to be settled had been agreed upon, it was considered that the assignees of the husband had done what was equivalent to a concession on their parts of a definite portion of the fund to the wife and the children, and that the children themselves had thereby acquired a right of which the mother could not deprive them (b).

If the husband refuses to execute a settlement, the court will order the interest to accumulate for the benefit of the wife, or that it shall be applied for her maintenance if the husband is not maintaining her, unless the husband is starving for want of maintenance (c). There are indeed cases which would tend to establish that the husband in case of refusal to execute a settlement, is still entitled to receive the whole of the wife's income if he be living with his wife and maintaining her, though all seem to agree that where the husband has deserted his wife, and no provision has been made for her, it is competent to the court to provide for her, out of the funds held in trust, a competent maintenance (d). "In general," said Sir T. Clarke, "where the husband comes into court for his wife's property, or any thing which he claims in her right *jure mariti*, he is obliged to submit to the terms of the court, and make a settlement or reasonable provision out of that. Various instances have been where the wife has insisted that the husband should have nothing, the court has not thought itself empowered to take from the husband the wife's fortune so long as he is willing to live with her, and to maintain her, and no reason for their living apart. Even when the husband will not come in before the Master, the court will not go so far as to do anything in diminution of the husband's right, so as to take away the produce from him or prevent him from receiving the

(a) *Rowe v. Jackson*, 2 Dick. 604; followed in *Murray v. Lord Elibank*, 13 Ves. 9; *Groves v. Clarke*, 1 Keen, 138; and *Groves v. Perkins*, 6 Sim. 584.

(b) *Barker v. Lea*, 6 Mad. 330; *Whittem v. Sawyer*, 1 Beav. p. 593; and see *Lloyd v. Mason*, 5 Hare, 149. In the first-cited case the bankrupt had bought from the assignees; on the basis of the wife and children being entitled to one half, there was what was treated as equivalent to a release to the wife and children of the other half.

(c) *Bond v. Simmons*, 3 Atk. 20; *Atherton v. Nowell*, 1 Cox, 229; in that case the court allowed maintenance for his wife and child out of the fund, the husband being in prison; *Armstrong v. Elveridge*, MS., 8 Aug. 1791, 1 Fonbl. 96.

(d) See the cases in the preceding note; and *Rishton v. Cobb*, 9 Sim. 620. Alimony granted by the Ecclesiastical Court is of a different nature; the order is personally against the husband, and does not specifically affect any portion of his or the wife's property.

interest, but constantly where he maintains the wife accompanies the direction for the suspension, with payment of the interest to the husband. It is otherwise where he leaves her unprovided (a); in the latter case the court will lay hands on the money which is in the power of the court, and direct payment of the interest to the wife until the husband returns and maintains her as he ought" (b), and Sir John Leach's decision in *Elliott v. Cordell*, above cited, is in conformity with this doctrine; but later authorities seem to have established that even where the husband is maintaining the wife, the whole of the income will not be directed to be paid to the husband (c).

An order for the payment of the money into court does not affect the relative rights of the husband and the wife, and in case there be an order for a proposal for a settlement, if either party dies whilst it rests merely in proposal it does not affect the right of survivorship as between husband and the wife where there are no children (d). If the husband survives, though there may be children, the whole must be paid to the husband as the person to whom it belongs by law (e), unless there be a contract, and a proposal made on the part of the

(a) See *Gilchrist v. Cator*, 1 De G. & Sm. 191; and see *Orenden v. Osenden*, Prec. Ch. 239; *S. C.* 2 Vern. p. 493; *Nicholls v. Danvers*, 2 Vern. 671; 1 Eq. Ab. 68; *Williams v. Callow*, 2 Vern. 752; *Wright v. Morley*, 11 Ves. 12; *Guy v. Pearkes*, 18 Ves. 196; *Coster v. Coster*, 9 Sim. p. 597, where the Vice-Chancellor of England stated that he agreed that it was not the practice, in any case, to give the whole to the wife, "excepting "till further order;" *ibid.* 602-4; and see *Green v. Olte*, 1 Sim. & St. 250; *et v.* 1 Dru. & W. 410. If the husband has, by unfair means, procured his wife's fortune to be transferred into the name of trustees for himself only, they will, for the above purpose, be considered as trustees for the wife; *Colmer v. Colmer*, Mosely, 113; 2 Atk. 98: the wife in that case had obtained a decree for alimony, and yet she had an allowance out of the trust property, having been deserted; and see 3 Atk. p. 295, *Head v. Head*. In *Watkins v. Watkins*, 2 Atk. 96, Lord Hardwicke made an order, impounding the property of which the husband had defrauded his wife, for the purpose of securing to her a maintenance out of it. In *Angier v. Angier*, Prec. Ch. 497, the court decreed the specific execution of an agreement made by the husband, who had ill-treated his wife, to allow a separate allowance to the wife; such order to remain in force so long as they should live separate.

(b) *Sleech v. Thorington*, 2 Ves. 560; and see *Bond v. Simmons*, 3 Atk. 20, where Lord Hardwicke stated the rule in similar terms;

and see *Macaulay v. Philips*, 4 Ves. 20, to the same effect.

(c) Lord Langdale, in *Wilkinson v. Charlesworth*, 10 Beav. p. 327, said, "he thought it probable that Lord Hardwicke's observations in *Bond v. Simmons*, and Sir Thomas Clarke's in *Sleech v. Thorington*, as well as the order of Lord Alvanley in *Macaulay v. Philips*, were all of them founded on the notion which has since been overruled, that the life interest of the wife was not a subject upon which her equity to a settlement could attach;" and his Lordship considered that Sir Wm. Grant acted on this impression in *Wright v. Morley*, 11 Ves. 17. It seems that a bill by the wife for a discovery of acts of cruelty on the part of the husband, so as to found an equity for a larger provision than her ordinary equity would give to her cannot be sustained, it being the subject of the jurisdiction of the Ecclesiastical Court; *Hineks v. Nelthorpe*, 1 Vern. 204: mere separation does not give her any additional equity; *Duncan v. Duncan*, 19 Ves. 394; *S. C.*, Sir G. Coop. R. 254.

(d) Lord Eldon, *Murray v. Lord Elibank*, 10 Ves. 91; *Macaulay v. Philips*, 4 Ves. 19; Lord Eldon, in *Murray v. Lord Elibank*, notices the inconsistency in some of the cases, in respect of the rights of the children.

(e) *Packer v. Wyndham*, Pr. Ch. p. 418; *Johnson v. Johnson*, 1 Jac. & W. 476; *Bond v. Simmons*, *ubi sup.* there cited; *Seriven v. Tapley*, Amb. 509; *Harper v. Ravenhill*, Tamlyn R. 144.

husband appears to be equivalent to a contract on his part, or a decree or order directing him to lay a proposal before the Master, which is an adjudication, then as before stated and then only the children will be entitled to enforce a settlement (a). Where the wife's fortune is settled for her separate use for life, remainder to her children, the wife, whatever may be her conduct, is not bound to maintain them (b).

We now proceed to consider the powers which a woman may secure to herself, by Contract with her intended husband before marriage; or with his assent after marriage; or which may be secured to her in respect of property coming to her by gift from strangers. As regards the Real estate of the wife of which she is seised or entitled in fee, and over which she has not secured a particular power of disposition, unless it be conveyed by that kind of deed which has been substituted for a fine, it will descend to her heir-at-law, and that more or less beneficially, for the husband may be tenant for life if they have issue, but still it descends to her heir-at-law (c): no post-nuptial agreement can affect the right of the heir though it may bind the husband. The wife however, by levying a fine or suffering a recovery, had, and now has by means of a deed executed and perfected according to the provision of the late act (d), as full a dominion over her property as a feme sole, in fact (having her husband's assent) she becomes *quasi* a feme sole in respect of it; her conveyance therefore together with her husband to a purchaser for value, even with notice of the settlement, will defeat all limitations in a settlement to collaterals who are merely volunteers (e). A woman, on her marriage, may so settle her real estate, by way of trust, or power over an use, as to enable her, without the equivalent for a fine, to pass it to others, and prevent its

(a) See *Lloyd v. Williams*, 1 Mad. p. 459. The dicta and cases referred to by Lord Eldon, in *Murray v. Lord Elibank*, 10 Ves. 91, and in which he overruled the demurrer, raised a doubt as to the right where there were children. Sir Thomas Plumer, in the case above cited, examined the authorities: he considered Lord Eldon's opinion in *Murray v. Lord Elibank*, to have been founded entirely on the decree, (*ibid.* pp. 466-7,) though it was in the power of the wife to have deprived them of such right; see 10 Ves. p. 91. The dictum in *Macaulay v. Philips*, 4 Ves. pp. 18, 19, would *primâ facie* go to the extent that even where a proposal had been laid before the Master, the husband would be entitled, in the event of the wife's death before a settlement was completed, but in that case there were no children; see 1 Mad. 466: and the dictum no doubt had reference to that state of circumstances. It

seems now to be established that where a proposal is carried in, the husband is bound; see *Anon.* 2 Ves. 671; *et v. supra*, 489; though an agreement by the husband, equally as a proposal in a suit, may be waived by the wife, according to *Fenner v. Taylor*, 2 Russ. & M. pp. 193-6; *sup.* p. 488.

(b) See Sugd. L. of Prop. 171; Llo. & G. temp. Sugd. 328.

(c) See *Peacock v. Monk*, 2 Ves. 191.

(d) *Supra*, vol. i. p. 169. It is to be observed that the power of alienation by fine did not contradict the common-law doctrine that the wife cannot contract; a fine (like a recovery, as regards tenant in tail,) assumed that there was a title paramount to that of the wife; see *Richards v. Chambers*, 10 Ves. 587-8; and see 11 Ves. 221.

(e) *Cotterell v. Homer*, 13 Sim. 512.

going to her heir-at-law (a). If a woman having a real estate before marriage, and either before, or after marriage with her husband's assent, by a proper conveyance conveys it to trustees in trust for herself during her coverture, for her separate use or otherwise, and afterwards that it shall be in trust for such person as she shall by any writing under her hand and seal, or by any writing in nature of a will, appoint, and in default of appointment for other persons designated, or for her heirs, and she makes such an appointment, that will be a good declaration of the trust, and the heir-at-law, and any other person to whom the estate may have been limited in default of appointment will be excluded (b). The giving such a power to be executed by will is usually in order to protect the person to whom it is given, against her own act, a will being revocable till death, therefore where it is to be executed by will only, nothing but an uncontrolled testamentary act will be a valid execution (c). Though the donee may not have executed her powers with all proper forms, yet the court will supply them in favour of a person having a meritorious consideration, in the same manner as if she were *sui juris* (d): by the late act in regard to wills, as has been already noticed, all appointments by will under powers must be executed in the same manner, whatever may be the formalities prescribed (e).

In the notion of the law, indeed, a wife cannot make a will (f), yet where she has a separate power over her estate she may dispose of it

(a) Of the doctrines as to the execution of powers by a married woman, see 1 Bright, 54, *et seq.*

(b) *Peacock v. Monk*, *ubi supra*; *Wright v. Englefield*, Amb. 468; *Wright v. Cadogan*, Amb. 468, 2 Eden, 259; 1 Bro. P. C. 486; *inf.* 498; *Parkes v. White*, 11 Ves. 228-9; *Dillon v. Grace*, 2 Sch. & Lef. 463. The usual course with conveyancers, where property of the wife is settled, is to give to the wife a power of appointment in the event of there being no issue, so as to give her the option of defeating the limitations over of her estate, (*Harbidge v. Wogan*, 5 Hare, 268); and the court, in decreeing the execution of articles, would insert such a power, or, as Sir J. Wigram has said, put it to the wife to say whether she desired that power to be excluded; *ibid.* In a marriage settlement of a ward, it would seem that such a power ought always to be inserted; *Birkett v. Hibbert*, 3 My. & K. 230, *sup.* 486; she may of course exercise it or not as she pleases, so that its mere insertion does not affect any one. A power may be so given to the wife as to be confined to the then present coverture: *Mor-*

ris v. Howes, 4 Hare, 599, affirmed by Lord Cottenham; *Burnham v. Bennett*, 2 Coll. 261; and see *Winch v. James*, 4 Ves. p. 386; and *Wells v. Price*, 5 Ves. 398. In approving of a settlement under the Marriage Act, 4 Geo. IV. c. 76, a power of appointment ought to be given to the wife, but so as not to interfere with the interests of the issue, if any, of the marriage; *Attorney-General v. Lucas*, xii. Jurist, 1011.

(c) Lord Eldon, *Reid v. Shergold*, 10 Ves. 379; 11 Ves. 230, 231; 2 Sugd. on Pow. 96; and see, on this subject, Bright, vol. ii. p. 231, *et seq.*

(d) Lord Northington, *Wright v. Englefield*, Amb. 473; *Cotter v. Laver*, 2 P. W. 625, to same effect; *Hervey v. Hervey*, 1 Atk. p. 567; and see *Dowell v. Dew*, 12 Law J., N. S., Ch. p. 159, before Lord Lyndhurst (1842).

(e) *V. sup.* vol. i. p. 473. On the application of the doctrine of supplying defects in appointments, since the late Wills Act, see *Buckell v. Blenkhorn*, 5 Hare, 131, 142, 143, 144.

(f) See *George, dem. Thornbury, v. Jew*, Amb. 628.

by an instrument in the nature of a will (a); though the instrument will not have the effect of a will as regards *personalty*, unless it be propounded as a will in the Spiritual Court, and then the probate is conclusive in this court as to its testamentary character (b). If the wife has not appointed an executor the court will grant administration to the husband, with the paper or testamentary schedule annexed (c). Whoever takes under such will, takes by virtue of the execution of the power, and by the power coupled with the writing, and as if the limitation in that writing of appointment had been contained in the instrument creating the power. But notwithstanding that, and though such writing is not a proper will, it has the effect and consequences of a will to three intents: First, the words are to have the like construction as if it were a proper will: Secondly, such will is ambulatory until the death of the appointor, and therefore though the party taking thereby takes by virtue of and under the power, yet, notwithstanding that, such appointee must survive the appointor in order that he may take; Thirdly, if he do survive the appointor, he can take only from the time of the death of the appointor, and does not take as from the time of the execution of the power (d).

The existence of a power in the wife to dispose of her estate by way

(a) *Cotter v. Layer*, 2 P. W. p. 623. If a feme covert has a power of appointment by will with witnesses, in order to establish that there has been a due execution of her power, there must be the judgment of the Ecclesiastical Court that the instrument is testamentary; and proof in the Court of Chancery by the witnesses to the instrument of the due execution: *Rich v. Cockell*, 9 Ves. 376. The court considers that probate was granted of the instrument only as her will; for though formerly it was held that the will of a married woman, not only need not, but ought not to be proved, and that the probate was of no authority, yet it is now settled that neither courts of law nor courts of equity will act upon such will, if it has not been first proved in the Ecclesiastical Court: see *Stevens v. Bagwell*, 15 Ves. 153, and *Stone v. Forsyth*, Doug. 683, there cited. The new Statute of Wills, as before observed, regulates how the appointment is to be attested.

(b) See *Henley v. Philips*, 2 Atk. 48; *Ross v. Ewer*, *infra*; *et v.* 1 Jarm. On Wills, 24, 33; *sup.* vol. i. p. 597; and *Douglas v. Cooper*, 3 My & K. 378; 2 Sugd. on Powers, p. 18. The late act as to wills has left the testamentary capacity of married women generally as it was; *v. sup.* vol. i. p. 473.

(c) *Ross v. Ewer*, 3 Atk. 156, 160; the rule

is the same at law: *Stone v. Forsyth*, Doug. 683, and the cases cited in the note. "It should seem," says Mr. Sanders, (in his note, 3 Atk. p. 161,) "from some of the cases, that the execution of a power by a feme covert is considered as a testamentary disposition and not properly as a will," citing *Cotter v. Layer*, 2 P. W. 624, and other cases; but he adds, in *Duke of Marlborough v. Godolphin*, 2 Ves. 75, "Lord Hardwicke said, that a feme covert may not only make a writing in the nature of a will, but also a proper will, if such will be made with the consent of her husband." "A wife," said Lord Thurlow, "may make a will of her chattels real and choses in action not reduced into possession, though if the husband do not assent, it cannot be proved; if he do consent, by matter *ex post facto* or by contract, that entitles her executor to those things which would otherwise belong to him as administrator;" *Hodsdon v. Lloyd*, 2 Bro. 543. See, on the subject of probate of the will of a married woman, 2 Bright, 61. In *Goldsworthy v. Crossley*, 4 Hare, 144, the Vice-Chancellor Wigram intimated that if the Court of Probate should refuse the will of a feme covert under a power to proof, on some ground of form, the Court of Chancery might resume its old jurisdiction, and act independently of the Court of Probate.

(d) *Southby v. Stonehouse*, 2 Ves. 610-12.

of power over an use, only enables her to do an act under the power conformably to the power; dealing with the subject of the power she deals with all the disabilities of a married woman: the same rule applies as regards all cases where there is a mere power (a).

If property, whether real or personal, be given to trustees upon trust for a woman for life for her separate use, and after her death to convey to such persons as she shall in her lifetime by deed or by will appoint, and in default in trust for third persons, she may at once absolutely convey her life interest and appoint the reversion by deed (b). Where a married woman has a power of appointment by deed, and it is provided that any appointment she may make by deed "shall not come into operation until after her death," these words neither restrain her from anticipation nor prevent her from making an irrevocable appointment (c).

It is to be observed that there is a marked distinction between Power and Property. A feme sole, by settlement, in contemplation of marriage, settled part of her fortune, in trust to pay the dividends to herself for her separate use *for life*, and after her death for her intended husband; and after the death of the survivor, to transfer the capital according to her appointment by will; and in case she should die without appointment, and her husband should be then dead, in trust for her next of kin, their executors, &c., according to the Statute of Distributions. She married, and afterwards her husband died; she then filed a bill against the trustees, claiming an absolute interest; but it was held, that she had only an interest for life, with a power of disposition by will (d). So where a person bequeathes

(a) Vice-Chancellor Knight Bruce, *Whitmarsh v. Robertson*, 1 Coll. p. 575; *Croft v. Slee*, 4 Ves. 64; *Anderson v. Dawson*, 15 Ves. 532. In *Johnstone v. Lumb*, (15 Sim. 315,) the Vice-Chancellor of England held that where the trust was to pay the income of the fund to such persons as the wife should appoint, not by way of anticipation, and in default to her proper hands, for her separate use, an appointment could not be made by her by a testamentary instrument, and therefore notwithstanding such an attempt at appointment, moneys in the hands of the trustees at her death unappointed during her life, were held to be "unapplied" within the meaning of the settlement in that case.

(b) *Barford v. Street*, 16 Ves. 135-9: an estate for life, said Sir William Grant, with an unqualified power of appointing the inheritance, comprehends every thing. In *Irwin v. Farrer*, 19 Ves. 86, it was held that where a

married woman had a power of disposition over the whole fund, her filing a bill to have the fund paid to her was sufficient without any appointment.

(c) *Alexander v. Young*, 6 Hare, 394.

(d) *Anderson v. Dawson*, 15 Ves. p. 532; *Socket v. Wray*, reported in note 2 Atk. 68, and 4 Bro. p. 483; 2 Sugd. Pow. pp. 237-8: *Hansen v. Miller*, 14 Sim. 22, 27. In this case the Vice-Chancellor of England disputed the authority of *Robinson v. Dugate*, 2 Vern. 181: there the court held that a bequest of 200*l.*, to be at the disposal of the testator's widow by her will to whom she might think fit to give the same, gave her the absolute interest, so that her administrator was entitled to it on her intestacy (see Mr. Raithby's note). *Maskelyne v. Maskelyne*, Amb. 750, by Sir T. Sewell, appears to be a direct authority in support of *Robinson v. Dugate*. In *Reith v. Seymour* (see the next note) there was an express

an estate for life to a wife, with a power to dispose of the reversion by will or otherwise, she does not take the absolute interest, therefore in order to convey the absolute property, at least to volunteers, she must make an appointment in the mode required for rendering the appointment effectual (*a*): if she has a power to dispose by a revocable instrument she cannot affect it by an instrument not revocable (*b*). The distinction is slight which exists between a gift for life, with a power of disposition superadded, and a gift to a person indefinitely, with a superadded power to dispose by deed or will; but that distinction is established; and, in the latter case, the property vests. A gift of personalty to A., and to such person as he shall appoint, is absolute property in A., without an appointment; but if it is to him *for life*, and after his death to such person as he shall appoint by will, he must make an appointment in order to entitle that person to anything (*c*).

There is a difference in these cases, between a limitation to a married woman or other person for life, with a power, and in default of execution to the Next of Kin; and where there is a limitation, in default of the execution of the power, to the "Personal representatives," or to "the executors and administrators" of such person. The latter is, it has been said, as to personal property, similar to a limitation to the right heirs, as to real estate (*d*); but a limitation to the next of kin is like a limitation to heirs of a particular description; which would not give the ancestor, having a particular estate, the whole property in the land (*e*). The husband is clearly not entitled under a limitation to the wife's next of kin (*f*), nor is the wife under a limitation to the next of kin of the husband (*g*).

Although in a limitation in default of appointment the words "Personal representatives" may well be construed next of kin upon the

gift *for life*, with a power of disposition, by will or otherwise; see also *Bradley v. Westcott*, stated *infra*.

(*a*) *Reid v. Shergold*, 10 Ves. pp. 370-9; *Reith v. Seymour*, 4 Russ. p. 266; and see *Tomlinson v. Dighton*, 1 P. W. 149, 171; and *Dowell v. Dew*, *sup.* p. 493.

(*b*) *Sockett v. Wray*, 4 Bro. 483; *Heatley v. Thomas*, 15 Ves. 603.

(*c*) *Per Master of the Rolls*, in *Bradly v. Wescott*, 13 Ves. 453; and see *Irwin v. Farrer*, 19 Ves. 86; see also *Tawney v. Ward*, 1 Beav. 568, 570. The appointment of an executor is not a nomination of an appointee to take under the will of a prior testator; 13 Ves. 452; but see *Goodere v. Lloyd*, 3 Sim. 538; 2 Sugd. Pow. 536.

(*d*) But see 2 *Rop. Husband and Wife*, 212; and additional note, No. 4.

(*e*) *Per Master of the Rolls*, in *Anderson v. Dawson*, 15 Ves. 536-7; *Sanders v. Franks*, 2 Mad. 155; 2 Sugd. Pow. 6th ed. 237-8; 7th ed. 219; see Mr. Jacob's observations on this doctrine, 2 *Rop. Husb. and Wife*, pp. 211-13.

(*f*) *Bailey v. Wright*, 18 Ves. 49, affirmed 1 Swanst. 39; there the limitation was to the wife's next of kin or personal representatives; *Kilner v. Leech*, 10 Beav. 367; see additional note, No. 4.

(*g*) *Garrick v. Lord Camden*, 14 Ves. 381, 386; *Cholmondeley v. Ashburton*, 6 Beav. 86; *Kilner v. Leech*, 10 Beav. p. 367; and see *Withy v. Mangles*, 10 Cl. & Fin. 215; Sugd. Law of Prop. 122.

context, it is hardly possible that "Executors and administrators" should be so construed, for whether the words are construed as words of limitation or of purchase the persons answering that description take in their representative or official characters, and then the fund is to be applied and administered in the same manner as any other assets that come to them in that character (a); unless indeed the direction should be that they should take "for his and their own use and benefit" (b). If a fund be given to S., the wife of C., for life with a power of appointment, and in default of appointment to her executors or administrators, on her death without making an appointment, the fund falls into her estate, and the husband surviving takes it *jure mariti* (c). Where a married woman had a power to dispose of a sum of money by will, and in default it was limited to her executors and administrators, and she made a will appointing an executor, but making no disposition of the money, it was held to belong to her executor as part of her assets, not to her husband (d).

In a late case a money fund was vested in trustees upon trust for the wife for her separate use during the joint lives of husband and wife, and after the death of the husband in trust for the wife and her assigns for life in case she should survive him, and after the decease of the wife as to one moiety of the property upon trust for the sole and absolute use of the wife to be disposed of as she should by deed or will notwithstanding her coverture appoint, and in default of appointment upon certain trusts therein mentioned; it was held that the wife during her then coverture could not make an absolute disposition of the moiety of the trust fund (e). If an estate be conveyed to a married woman in fee, with a superadded power of appointment, though it was formerly held that the power was merged in the fee (f), it is now settled that the wife has a power to appoint the

(a) *Daniel v. Dudley*, 1 Phill. 6; reversing the decision of the Vice-Chancellor of England, 11 Sim. 163. In *Bulmer v. Jay*, 3 My. & K. 197, (see pp. 200-1), on a trust in a settlement to raise, after the death of the wife, 750*l.*, to be paid to such person as the wife should appoint, and in default of appointment, to her executors or administrators, it was held, under the circumstances, that the next of kin were entitled: in *Daniel v. Dudley*, (p. 7,) Lord Cottenham said, "That case stands alone;" but the following expressions of his Lordship, in *Attorney-General v. Malkin*, (2 Phill. 68,) "For the words being only the *media* through which the meaning is conveyed, it is immaterial what words are used, if we are sufficiently informed what meaning they are intended to bear," and his Lordship's observations on *Bulmer v. Jay*, in the same case,

p. 67, seem to show that his Lordship did not mean to decide that in no possible case could the next of kin take under a limitation nominally to "executors," at least so as to exclude the husband; see *Attorney-General v. Malkin*, 2 Phill. 67-8; x. Jur. p. 955 (1846), where the cases are examined by Lord Cottenham: and see 2 Bright, 198, 202, where the cases are collected; and add. note, No. 4.

(b) *Sanders v. Frank*, 2 Mad. p. 155: but see *Stocks v. Dodsley*, 1 Keen, 328, as to the general rule; there the legacy was limited to the executors *absolutely*.

(c) See 2 Bright, 1.

(d) *Churchill v. Dibben*, Ram on Assets, 712; see the additional note, No. 4.

(e) *Nixon v. Nixon*, 2 J. & Lat. 416, 421.

(f) *Goodill v. Brigham*, 1 Bos. & P. 192.

fee (a). If real estate be devised to trustees in trust to convey to a woman at 21, if she, being married, together with her husband file a bill praying for a conveyance according to the trust, no terms can be imposed on the husband in such case (b).

Lord Hardwicke seems to have considered that a feme covert could not bar her heir by a bare agreement, even before marriage, without doing something to alter the nature of the estate (c). "Suppose," said that eminent judge, "a woman having a real estate before marriage, in consideration of that marriage enters into an agreement with her husband, that she may by writing under her hand, executed in the presence of witnesses, or by will, dispose of her real estate, will this bind the heir-at-law? It rests in agreement; and if she does it, though it may bind her husband from being tenant by the curtesy, that arises from his own agreement; but what is that to the heir-at-law? Still she is a feme, under the disability of coverture at the time of the act done; and if she attempts to make a will, the instrument is invalid. The only question that could arise would be, whether such an agreement between her and her husband would not give her a right to come into a Court of Equity after the marriage, to compel that husband to carry this into execution, and to join with her in a fine to settle the estate, either on such trusts, or to such and such uses; and if it is such an agreement as the court would decree to be further carried into execution by a proper conveyance, then the question may be whether the heir-at-law is not to be bound by the consequences of that agreement? But that is the only way in which it could be brought in. But if the agreement cannot be carried into execution, though she might have power to bar her husband, it being a voluntary claim from her, and the law casting the descent on the heir-at-law, it seems it could not be done" (d). However, the cases of *Wright v. Lord Cadogan*, before Lord Northington and in the House of Lords (e), and of *Rippon v. Dawding* (f), before Lord Camden, appear to have settled that the husband and wife may by mere agreement before marriage enable the wife to dispose of her real estate during coverture, and defeat the right of her heir (g): as that

(a) See *Maundrell v. Maundrell*, 10 Ves. 265; *Downes v. Timperon*, 4 Russ. 334; 2 Roper, Husband and Wife, 181, and the references.

(b) *Lupton v. Tempest*, 2 Vern. 626.

(c) See, on this subject, *Hodsdon v. Lloyd*, 2 Bro. C. C. 543-4; the case itself turned on the will made before marriage being revoked by the subsequent marriage.

(d) Per Lord Hardwicke in *Peacock v. Monk*, 2 Ves. 191; and see *Feltiplace v. Gorges*, 3 Bro. C. C. 10.

(e) 1 Bro. P. C. 486, 496, 504; Amb. 468; 1 Fonbl. 113.

(f) Amb. 566, Lord Camden.

(g) See *Power v. Bailey*, 1 Ball & B. 49; 2 Rop. Husb. and W. 180, 247; Blunt's note, Amb. 566; 1 Sugd. on Powers, 186-7.

which for valuable consideration is agreed to be done is considered in equity as done (a), it is not necessary that the estate should be actually settled so as to give the power. Though a mere parol agreement before marriage between the husband and the wife, that the wife shall have certain specific articles belonging to her for her separate use cannot be enforced against the husband, yet if the property is placed in the hands or under the power of trustees in pursuance of the agreement it will be binding on the husband (b). How far the wife's estate settled for her separate use, or over which she has a power of appointment, may be bound by her contracts will presently be considered.

An infant being entitled to property to her separate use, the court, upon her marriage under age, settled it on trustees, with a power of sale; it was afterwards held that the court could confer no title on the trustees which the infant would not have had, and that the power could not therefore be well executed during her minority (c).

It is to be observed that where a female infant has been made a ward of court, and a settlement of her property has been approved, it is not competent to the husband and wife, by delaying the marriage until the wife has come of age, to defeat the settlement approved by the court (d). Where a settlement has been made on the marriage of an infant, and on her widowhood she does nothing to repudiate it, it will be binding on every subsequent husband, at least if he have notice of it or it be not concealed from him (e); and if a settlement be made in contemplation of a marriage which does not take place, it will not on that account only be held to be void (f).

A mistake in a settlement, as will be noticed more fully hereafter, will be corrected as well as in any other deed. Where one of the parties had executed the deed upon a clearly proved misapprehension of his interest in a fund, and it appeared that he had no intention that the fund should be dealt with, excepting as he was influenced by such misapprehension; it was held that he was not bound as to his rights over the fund by the execution of such a deed (g).

It is very common in marriage settlements, where the property

(a) *V. supra*, p. 253, *et seq.*

(b) *Simmons v. Simmons*, 6 Hare, p. 358; the parol agreement set up was that the wife should have certain articles of furniture for her separate use; it had been objected that such an agreement was void under the Statute of Frauds (§ 4).

(c) *Simson v. Jones*, 2 Russ. & M. 365.

(d) *Hobson v. Ferraby*, 2 Coll. 412.

(e) *Ashton v. M'Dougall*, 5 Beav. 66.

(f) *Lady Strathmore v. Bowes*, 2 Cox, 28; *S. C.* 1 Ves. J. p. 22; 2 Bro. by Eden, p. 345; see *Clancy*, 615-16-17.

(g) *Ashhurst v. Mill*, xii. Jur. 1035, affirming the judgment of Vice-Chancellor Wigram, *ibid.* 693; here the misapprehension appeared from the recitals in the deed, and the correspondence which passed at the time. The

settled is large, to provide that the wife shall receive, during the joint lives of the husband and wife, a certain annual sum for her private separate use independently of her husband, in order to enable her to provide for her clothing and other continually recurring expenses in regard to the ornament of her person, without having on each occasion to apply to her husband: such a provision is usually called Pin-money(a): this can only be secured through the medium of the equitable jurisdiction of the Court of Chancery; it may be done by a direction to the trustees of the settlement to pay it, or by a term being vested in trustees, upon trust, out of the rents, or by mortgage, sale, or other lawful means, to raise the appointed annual sum, and to pay it to the wife upon her sole receipt, notwithstanding her coverture.

Lord Hardwicke observed that these separate provisions do often occasion the very evils they are intended to prevent: they are not, he said, to encourage a wife to leave her husband whatever his behaviour may be; for were this the construction, it would destroy the very end of the marriage contract, and be a public detriment. The court appears to have considered that a control may be exercised in respect of a provision of the nature of pin-money in the event of any misconduct on the part of the wife (b). Where the husband articles to settle such and such lands in certainty on his wife, this is a jointure, and not forfeitable either by an elopement or even adultery(c); for the law has not imposed this penalty against her enforcing a positive right: the forfeiture of dower is by legislative enactment: *primâ facie*, therefore, it would appear that any certain settled sum would stand in the same predicament. But pin-money is of a peculiar character: where an annual sum is secured to the wife by way of pin-money,

cases as to rectifying mistakes are collected 2 Bright, 218, note.

(a) As to what Pin-money is, see 2 Cl. & Finell. 654; and as to its original introduction, Sugd. Law of Property, 165, in the note.

(b) In the case before Lord Hardwicke, which called forth the observations in the text, the wife had left the husband; but his Lordship was disinclined to stop the proceedings of the trustees to recover the arrears of the pin-money, the wife having simply left her husband apparently on excusable grounds, and there being a case of acquiescence on the part of the husband, by payment of the pin-money to the wife after she had left him; *Moore v. Moore*, 1 Atk. 276; an injunction had been obtained, which was continued on terms: and see *Jodrell v. Jodrell*, *infra*. In *Moore v. Moore*, the wife had been excommunicated in a suit for the restitution of conjugal rights by the husband; but Lord Hardwicke thought

that that suit and the offer then made to take her back were a contrivance to give a foundation for his suit in this court; distinguishing it in this respect from the case of *Whorewood v. Whorewood*, (1 Ch. Ca. 250,) where a *bond fide* offer had been made by the husband to take back his wife; and see *More v. Earl of Scarborough*, 2 Eq. Ab. 156; and *Moore v. Moore*, 1 Atk. p. 276; and 2 Roper, Husband and Wife, by Jacob, 134-5.

(c) *Sidney v. Sidney*, 3 P. W. 276; *Blount v. Winter*, *ibid.* 277, in note; *Seagrave v. Seagrave*, 13 Ves. 444; *Blount v. Winter*, MS., 1 Fonbl. 94. Adultery is no bar at law to the trustee recovering maintenance secured for the wife by a legal obligation; *Baynon v. Butley*, 8 Bing. 256; *Field v. Serres*, 1 New R. 121; and see 1 Roper, Husband and Wife, 137; and *Hodgens v. Hodgins*, 11 Bli. 62; 4 Cl. & Fin. 323; Sugd. Law of Prop. 171.

she cannot do as she pleases with it; it is her duty to apply it, as it is intended, for her own personal dress, decoration, and ornament; the husband as well as the wife has an interest in its being properly applied; and if the wife neglect her duties, the court, it has been said, will reach the moneys in the hands of the trustees to ensure their performance: and for the same reason she cannot make a sweeping disposition of it as she can of her general separate estate (a). It is on this ground, namely, the special purposes to which pin-money is devoted, that the Court of Chancery refuses to call upon the husband to pay the arrears beyond one year unless it appears that he has withheld the payment without the wife's consent and without any implied acquiescence on her part (b): and though the wife may claim such arrears for one year (c), (unless the husband has provided her with clothes and other necessities (d),) as she may of the income of her separate estate though she has permitted her husband to receive her separate income (e), the personal representatives of the wife are not generally allowed to claim arrears of pin-money even for a year: *à fortiori*, if the wife becomes insane and remains so until her death, if the husband has maintained and clothed her and taken suitable care of her according to her rank and condition, the court it seems will not give to her personal representatives *any* arrears of pin-money even secured by a marriage settlement, or indeed allow them to be claimed (f). Pin-money is not liable to a deduction on account of alimony granted to the wife, for if the husband and wife had lived together she would have been entitled to maintenance as well (g).

(a) *Howard v. Digby*, 2 Cl. & Fin. 634; S. C. 8 Bli. N. R. 242; judgment of the Lord Chancellor, v. *infra*; *Jodrell v. Jodrell*, 9 Beav. 55, 62, stated *inf.*; *sed v. inf.* note (f).

(b) *Ridout v. Lewis*, 1 Atk. 268; and see *Lady Warwick v. Edwards*, 1 Eq. Ab. 140; and *Cornwall v. Earl of Montague*, *ibid.* 66; *Clancy*, 379; see *Thrupp v. Harman*, 3 My. & K. *infra*.

(c) *Offley v. Offley*, Prec. Ch. 26.

(d) *Fowler v. Fowler*, 3 P. W. 355.

(e) *Parkes v. White*, 11 Ves. 225; but see *Dalbiac v. Dalbiac*, 11 Ves. 126; and see Bythewood's Convey. by Jarman, vol. ix. pp. 217, 218, note; *Seagrave v. Seagrave*, 13 Ves. 444, and see 2 Roper, Husband and Wife, p. 137. Where the wife has for a long time *acquiesced* in the husband receiving the rents of her separate estate, though she may have made repeated applications for the arrears, unless the husband has contracted to pay them, no more than one year's arrears can be claimed; a promise on his part without consideration is

not sufficient; *Thrupp v. Harman*, 3 My. & K. 517.

(f) See *Howard v. Digby*, 8 Bli. pp. 246, 250, 252, 271, reversing the decree of the Vice-Chancellor of England, 4 Sim. p. 588; S. C. 5 Sim. 330, where the subject is elaborately discussed. The Vice-Chancellor's decree was founded on this, that the duchess, having been a lunatic, was incapable of giving her consent, so that no case of *acquiescence* could be raised against her. A distinct ground, as will be seen, which superseded the question of *acquiescence*, was taken in the House of Lords; but Sir E. Sugden, in his late valuable work on the Law of Property, (pp. 165, 168, 170,) has made some forcible observations upon the doctrines stated in Lord Brougham's speech in the House of Lords in the first-cited case, which are also applicable in part to Lord Langdale's doctrine; and has examined the decision of the House of Lords, to which he objects upon principle and authority.

(g) *Ball v. Coutts*, 1 Ves. & B. 305.

The wife may acquire a separate right to personal property during the marriage by the consent of her husband; and the husband may clearly make a Gift to his wife which will be good as against his personal representatives (*a*), though not against his creditors (*b*): but to establish such a gift the evidence must be clear beyond suspicion: it must be by a clear distinct act by which he has divested himself of the property by transfer to a trustee, or shewing an explicit definitive intention to hold it himself as a trustee for the wife (*c*): a voluntary promise by the husband to his wife is no more binding than if it were made to a stranger (*d*): and it is only reasonable provisions for her that will be supported in equity, not a gift to her by the husband in his lifetime of the whole of his substance (*e*). Lord Hardwicke considered that ornaments given to a wife by a stranger must be considered as given for her separate use (*f*).

If the husband in pursuance of an agreement on marriage makes advances to his wife for her clothing and the like, and she lays up a fund out of the savings, on his death the husband's creditors cannot touch it, much less the husband's representatives; and if the husband voluntarily makes advances to the wife for such purposes, though his creditors, in case of a deficiency of his estate for payment of his debts, may take them equally as her paraphernalia under the same circumstances (*g*), his personal representatives have no claim upon them; the husband might have objected in his lifetime that the money was not properly applied, but after his death no one can be a judge of what he might have considered to be a proper application (*h*). When the husband gives ornaments to his wife, they are generally to be considered as paraphernalia, and she cannot properly dispose of them during his life, as that would be inconsistent with the purpose of the

(*a*) *Lucas v. Lucas*, 1 Atk. 271; *Graham v. Londonderry*, 3 Atk. 393-4; and see *Ram on Assets*, 213.

(*b*) *Flay v. Flay*, 2 Freem. 64; *Lady Tyrrell's case*, *ib.* 304; *Slanning v. Style*, 3 P.W. 339.

(*c*) *Walter v. Hodge*, 2 Swanst. 92, 104-7, (to which case Mr. Swanston has appended a valuable note as to what is or is not to be considered a *donatio mortis causâ*, *ib.* p. 101,) and the cases there cited; *M'Lean v. Longlands*, 5 Ves. 78-9, cited 2 Swanst. 104-6; *Ram on Assets*, 212.

(*d*) Lord Hardwicke, *Darley v. Darley*, 3 Atk. 399: *this dictum* has not been disputed that I am aware.

(*e*) *Beard v. Beard*, 3 Atk. 72: a provision, said Lord Hardwicke, is all that the wife is entitled to.

(*f*) 3 Atk. 393-4; 2 Rop. *Husb. & Wife*, 143.

(*g*) *V. int. al. Burton v. Pierpoint*, 2 P. W. 79; 2 Roper, *Husband and Wife*, 132.

(*h*) See *Sir Paul Neale's case*, cited *Prec. Ch.* p. 44; *Lucas v. Lucas*, 1 Atk. p. 271; *Willson v. Pack*, *Pr. Ch.* 297: and *Slanning v. Style*, 3 P. W. p. 338; in this case the husband allowed his wife to sell and take to herself for pin-money, the butter, eggs, &c., not used in the family; there was a clear case of acquiescence on the part of the husband: *Offley v. Offley*, *Prec. Ch.* 27, third resolution; the wife had invested her savings in jewels, value 500*l.*, the husband was a man of great estate and consequence; and see 2 Rop. *Husband and Wife*, by Jacob, 137-40; *et v. sup.* p. 479; *infra*, p. 503.

gift (a). Where the wife lent her savings to her husband on his note to her trustee, it was held that his assets were liable to pay the note (b). The wife's savings of her pin-money, equally as of her separate estate, are not assets for payment of the husband's debts if she survive her husband (c). A defective execution of a power made by the husband to the wife will be made good in equity, but when made by the wife to the husband it will not be supplied, unless there is some consideration, as a prior contract (d).

A wife may also by agreement before marriage secure to herself the profits of her trade for her separate use; and in such case, though no trustees are interposed, the property will be protected against the husband and the claims of his creditors (e). The wife before marriage may with the consent of her intended husband convey all her stock to trustees to enable her to carry on her business separately, and if the husband do not intermeddle with them and there be no fraud, such effects, though fluctuating, are not liable for his debts; it is not absolutely necessary that there should be an inventory (f). If there be an agreement between husband and wife to this effect after marriage, it must be founded on valuable consideration, in order that the property may be protected from the husband's creditors: if voluntary, it will be good against the husband only (g). If the husband desert his wife, and she carry on a separate trade for her support, the Court Chancery will protect her earnings against her husband (h).

Though a trader cannot on marriage secure a provision for his wife in the event of his bankruptcy to the prejudice of his creditors, yet he may in consideration of his wife's fortune convey property to trustees for his own use until his death or bankruptcy, and in either event for the benefit of his wife; it is in the nature of a mortgage to secure his wife's fortune (i).

We now proceed to consider the general doctrines of the Court of Chancery in regard to the separate interests of married women in real

(a) *Graham v. Londonderry*, 3 Atk. 394.

(b) *Spencer v. Latimer*, coram Vice-Chancellor, 7 Feb. 1820, (Mad. P. and P.); and see *Slanning v. Style*, *ubi sup.*; *Tait v. Hilbert*, 2 Ves. J. 111; and 5 Ves. 71.

(c) *Herbert v. Herbert*, Prec. Ch. 44; *Willson v. Pack*, *ibid.* 295-7. At law, property bought by the wife, living with her husband, with her separate property, is liable to execution for the husband's debts, *Carne v. Brice*, 7 Mees. & W. 183; as is property given for her separate use, without the intervention of a trustee; but not so in equity, *Newlands v. Paynter*, 4 My. & Cr. 418.

(d) *Tollett v. Tollett*, 2 P. W. page 489; *Moodie v. Reid*, 1 Mad. p. 521; *S. C.* 2 Mad. 156; 1 Bright, Husband and Wife, 31.

(e) See 2 Rop. Husband and Wife, 165-6, 171-6.

(f) *Jarman v. Woollaton*, 3 T. R. p. 618; and see *Haslington v. Gill*, (3 Doug. R. 415,) *ibid.* 620, n.; *Dean v. Brown*, 8 Dow. & R. 95; 5 Barn. & C. 336.

(g) *V. ibid.* 303-331; see 1 Fonbl. 103.

(h) *Cecil v. Juxen*, 1 Atk. p. 279; Sir J. Jekyll, *Lamphir v. Creed*, 8 Ves. 599; 2 Rop. Husband and Wife, 173.

(i) *Higginson v. Kelly*, 1 Rose, 368.

and personal property, secured to them by settlement or conferred upon them by gift or devise.

Where real estate is settled upon the wife *in fee* in trust for her separate use without any special power of disposition, she can only dispose of the inheritance by a conveyance duly acknowledged, the substitute for a fine (a). If a woman has a separate estate in land for *her life*, she may in equity sell that interest (b), and transfer it without a fine or its equivalent, for such a transaction does not affect her heir; or she may dispose of or charge the rents and profits accruing during her life, of an estate settled upon her, whether in fee or for life, in the same manner as she may the income of personal estate so settled (c): and she may absolutely dispose of an annuity charged on land for her life for her separate use without any special power, in like manner as her separate personal property (d). A devise of an estate to trustees in trust for the separate use of a wife, and to convey to her *in fee*, free from the control &c. of the husband, does not confer on her a power to devise the estate (e).

It was said by Lord Redesdale that a wife, having a power to appoint an estate not settled to her separate use, could not defeat the right of her heir, by means of a mere contract to convey, entered into after marriage (f): and Sir T. Plumer doubted whether a married woman, having a power of appointment, to be executed in a particular manner, could bind herself by a contract to sell the property, and thus in effect contract to execute the power as prescribed; a contract by a married woman being, as he considered, void (g). But though a contract by a married woman is so far void that it cannot found a personal claim against a wife, it may affect her separate estate (h).

(a) 2 Rop. Husband and Wife, by Jacob, 182; and see Jarman's Convey. vi. 39, note, 1st edit., where the authorities are collected, and vol. ix. 102, 362. The practice uniformly is to convey trust estates in fee settled for the separate use of the wife by deed acknowledged, and it is understood that she cannot and never could bind her heirs, without a fine or its equivalent, though it has been contended from some expressions in Mr. Justice Rooke's judgment, *Goodill v. Brigham*, 1 Bos. & P. 198, that where the legal estate was in trustees she might convey without fine. The act 3 & 4 Will. IV. c. 74, § 91, provides for the case of the husband being incapable of joining in the wife's conveyance, and for that of his being separated from her, but is silent as to the case of his refusing to join in her conveyance of her separate estate; it is therefore left to the court to say, in each case, whether a power to appoint the fee is to be

presumed, (see *Doe v. Staple*, 2 T. R. 695, and *Jarm. Convey.* 9, *ubi sup.*) or the husband, as her trustee, is to be compelled to join with his wife to perfect her deed; or that her conveyance is sufficient; v. *inf.* p. 506, n. (c), and 513.

(b) Lord Eldon, *Parkes v. White*, 11 Ves. 232; *Grigby v. Cox*, 1 Ves. Sen. 517; and see what is said in *Burdon v. Dean*, 2 Ves. J. 609.

(c) *Hulme v. Tenant*, 1 Bro. 21.

(d) *Major v. Lansley*, 2 Russ. & M. 355: there her title was in reversion; she was held to be bound after the death of her husband; *et v. Sturges v. Corp.*, 13 Ves. 190.

(e) *Doe v. Scott*, 4 Bing. 505.

(f) *Dillon v. Grace*, 2 Sch. & Lef. 463.

(g) *Martin v. Mitchell*, 2 Jac. & W. 424, and see Sugd. V. and P. p. 230; 12 Law J. Chanc. 158.

(h) *Grigby v. Cox*, 1 Ves. Sen., 517, *Belt's Sup.* p. 230.

In a late case, where the husband and wife had joined in a written agreement to appoint and convey land settled to the separate use of the wife for life, by way of mortgage to secure a sum of money borrowed by them; Lord Langdale held that the wife was bound by the agreement (a): and, in a later case, *Dowell v. Dew* (1842, 1843) (b), the Vice-Chancellor Knight Bruce, and Lord Lyndhurst, on appeal, after the death of the wife, enforced the performance of an agreement by the wife to grant a lease, she having had a power to grant such a lease: the Lord Chancellor said he thought there was no sufficient reason why her agreement to execute the power should not have the same effect as if she were unmarried, not indeed as to any remedy against her personally, but as to the estate in respect of which the power was to be exercised. It is now settled that the Court of Chancery will not make a peremptory order on a married woman to execute a conveyance of an estate not settled to her separate use (c).

By the strict rules of the common law, as will have been seen from the introductory remarks in this Section, a wife can have no separate interest (d) in her Personal property; as the husband bears the burthen of supporting her and answering for her debts, he has *primâ facie* a right to her property (e); and as the law charges the husband with all the burthens, it will not allow a fraud upon him, for instance a secret settlement made previously to marriage, to prevail (f). There is,

(a) Sugd. V. and P. 230; *Stead v. Nelson*, 2 Beav. 245, 1835. In *Grigby v. Cox*, *supra*, recognized by Lord Thurlow, in *Hulme v. Tenant*, 1 Bro. p. 20, Lord Hardwicke enforced a contract for sale entered into by the husband and wife of part of her separate real estate, which she had power to appoint. In *Aylett v. Ashton*, 1 My. & Cr. 112, Lord Cottenham is reported to have said, "Although a married woman has a power, and the court has jurisdiction over the rents and profits of her separate property, no case has given effect to her contracts against the corpus of her separate estate;" but these expressions had reference to Lord Thurlow's corresponding dictum in *Hulme v. Tenant*, 1 Bro. 21, that her general engagements will not affect the corpus of her separate real estate.

(b) *Dowell v. Dew*, 1 Y. & Coll. C. C. 345, see 355-6, affirmed 12 Law J., Chan. 164; and though the wife could not grant reversionary leases, and the agreement was made some time before the lease in possession expired, that was held to be no objection, the reason for anticipating the time being satisfactorily explained. On the general subject of granting leases of the wife's estates in reversion, see

1 Roper, Husband and Wife, 134-5.

(c) *Jordan v. Jones*, 2 Phill. 170; there had been a decree for sale, *et v. Aylett v. Ashton*, *supra*.

(d) *Et v. sup.* vol. i. p. 594.

(e) *Kensington v. Dollond*, 2 My. & K. 188; 1 Fonbl. 99.

(f) *Goddard v. Snow*, 1 Russ. p. 485; *St. George v. Wake*, 1 My. & K. p. 610; and see *Strathmore v. Bowes*, 1 Ves. J. 28; *supra*; *Edmonds v. Dennington*, cited 2 Vern. p. 17; *Ashton v. M'Dougall*, 5 Beav. 66; and *Taylor v. Pugh*, 1 Hare, 612; a case where the circumstances were special; the earlier cases on this subject are collected in Clancy on Husband and Wife, ch. xiii. p. 614, *et seq.* Whether the settlement is fraudulent or not depends in each case on the circumstances; *England v. Downs*, 2 Beav. 522. The Vice-Chancellor Knight Bruce, in the late case of *Griggs v. Staplee*, (xiii. Jur. 29,) a case of complicated and peculiar circumstances (*v. inf. alia*, p. 32), offered the plaintiff an issue, with a view to determine whether a settlement, the execution of which was alleged to have been obtained by a third person, was a fraud on the husband's marital rights, and if the issues were refused,

indeed, a notable exception as regards the character sustained by a married woman in regard to the Queen Consort, who, in respect to private rights, is considered as a distinct and separate person from the King. She may sue and be sued alone, and in her own name. She can take directly by grant from the King, or from any other person, without the intervention of trustees; and can execute a bond or other specialty, and may convey her estate without his being a party to such security or conveyance (a).

But the strictness of the common law in regard to private persons has been much relaxed by the doctrines which have been introduced by the Court of Chancery, through the medium of its powers, which can hardly be designated to be other than legislative, in constituting and enforcing trusts, as has been noticed in the former volume (b).

An agreement between husband and wife in writing before marriage, as to her real estate, as we have seen, is good in equity, against the heir, even though no trustees be interposed (c); *à fortiori* it is good against her personal representatives as regards her personal estate. Subsequent marriage extinguishes any obligation on the part of the husband to his wife at law if it be such as to create a debt or demand *during* the coverture; but it is good in equity (d). Where there is a contract in writing (e) between husband and wife before marriage, that the wife shall have to her Separate use, either the whole or particular parts of her Personal estate, she may dispose of all that is embraced in the contract in her life, or by will, and she may do it either way, though nothing is said in regard to disposition (f); but if there be a covenant merely that the wife shall dispose of her personal estate, this does not extend to what shall come to her after marriage (g). Although the husband, under his covenant

the bill was to be dismissed. See the Vice-Chancellor's dictum, p. 31, as to what conduct in the promoter of an improvident transaction will avoid it, though he may have had no fraudulent intent.

(a) 1 Inst. 133 a.; 2 Roll. Ab. 213; 4 Co. 23 b.

(b) V. *supra*, vol. i. pp. 419, 595-6-7; and see 1 Fonbl. 94, n.

(c) V. *supra*, p. 498; and see 1 Fonbl. pp. 102, 113, 114, and cases there cited. In *Compton v. Collinson* (2 Bro. 377; 1 H. Black. Reports, 344), one of the cases cited, it was held that the wife, living separate from her husband, might alone, under the marriage contract, surrender a copyhold estate settled to her separate use; the husband had covenanted to join in the necessary conveyances, but the court considered it necessary that he should join only to support his interest in

her estate.

(d) See the cases 1 Fonbl. 102; so an obligation by the wife to the husband continues good in equity, *Cannel v. Buckle*, 2 P.W. 244; *et v. Prebble v. Boghurst*, 1 Swanst. p. 319; *More v. Freeman*, Bunb. 207.

(e) See *Simmons v. Simmonds*, 6 Hare, 358.

(f) See Lord Hardwicke's judgment in *Peacock v. Monk*, 2 Ves. 190; *Norton v. Turvill*, 2 P.W. 144; *Rich v. Cockell*, 9 Ves. 369, 375, 379; *Parkes v. White*, 11 Ves. p. 222, (where Lord Eldon considers the effect of the words "to pay into her proper hands," and the like, and observes upon Lord Rosslyn's decision, *Whistler v. Newman*, 4 Ves. 129); *Tappenden v. Walsh*, 1 Phillim. p. 353; and Com. Dig. Chanc. 2 M. 11, p. 391, 4th edit. Of the probate of a will of a married woman of her separate estate, see 1 Jarm. Wills, 25.

(g) *Pilkington v. Cuthbarton*, D. P. 11

before marriage that the wife shall have certain property for her separate use, becomes a trustee for her in equity, he is not so at law (a).

The wife may not only acquire a separate interest in her own property, or in the property of others, real or personal, settled on her marriage, by the marriage contract; but she may also acquire a separate interest in property real and personal by gift, devise, or bequest, and that without the intervention of trustees; and where the legal estate devolves on the husband, or whatever may be the interest which vests in him as husband, he will be decreed to be a trustee of such estate or interest for the wife, in like manner, as it has been said, as, where lands are charged with debts, the heir takes, but as a trustee *pro tanto* (b); though Lord Cowper had entertained some doubts whether the husband could be a trustee of pure personalty so given (c): the wife has the same powers of disposition over separate estate so acquired by transfer or by will, as over separate estate conferred by settlement, and that without the assent of her husband or of her trustees, unless such assent is imposed as a requisite by the instrument of gift (d).

Technical words are not necessary (e) to confer a separate estate or interest on the wife; the court will execute a trust for the separate use of a wife wherever the intent is clearly and unequivocally declared (f). It has been held that a bequest, (whether with or without the intervention of trustees is immaterial) for the benefit of a married woman, "to her sole and separate use" (g), "for her sole use and benefit" (h), or for her "sole use" simply (i), "for her own use and at her dis-

March, 1711; Harc. MS.; Mad. P. and P. i. 486, 2nd ed.

(a) *Izod v. Lamb*, 1 Crompt. & J. 44; *Rich v. Cockell*, 9 Ves. 375.

(b) See the cases 1 Fonbl. 109, n. (p); *Bennet v. Davis*, 2 P. Wms. p. 316; *Parker v. Brooke*, 9 Ves. 583; the trust was held to attach upon reversionary leases obtained by the husband, and against a purchaser with notice: see *Raw v. Chichester*, 1 Bro. 198, *supra*. 304.

(c) *Harvey v. Harvey*, 1 P. Wms. 126, and the cases cited in the note; *S. C.* 2 Vern. 659; *Parker v. Brooke*, *supra*; *Bennet v. Davis*, 2 P. W. 318.

(d) See *Hulme v. Tenant*, 1 Bro. 20; *Fetiplace v. Gorges*, 1 Ves. J. 46; 3 Bro. 10; and Lord Henley's note: the wife's power of disposition is more fully considered, *infra*.

(e) Lord Hardwicke, *Darley v. Darley*, 3 Atk. 399; Lord Brougham, *Tyler v. Lake*, 2 R. & My. 188. The cases on this subject are

collected by Mr. Hill on Trustees, 424, from which Treatise I have received the greatest assistance in referring to them; Lewin on Trusts, p. 117; Roper on Legacies, by White, 1415-17; and 2 Bright, 210, *et seq.*

(f) *Wills v. Sayers*, 4 Mad. 409.

(g) *Rollfe v. Budder*, Bunb. 187-8; *Parker v. Brooke*, 9 Ves. 583; *Bennet v. Davis*, 2 P. W. 316. The various forms of expression which have been held, *per se*, to give the wife a separate interest, are collected 2 Roper on Legacies, 370-71.

(h) *Adamson v. Armitage*, 19 Ves. 416; *S. C.* G. Coop. 283 (see 2 Coll. 421); *Ex parte Killick*, 3 Mon. D. & De G. 480.

(i) *Ex parte Ray*, 1 Mad. 207; *own use* is not sufficient, *Roberts v. Spicer*, 5 Mad. 491-2; *Wills v. Sayers*, 4 Mad. 409, *et v. Rycroft v. Christy*, 3 Beav. 241; *Beales v. Spencer*, 2 Yo. & Coll. C. C. 651.

posal" (a), "independent of the control of her husband," or the like (b), "for her own use and benefit independent of any other person" (c), "her receipt to be a sufficient discharge to the executors" (d), and "to be delivered to her on demand," confers upon her an interest for her separate use (e). But where the expressions do not clearly show that the husband is to be excluded from his marital rights, then the wife will not take for her separate use; therefore a mere trust to pay the interest to her for life, without saying, to her separate use, is not sufficient, the mere intervention of trustees never having had the effect of vesting a sole and separate interest in the wife (f). A trust for a wife's "own use and benefit" is not a trust for her separate use (g), nor, according to modern authority, will a direction to pay into her own *proper* hands for her own use and benefit have that effect (h). The expressions, said Lord

(a) *Prichard v. Ames*, Turn. & R. 223, Graham, B.

(b) *Wagstaff v. Smith*, 9 Ves. 520; *Ogle v. Corthorn*, ix. Jur. 325; *Simons v. Horwood*, 1 Keen, 7.

(c) *Margetts v. Barringer*, 7 Sim. 482; and see *Bain v. Lescher*, 11 Sim. 397.

(d) *Lee v. Prieaux*, 3 Bro. p. 381. Lord Hardwicke is reported to have said, where an estate is given to a husband for the "livelihood" of his wife, it was sufficient to show that it was for her separate use, *Darley v. Darley*, 3 Atk. 399: this case appears to be incorrectly reported by Mr. Atkins, as regards the facts and the decree; it seems to have turned upon the question as to whether the wife was entitled to dispose of the property by will, under a power alleged to have been given to her; see *Lee v. Prieaux*, 3 Bro. 384: the claimant's bill was dismissed, so that the dictum appears to be of no value, and was so treated by Lord Alvanley, *ubi sup.*; and see *Wardle v. Claxton*, 9 Sim. 525.

(e) *Lumb v. Milnes*, 5 Ves. 521; *Dixon v. Olmuis*, 2 Cox, p. 414: and see — *v. Lyne*, 1 Yo. 562; but as to this case, see Lord Cottenham's observations, 2 My. & K. p. 183. Other cases are cited in the Vice-Chancellor Wigram's judgment, set forth in the text, *inf.* Sir Jos. Jekyl, by all admitted to have been a great judge, held that a direction that the wife "should enjoy and receive" the rents and profits, was sufficient in a note signed by the husband forming part of a marriage agreement; "for to what end should she receive it if it is to be the property of the husband the next moment?" *Tyrrell v. Hope*, 2 Atk. 561: and see *Acherley v. Vernon*, 10 Mod. 531.

(f) *Lumb v. Milnes*, 5 Ves. 517: "It is necessary," said Lord Alvanley, "to show a

decided intention that the husband shall have no interest whatever;" *Rich v. Cockell*, 9 Ves. 370; *Wardle v. Claxton*, 9 Sim. 525; see the other authorities, 1 Bright, 206, *et seq.*

(g) *Wills v. Sayers*, 4 Mad. 409; *Roberts v. Spicer*, 5 Mad. 591; *Tyler v. Lake*, 2 Russ. & M. 183; *S. C.*, 4 Sim. p. 144. This was a strong case, for a direction to pay; "into their own proper hands" was specifically applied to the two married daughters, the previous bequests being to them and their brothers and unmarried sisters; though in a subsequent part of the will similar words were used as regards the bequests to others of the legatees. In *Stanton v. Hall*, 2 Russ. & M. 175, on the son executing any assignment, which he did, or, in case of his bankruptcy, an annuity was to be paid to the wife during the life of the son, her husband; the Vice-Chancellor of England intimated an opinion (and see 2 Hare, p. 50, to same effect), that the wife was entitled for her separate use. Lord Brougham decided the contrary, and even, following *Elliott v. Cordell*, *supra*, held that she was not entitled to a settlement; this also is a strong case: and see *Beales v. Spencer*, 2 Yo. & Coll. C. C. 651.

(h) *Tyler v. Lake*, *ubi sup.*; *Blacklow v. Laws*, *ubi inf.*: but Lord Alvanley, as mentioned above, gave effect to the word *proper* in *Hartley v. Hurle*, *ubi supra*. In *Kensington v. Dollond*, 2 My. & K. 184, the words "for her own use and benefit," in a settlement, were held, by Sir J. Leach, not to create a separate estate; but he held, as I read the judgment, that if the husband had been one of the trustees of the settlement they would; but in the case before him a trust for separate use was *expressly* created in another part of the instrument.

Brougham, must be such as "to leave no doubt of the intention, and which forbid the court to speculate on what the probable object of the donor might have been" (a): in the same case his Lordship said, "If a sufficient strength of *negative* words is not to be found in the gift or limitation, you are not allowed to fish about for indications of intention from *other* parts of the instrument:" though in another case his Lordship said the intention may be inferred from the nature of the provisos annexed to the gift, as where, for example, the property is to be at the wife's own disposal, or her receipts are to be a good discharge (b). The doctrine in the first passage above referred to does not appear to be peculiarly applicable to cases of this description; in no case can the court in fixing the construction speculate on the *probable* intention, as has been frequently adverted to and particularly in treating of the conversion of real estate out and out so as to exclude the heir-at-law; but the last-cited passage, if it means that there must be negative words annexed to the *very gift or limitation*, does appear to introduce a strictness of construction which is not applied to other cases of gift (c): however, looking to the language of this dictum, it can hardly be construed to mean that if, upon the entire context of the will there be 'a manifest implication that the marital right was meant to be excluded' (d), that that shall have no effect if there be not negative words in the gift itself. Some discrepancy may be expected in the decisions in cases of this description, as the judge may be influenced, in some degree, by his being favourable or not to the policy of breaking in on the common law in the way that is effected by the separate-use doctrine; and what may be considered sufficient where it can be collected that there was a contract that the wife should have *her* property for her separate use, may not be considered as sufficient where the question depends solely on the terms of a gift. "The cases," said Lord Cottenham on a recent occasion, speaking generally (e), "require very distinct and unequivocal expressions to create a separate interest in the wife. In *Tyler v. Lake* (f),

(a) Lord Brougham, *Tyler v. Lake*, 2 Russ. & M. p. 189; and see *Brown v. Clark*, 3 Ves. 167.

(b) *Stanton v. Hall*, 2 Russ. & M. 180.

(c) See the Vice-Chancellor Wigram's judgment in *Blacklow v. Laws*, 2 Hare, 50.

(d) See *Stanton v. Hall*, 2 Russ. & M. 180, Lord Brougham.

(e) *Massey v. Parker*, 2 Myl. & K. 175. The words there relied upon were under her "sole control," but there was nothing to show that they were used in reference to

marriage: it is to be observed that *Stanton v. Hall*, 2 Russ. & M. 175, to which Lord Cottenham's subsequent observations, as to there being no words of exclusion though the intention was plain, apply, arose upon a will; but his Lordship does not intimate that it would have made any difference had it arisen on a contract. *Tyler v. Lake* arose upon a settlement; Lord Brougham there observes on the words "own" and "sole" use and benefit; 2 Russ. & M. p. 187.

(f) 2 Russ. & M. 183. It is to be observed

the Lord Chancellor says the husband is not to be excluded except by words which leave no doubt of the intention, and of this principle the case of *Tyler v. Lake*, which is also reported before the Vice-Chancellor, and the case of *Stanton v. Hall* afford a strong illustration."

In the late case of *Blacklow v. Laws*, the Vice-Chancellor Wigram examined the authorities in reference to the second of Lord Brougham's propositions cited above. "In *Tyrrel v. Hope*" (a), said the Vice-Chancellor Wigram (b), "there was an agreement that the wife should enjoy and receive the issues and profits; that is the mere legal consequence of the receipt of the money by her; yet in that case the direction that she should enjoy was held to create a separate use. In *Pritchard v. Ames* a like decree was made by Sir Wm. Grant, (should be Mr. Baron Graham) upon a similar ground; and in *Atcherley v. Vernon* (c), to the words 'to be by her laid out in what manner she shall think fit,' the same construction was applied. The gift in *Margetts v. Barringer* (d) was for her own use and benefit *independently* of any other person, which was held to exclude the husband. *Wardle v. Claxton* (e)," continued the Vice-Chancellor, "seems to be the case of a gift to the separate use of the wife within those cases; but the Vice-Chancellor said that the direction to the wife to apply the fund for the maintenance of her children as well as herself prevented the case from being brought within the language of the authorities (f)." In the case before the Vice-Chancellor Wigram the words were "in trust to pay one annuity into the proper hands of my youngest daughter Alice, now the wife of James Laws (one of the trustees) for her own proper use and benefit." It is evident that, but for the later authorities, his Honour would have followed Lord Alvanley's decision in *Hartly v. Hurle* (g), but he said, adverting particularly to Lord Brougham's doctrine, "the authorities referred to place me in this situation, that I must construe the will in this case with the utmost strictness" (h), and his Honour decided that the property was not conferred on the wife for her separate use. There existed in this case as in *Tyler v. Lake*, this special circumstance, as the Vice-Chancellor observed, that one could not help seeing, looking to the whole will,

that his Lordship does not expressly cite the stronger of Lord Brougham's propositions; see p. 181, 2 My. & K.

(a) 2 Atk. 561.

(b) *Blacklow v. Laws*, 2 Hare, 52.

(c) 10 Mod. 518, 531.

(d) 7 Sim. 482.

(e) 9 Sim. 524.

(f) See *Kirk v. Paulin*, 7 Vin. Ab. 96, pl. 43.

(g) Sir Wm. Grant, in *Hovey v. Blakeman*, appears to have made a similar decree, 9 Ves. 524; see *Lumb v. Milnes*, 5 Ves. 517.

(h) See 2 Hare, 51.

that the testator did not know the meaning of the terms he was using.

On the whole perhaps it may be considered as the fair result of the authorities that where such expressions are used, in any part of the will, in reference to the bequest in question, as are clearly inconsistent with the notion that there should be any control over the property on the part of the husband for his own benefit, the wife will be held to be entitled to it for her separate use, but there must be words clearly importing exclusion or the husband's marital right will attach on the property. Where a testator gave several annuities to his nieces with a prohibition against alienation or anticipation, it being the testator's intention, as he expressed, that the annuities should be received as some provision towards the maintenance and support of the several annuitants during their respective lives, and the testator directed that the annuity given to the married niece should be for her separate use, it was held that the annuity given to an unmarried niece was not so given as to exclude the marital right on her subsequent marriage; but the husband having driven away the wife by his cruelty, the Vice-Chancellor K. Bruce ordered the whole amount of the annuity to be paid to her till further order (a).

A legacy was given to a daughter "to be settled on her when she married, or to be paid to her on her attaining 21;" she married in the life of the testator before 21; it was held that the legacy ought to be settled on her and her children (b).

Where the donee of a power is authorized to appoint with such conditions, &c. as he shall think fit, he may appoint to a daughter, an object of the power, as such daughter shall by deed or will appoint, and for default of appointment to her separate use (c).

Where land is given for the separate use of a married woman the husband can have no seisin so as to entitle him to a tenancy by the curtesy (d).

A personal gift may be made to a feme covert with a restraint on alienation, as will be more particularly noticed hereafter, or with a limited power (e): if property be given to her absolutely for her

(a) *Gilchrist v. Cator*, 1 De G. & Sm. 191; see, on the last point, *Oxenden v. Oxenden*, 2 Vern. 493; *Williams v. Callow*, *ibid.* 752; *Nichols v. Dancers*, *ibid.* 671; *Sleech v. Thorington*, 2 Ves. Sen. 562; *Coster v. Coster*, 9 Sim. 597, stated *infra* in this Section; *et sup.* p. 190.

(b) *Young v. Macintosh*, 13 Sim. p. 450;

but in *Laing v. Laing*, (10 Sim. 315,) on the words there used, the daughter having married was held to be entitled to the capital for her separate use, on attaining 21.

(c) *Bray v. Bree*, 8 Bli. N. S. 568; Sugd. Law of Prop. 490.

(d) *Heavle v. Greenbank*, 1 Ves. 298.

(e) *Wagstaff v. Smith*, 9 Ves. 524; *Hyde*

separate use, and there be superadded words conferring a general power to appoint, this will not in general detract from the effect of the previous absolute gift: an unlimited power to appoint following a gift for life for her separate use, and a limitation in default of appointment to her personal representatives, has been considered as equivalent to an absolute gift (*a*); but where she is to take the absolute interest only on a contingency, as in the event of her surviving her husband, she has no power of disposition till the contingency happens (*b*). Where the separate estate is to be disposed of by the feme covert, only in a particular manner directed by the instrument giving the estate, she cannot charge her separate estate, unless it be done, *eo modo*, as prescribed by the instrument creating the separate estate (*c*); and she may be restrained from the power of disposition altogether (*d*). She is in fact only a feme sole so far as the instrument makes her such (*e*): so far as the instrument creating her separate estate makes her a proprietor, so far is she a feme sole; and if she has disposed of or pledged her estate according to her power, the trustees must hold it to the uses she appoints (*f*): if she do not follow the mode prescribed the property will not pass (*g*); and if the trustees should act upon an attempted disposition not according to the mode prescribed they will have to replace the fund (*h*).

In some cases it seems to have been thought that a restriction on a feme covert's power over her separate estate might be *inferred*, but the settled doctrine now is that the instrument giving her the property must contain express words restricting the wife's general power, in order to effect such restraint. Though the trust be, "*to pay the money into the hands of the feme covert from time to time, and take a receipt from her,*" she has notwithstanding an absolute disposing power over it (*i*). Per-

v. Price, 3 Ves. 437; and see *Mores v. Huish*, 5 Ves. 694; and the reference *infra* in this section.

(*a*) See *Frederick v. Hartwell*, 1 Cox, 193, and the other cases, Clancy on Husband and Wife, 294-5; the wife's consent in court seems to have been taken in the above case, only because the gift was to her husband.

(*v. infra*, p. 514, n. (*b*) and (*d*)).

(*b*) *Richards v. Chambers*, 10 Ves. 580; and see *Medley v. Horton*, 14 Sim. 226.

(*c*) *Jones v. Harris*, 9 Ves. 497; see also *Essex v. Atkins*, 14 Ves. 546; *Lord Strange v. Smith*, Amb. 264.

(*d*) *Rennie v. Ritchie*, 12 Cl. & Fin. 204; Sugd. Law of Prop. p. 172.

(*e*) *Sockett v. Wray*, 4 Bro. 483, (11 Ves. 221).

(*f*) *Pybus v. Smith*, 1 Ves. J. 194.

(*g*) *Ross v. Ewer*, 3 Atk. 156; *Croft v. Slee*, 4 Ves. 64; *Anderson v. Dawson*, 15 Ves. 532-8; *Hopkins v. Myall*, 2 Russ. & M. 86. Mr. Clancy (chap. vi. p. 294, *et seq.*) has brought together and examined the authorities where the estate or interest is given to a feme covert with a limited power of appointment.

(*h*) *Hopkins v. Myall*, *ubi supra*.

(*i*) In *Pybus v. Smith*, 1 Ves. Jun. 194, S. C. 3 Bro. C. C. 340, Lord Thurlow doubted whether the wife could make a sweeping appointment where the words were that "the rents or interest" should be paid to her *from time to time*; but subsequent decisions have overruled that doubt: see *Brandon v. Robinson*, 18 Ves. 434; *Jackson v. Hobhouse*, 2 Mer. 487; *Witts v. Dawkins*, 12 Ves. 501; *Browne v. Like*, 14 Ves. 302; and see *Parkes v. White*, *infra*.

sonal property, where it is enjoyed separately, unless the wife is restricted as to the mode of alienation, or as to giving receipts (*a*), will be so, generally speaking, with all the incidents of property (*b*); the court, it has been said, will never encourage the locking up of property, which would be the case if separate property could not be disposed of (*c*). A married woman therefore is to be considered as a feme sole in respect of such her absolute separate property (*d*): she may charge or convey away personal property settled for her separate use, whether in possession or reversion, and her life interest in real estate (*e*): nor is it necessary that the trustee should join in the conveyance (*f*), unless his assent is expressly rendered necessary by the instrument giving her that property (*g*). She may grant an annuity out of her separate estate and it will be effectual, though her trustees, disapproving of the purpose, may have given notice to the purchaser previously to the completion that they will not pay it to him (*h*).

(*a*) If the trust is to pay the rents and profits or interest to her upon any instrument signed by her since the last payment, an instrument signed before will not be sufficient; *Pybus v. Smith*, 1 Ves. J. 193, Lord Thurlow. Sir Edward Sugden, on Powers, i. p. 207, *et seq.*, 7th edit., has examined into the distinctions between what upon the authorities is an unalienable personal trust and what is a power of disposition. As to what words will and what will not amount to a restriction on alienation, see *Wagstaff v. Smith*, 9 Ves. 520; *Parkes v. White*, 11 Ves. 220; *Glyn v. Baster*, 1 Yo. & J. 329; *Lee v. Muggeridge*, 1 Ves. & B. 118; *Sturgis v. Corp*, 13 Ves. 190; and *Mores v. Huish*, 5 Ves. 692; and *Sockett v. Wray*, 4 Bro. p. 483. The authorities on this subject are brought together and observed upon in *The Methodist Episcopal Chapel v. Jaques*, by Chancellor Kent, U.S.; see 3 Johns, C. Rep. 85-114; and on appeal; referred to, Story on Equity, § 1391, n., which the practitioner may usefully consult: the cases are also stated and examined by Mr. Clancy, p. 289, *et seq.*

(*b*) *Fettilplace v. Gorges*, 3 Bro. C. C. 10.

(*c*) *Standford v. Marshall*, 2 Atk. 69; case of charge on rents of real estate: and see *Allen v. Papworth*, 1 Ves. 163; and the other cases referred to by Mr. Sanders; and *Field v. Sowle*, 4 Russ. 112, *infra*.

(*d*) *Hulme v. Tenant*, 1 Bro. C. C. 21; see 11 Ves. 221-2; and *Nantes v. Corrock*, 9 Ves. 188; *Lillia v. Airey*, 1 Ves. Jun. 278; *Pybus v. Smith*, 3 Bro. C. C. 346; *Peacock v. Monk*, 2 Ves. Sen. 191; *Sockett v. Wray*, 4 Bro. C. C. 486; *S. C.* note to 2 Atk. 68; *Wagstaff v. Smith*, 9 Ves. 524; *Witts v. Dawkins*, 12 Ves.

501; *Sturgis v. Corp*, 13 Ves. 190; *Heatley v. Thomas*, 15 Ves. 596.

(*e*) *Int. alia*, see *Chesslyn v. Smith*, 8 Ves. 183; and *Brown v. Like*, 14 Ves. 302; *Essex v. Atkins*, *ubi infra*; *Glyn v. Baster*, 1 Yo. & J. 329; and *Sturgis v. Corp*, 13 Ves. 190, (a case of a reversionary interest in stock,) as to personal estate; and *int. al. Acton v. White*, 1 Sim. & S. 429, 432 (a leading case), where the words were that "the receipt of the wife alone of what should be paid to her proper hands should be a sufficient discharge;" *Witts v. Dawkins*, 12 Ves. 501; and *Stead v. Nelson*, 2 Beav. 245; and *Medley v. Horton*, 14 Sim. 222-6, as to real estate: but as to the last case, it may be contended (see viii. Jur. part ii. p. 383.), that in this case, under the special terms, there was a restriction on alienation. The doctrine as to reversionary interests in choses in action, has no application to reversionary interests settled for the separate use of the wife: see *Stead v. Nelson*, 2 Beav. 248; *et v. sup.* p. 504.

(*f*) 1 Ves. 518: "notwithstanding Lord Rosslyn's doubt, the established doctrine is, that a married woman can bind her separate property without her trustees, unless their assent is rendered necessary by the instrument giving her the property;" Sir Wm. Grant, *Essex v. Atkins*, 14 Ves. 547.

(*g*) *Pybus v. Smith*, 1 Ves. J. 193-4; *Essex v. Atkins*, 14 Ves. 547.

(*h*) *Wagstaff v. Smith*, 9 Ves. 524; *Essex v. Atkins*, 14 Ves. 542, overruling *Mores v. Huish*, 5 Ves. 693; *Power v. Bailey*, 1 Ball & B. p. 49; in these cases the annuities were expressly or by implication charged on the separate estate, but now perhaps that would not

Doubts have been entertained (a), whether a feme covert could part with her separate estate in favour of her husband, but the authorities have established that she may (b). If she enables her husband to receive her separate income, or acquiesces in his receiving it, any balance of such separate income remaining at his banker's, at his death, will belong to his estate, not in favour of creditors only but of legatees, as a gift to him will be implied (c). Where money was vested in trustees, in trust for husband and wife successively for life, remainder to their children, and in default of children to such person as the wife should appoint, a deed of the wife conveying and appointing this contingent interest, to raise money to relieve the husband was, upon a bill filed for that purpose, established (d). The wife cannot, however, transfer to her husband personal property settled in trust for her absolutely on her surviving her husband (e). In one case, where a legacy was given to the wife for her separate use during her life, with remainder to such person and for such uses as she should appoint *by will*, and in default of appointment to her *executors*, it was ordered, upon her consent, to be paid to her husband (f); but this case has been subsequently overruled, the power of disposition in such case only extends to a disposition *by will* (g). If a wife charge her estate with the payment of her husband's debts, or apply her separate estate to such purpose, and it does not appear to have been intended by her as a gift to her husband; the Court of Chancery will decree that the husband's assets be applied in

be considered to be necessary. Where money was given in trust for a feme covert for life for her separate use, and after her death to her children, it was held, that though she might contract to raise money by loan, she could not by way of annuity for her own life, that being too large an anticipation; and leave was given to redeem the annuity from the beginning, though made irredeemable; *Caverly v. Dudley*, 3 Atk. p. 541; this case is hardly reconcileable with the current of authorities, for there was apparently no restriction in the will.

(a) By Sir J. Leach, Vice-Chancellor; and see *Whistler v. Newman*, 4 Ves. p. 129; and Lord Eldon's observations, 11 Ves. 223-4.

(b) *Freeman v. More*, 1 Bro. P. C. p. 237; *Milnes v. Busk*, 2 Ves. Jun. 498; and see *Pawlet v. Delavall*, 2 Ves. 670; *Ellis v. Atkinson*, 3 Bro. 565; see also *Parke v. White*, 11 Ves. 209, 222. In *Frederick v. Hartwell*, 1 Cox, 193, a sum of money in the funds being given by will to trustees for the separate use of a feme covert, and to be subject to her appointment after her death; the wife made an appointment of this money to her husband;

and on a bill filed by husband and wife against the trustees to transfer this fund, the court, on examination of the wife, decreed the same; *v. inf. n. (d)*. That a feme covert's separate estate may be bound by a contract of which her husband is to enjoy the benefit; see *Masters v. Fuller*, 4 Bro. C. C. 19; *S. C.* 1 Ves. Jun. 513; *Standford v. Marshall*, 2 Atk. 69; and *Wagstaff v. Smith*, 9 Ves. 524.

(c) *Beresford v. Abp. of Armagh*, 13 Sim. 650; and see *Bartlett v. Gillard*, 3 Russ. 155.

(d) *Guise v. Small*, 1 Anst. 277. The money was ordered into court, to answer the contingent trusts of the settlement, and the wife's consent in court being taken, the deed was established: the examining the wife appears to have been to ascertain whether coercion had been used. The cases on this subject are collected by the Vice-Chancellor of England, 4 Sim. p. 93.

(e) *Richards v. Chambers*, 10 Ves. 580.

(f) *Newman v. Cartony*, note 1 to *Willats v. Cay*, 2 Atk. 68; and 4 Bro. 485.

(g) *Socket v. Wray*, note 1 to *Willats v. Cay*, 2 Atk. 68; *S. C.* 4 Bro. C. C. 486.

exoneration of her estate, or in repayment of the money advanced; evidence of her declarations may be received (a).

As regards the Liability of the Separate estate of the wife. It has been held that if she give a note (b), bill (c), or bond (d), or enter into an agreement (e) to pay, the Court of Chancery acting on the implied intent—for otherwise such documents could have no operation—will decree a satisfaction by the trustees out of her separate property including the rents of her separate real estate (f). It is not necessary that she should make a direct reference to her separate estate: “I apprehend,” said Lord Langdale in a late case, “there are many ways in which a married woman may render her separate estate liable to a charge, without having in the transaction made any direct charge on or made reference to the property settled to her separate use” (g). The bond or other instrument is an acknowledgment of the debt, and takes effect upon the interest in the separate estate by way of trust; but a bond of a married woman is void as a bond, and gives no priority (h). Several eminent judges have considered that the rents of her real estate may, as so much money, be charged by her *parol* promise not in writing, though this has been a subject of doubt (i).

(a) *Huntington v. Huntington*, 2 Vern. 437; 1 Bro. P. C. 1; *Pocock v. Lee*; S. C. 2 Vern. 604; *Tate v. Austin*, 1 P. W. 264; 2 Vern. 689; *Parteriche v. Powlet*, 2 Atk. 384; see also *Clinton v. Hooper*, 1 Ves. J. 185-8; 3 Bro. 545; *Astley v. Earl of Tankerville*, 3 Bro. 545; and *Innis v. Jackson*, 16 Ves. 366; 1 Fonbl. 102-3; *Lewis v. Nangle*; S. C. Ambl. 150; 1 Cox, 240; and see Mr. Blunt’s notes, pp. 150-1; *et v. supra*, p. 306.

(b) *Bullpin v. Clarke*, 17 Ves. 365; *Field v. Sowle*, 4 Russ. 112-13; *Murray v. Barlee*, 3 M. & K. 224; *Nail v. Punter*, 5 Sim. 562, where the rule was held good against an appointment by the wife to her husband.

(c) *Stuart v. Lord Viscount Kirkwall*, 3 Mad. 387.

(d) *Standford v. Marshall*, 2 Atk. 69, and the cases in the note; *Hulme v. Tenant*, 1 Bro. 16; S. C. 2 Dick. 560; *Peacock v. Monk*, 2 Ves. 193; *Norton v. Turvill*, 2 P. Wms. 144; approved in *Socket v. Wray*, 4 Bro. p. 486; *Heatley v. Thomas*, 15 Ves. 596; *Murray v. Barlee*, *ubi supra*.

(e) *Master v. Fuller*, 1 Ves. J. 513; S. C. 4 Bro. C. C. 19; *Grigby v. Cox*, 1 Ves. Sen. 517; and see the cases cited, 3 My. & K. 223.

(f) In *Staniford v. Marshall*, and *Hulme v. Tenant*, the rents of the separate estate were held liable, though there was no specific reference to them in the writing given by the

married woman. In *Briscoe v. Kennedy*, July 21, 1762, Rolls, Mad. MS., a creditor of the wife in respect of a debt contracted before marriage, was decreed a satisfaction out of her separate estate after the outlawry of her husband.

(g) *Crosby v. Church*, 3 Beav. p. 485; see also *Tullett v. Armstrong*, add. note, No. 5.

(h) *Norton v. Turvill*, *ubi sup.*; *Anon.* 18 Ves. 258; and see *Ram on Assets*, 709; *Allen v. Papworth*, 1 Ves. 163; *Lillia v. Airey*, 1 Ves. J. 277; *Greatley v. Noble*, 3 Madd. 94; *Stuart v. Lord Kirkwall*, *ubi sup.*; *Anon.* Mosely, 328; *Anon.* 18 Ves. 258; and see *Owens v. Dickinson*, *sup.* p. 324.

(i) In *Clinton v. Wills* (1820), (Sugd. on Pow. vol. i. p. 208; and 2 Rep. Husband and Wife by Jacob, p. 245,) Sir T. Plumer was of opinion that it made no difference whether the debt was secured by writing or not, as the estate was not to be charged, only the rents as received. Sir T. Clarke, in *Clerk v. Miller* (2 Atk. 379), doubted whether there must not be a writing to affect the rents of real estate. Sir T. Plumer’s opinion has been sanctioned in later cases; see *Owens v. Dickinson*, Cr. & Phill. 48; *v. supra*, p. 324; and Lord Brougham’s judgment in *Murray v. Barlee*, 3 My. & K. 225; *infra*, p. 516: the separate property there was real estate; Mr. Jacob (2 Rep. Husband and Wife, p. 244,) considered

Where the wife has an interest as well as a power, and where the estate is limited to her separate use in default of appointment, her estate may be affected by her acts, though not such as to amount to an appointment (a).

It was held by Sir John Leach that the separate property of a feme covert is not subject to General demands upon her (b), without any charge on her part, either express or implied: this is consistent with the holding her to be a feme sole as to her separate estate, for in that character no part of her property would be specifically liable without some charge or security upon it: however by reason that her dealings cannot be considered as entered into in respect of any personal responsibility, the course of modern authority has been in favour of holding that all her dealings must be considered as entered into in reference to her separate property, and Lord Cottenham seems to consider it as actually established that her separate property is liable for general demands upon her equally as where she has given a written promise (c).

In the late case of *Callow v. Howle* (1847) (d), the question was whether an attorney who had been employed to do business in respect of the wife's separate estate could proceed directly against her and her trustees, to be paid out of her separate estate. The bills had been made out as against and delivered to the husband, and the attorney had proceeded against him to recover payment. "In my judgment," said the Vice-Chancellor K. Bruce, "the mere circumstance of the business being done in respect of the separate property of a married woman vested in trustees is insufficient to show that the property of a married woman is liable *directly* to the attorney for the expenses incurred in respect of that property; the trustees may be

that (of course in reference to the Statute of Frauds, citing *Clerk v. Miller*, *sup.*) her separate estate in land could not be affected by parol. The court in no case will charge the corpus of a married woman's separate estate in respect of her general obligations; *Aylett v. Ashton*, 1 My. & Cr. 112; 9 Ves. p. 189; 1 Mad. 264; *supra*, p. 505, n. (a).

(a) *Handford v. Marshall*, *ubi sup.*; *Bulpin v. Clarke*, 17 Ves. p. 365; *Wainwright v. Hardisty*, 2 Beav. 364.

(b) See *Greatley v. Noble*, 3 Mad. Rep. 79; *Stuart v. Lord Viscount Kirkwall*, *ibid.* 387; *Aguilar v. Aguilar*, 5 Mad. 418; but see the early case of *Kenge v. Delavall*, 1 Vern. 326; and see, on this subject, Ram on Assets, 711, note (k); and Roper on Husband and Wife, by Bright, ii. p. 251, *et seq.*; and the later

cases, cited *infra*.

(c) In *Murray v. Barlee*, 3 My. & K. 209, 4 Sim. 82 (in which case the rents of the separate real estate were held liable under a general promise contained in letters to the solicitor of the married woman, not referring to her separate property, *v. ibid.* pp. 212, 220, 224, 225,) Lord Brougham stated that it was not necessary that there should be a written promise. Lord Cottenham, in *Lord v. Wightwick*, 2 Phill. 111, cites *Murray v. Barlee*, in reference to this dictum, as if he considered the doctrine as settled, though the point was not argued in that case; and in *Owens v. Dickinson*, Cr. & Ph. 54, his Lordship intimated the same opinion, though there also it was not a decision; see 1 Sugd. Pow. 206.

(d) Jur. xi. 986.

liable, but it does not, in my opinion, follow that the property of the wife, or that the wife in respect of the property, is necessarily liable." "Here," added his Honour, "is an absence of any proof of liability, and an absence of any ground of inference of liability." In this case, as will have been observed, there were circumstances which showed that the attorney had not done the business upon the wife's responsibility, but the general observations would tend to show that the learned judge did not consider that the law was settled that her estate should be liable for general demands upon her (a).

There is no case where a demand against a married woman, arising out of a fraud, has been decreed to be satisfied out of her separate estate (b); it is impossible to imply a contract to answer out of her separate estate in respect of such a transaction: and it has been held that the wife's separate estate is not liable for moral obligations, though of such a nature as to found the equitable action of assumpsit: where a feme covert granted an annuity charged upon her separate property, and the annuity, owing to the fault of the grantee, failed, it was held that the separate estate was not liable for the consideration money, and that there was no equity specifically to affect the fund (c). In *Kingham v. Lee* (1846) (d), the testator devised his freehold estates to his wife for life, she keeping the buildings thereon in good repair and doing no manner of waste; she afterwards married again and her husband committed waste; it was contended on the authority of Sir J. Leach's doctrine in *Lord Ormonde v. Kynersley* (e), that this condition was in the nature of a trust and that the estate of the wife was liable for the acts committed by her husband as her transferree: the Vice-Chancellor of England held, that the condition was not a trust, and that her separate estate was not liable for the acts of her husband (f).

According to the opinion of Sir J. Leach, if the wife having separate estate enter into a general contract to purchase real estate, the purchaser can not, though it be in writing, enforce the payment of the purchase-money out of her separate estate, such a general contract

(a) The question whether the trustees might reimburse themselves was not before the court.

(b) See *Grealley v. Noble*, 3 Mad. 79; and what is said by the Lord Chancellor in *Jackson v. Hobhouse*, 2 Mer. 488.

(c) *Jones v. Harris*, 9 Ves. 486, 497; see also *Duke of Bolton v. Williams*, 2 Ves. J. 138; *Sperling v. Rochfort*, 8 Ves. 164; *Socket v. Wray*, 4 Bro. C. C. 486; *Aguilar v. Aguilar*, 5 Mad. 415.

(d) 15 Simons, 396.

(e) 5 Mad. 369.

(f) 15 Sim. 401, *sup.* 305. The V.-Ch. observed in this case, that where the wife sustains a fiduciary character as executrix or administratrix, she surviving may be sued as well as the representatives of the husband for a breach of trust committed during coverture; *ibid.* 401. In *Clough v. Dixon*, 8 Sim. 594, there referred to, the question was not decided, nor was it noticed on the appeal; 3 My. & Cr. 490.

not constituting a charge (a); but this is not reconcilable with the subsequent authorities, which have established that a reference to the wife's separate estate is not necessary in order to bind it (b); and on this ground Lord Chancellor Plunket has since held that the contract is good, and in effect that her separate estate is liable to pay the purchase-money (c).

As regards the liability of the wife's separate estate to general demands upon her *after her death* (d). If she were to be considered in the condition of a feme sole at her death—as she is generally speaking, as we have seen, during her life—and if the analogy of the common law were followed, even though it should be held that her estate is not liable for general demands upon her during her life, an intelligible and practical rule might be established, favoured by some of the cases, and not, as far as it appears, in conflict with any of the authorities now considered as binding (e). Real estate must of course be put out of the question; for in respect of the wife's real estate there is no analogy to the doctrines of the common law or the statutory enactments affecting real estates with debts, for the real estate of the wife cannot be affected, excepting by an actual conveyance or an appointment under a power, which in the case we are considering it is assumed does not exist. But taking the analogy of the common law as to Personal

(a) *Chester v. Platt*, Sugd. V. and P. 232, 11th ed.

(b) And see the dicta of Lord Thurlow, in *Hulme v. Tenant*, 1 Bro. 16.

(c) *Dowling v. Maguire*, Llo. & G. temp. Plunk. 1; see p. 19. It is to be observed however that it was the purchaser who refused to perform the contract, the objection did not come from the wife's representatives; the separate estate of the wife in that case was a jointure, and as she was dead, the separate estate out of which the purchase-money was to come had ceased to exist; but the heir of the wife, who was the plaintiff, offered to pay the purchase-money.

(d) Lord Cottenham, in his judgment in *Owens v. Dickenson*, *supra*, p. 324, intimates that questions might arise in respect of what would be considered as debts due in regard to her separate estate; his words are "the authorities are very vague as to what are to be considered as debts in this sense;" that is, under a charge in the will of a married woman; Cr. & Phill. 55.

(e) In *Court v. Jeffery*, 1 Sim. & St. 106, Sir T. Plumer held that the appointees of the wife were necessary parties, because they could not be defeated by debts, but that was not a

case of the administration of separate estate; Mr. Jacob seems to have misapprehended this case, *Rop. Husband and Wife*, 245. Since the stat. 1 Viet. c. 110, the objection in *Nantes v. Corrock*, 9 Ves. p. 189, that stock could not be taken in execution, no longer exists. Lord Eldon's observations in *Jones v. Harris*, 9 Ves. 497, have reference to specifically charging the separate estate of a married woman in her lifetime. Sir J. Leach's doctrine in *Aguilar v. Aguilar*, 5 Mad. p. 418, founded on the assumption that the property of a married woman can only be affected by some act of hers in the nature of an appointment, may now be considered as overruled; *v. supra*. In *Norton v. Turvill*, 2 P. W. p. 145, the Master of the Rolls says, with reference to any specific charge, "All the separate estate of a feme covert is a trust for the payment of debts;" and being such a trust, he held that the Statute of Limitations could not be pleaded, the feme was dead. In *Court v. Jeffery*, 1 Sim. & St. p. 105, the feme covert was living; Lord Thurlow's language in *Lillia v. Airey*, 1 Ves. Jun. p. 277, would seem to show that in his opinion that would make no difference. See *Nurse v. Craig*, 2 Bos. & P. N. R. 162-3, judgment of Mansfield, C. J.

estate, and treating the wife and her personal representatives, as regards her separate personal estate, as being in the same condition as they would have been had she been a feme sole, her personal estate ought, as it is conceived, to be liable for *all* her engagements. By the common law, during the life of a person no creditor has any lien on any part of the personal estate of his debtor, without a contract being entered into to that effect; but on his death the whole of his personal estate is liable for the payment of his debts; it would therefore be perfectly consistent to hold (a), that *during the life* of the feme covert there must be a contract, express or implied, in order to charge the separate estate, but that after her death the simple fact of the contracting of a debt, that is the existence of such circumstances as in case she had been a feme sole would have made her a debtor, should be sufficient, as has been supposed to have been Sir Wm. Grant's opinion from the expressions he made use of in the anonymous case in 18 Ves. above referred to (b). If it should be objected that the person would have a remedy on the death of the married woman which he would not have during her life, this is no more than would have happened, as regards her property, (excepting through the medium of judgment and execution,) in case she had been a feme sole: the exceptions which have been established, exonerating her from particular liabilities to which she would have been liable if a feme sole, might be retained (c). If this analogy be not fully borne out by the authorities as they stand, it requires but little of Chancery legislation to accomplish it, and it is entirely by assuming what is equivalent to legislative authority, that the doctrines as to the wife's separate estate exist as they stand (d). If however it is to be considered as established that the separate estate is liable for general demands even during the life of the wife, and such, as before stated, seems to be Lord Cottenham's opinion, that would seem to settle the matter whether the wife be dead or alive; and undoubtedly in point of honesty and justice it would be the most satisfactory course, for,

(a) See 2 Rop. Husband and Wife, by Jacob, pp. 235, 243; *supra*, p. 516; *Aguilar v. Aguilar*, 5 Mad. 418.

(b) And see *Gregory v. Lockyear*, 6 Mad. 90, though in neither case was any question raised as to what were debts of the wife. From the argument of Lord Cottenham, in *Murray v. Barlee*, (3 My. & K. 214,) and his Lordship's judgment in *Owens v. Dickinson*, before referred to, it is pretty clear, as before noticed, that his Lordship's opinion is in favour of this view; indeed, that the separate estate

is liable even during her life. In *Gregory v. Lockyear* the Vice-Chancellor doubted whether the funeral expenses could be thrown upon the estate of the wife; in *Bertie v. Lord Chesterfield*, 9 Mod. 31, it was decided that they could not.

(c) *Supra*, p. 517; it is however to be observed that if a feme covert obtain a transfer of a fund to her trustees by fraud, and the fund remains in specie, it may be followed; *Greatley v. Noble*, 3 Mad. 79.

(d) *V. supra, et inf.* p. 525.

generally speaking, her separate estate, and particularly as regards real estate, is extinguished on her death.

The wife, so long as she continues to be a wife, may be absolutely restrained by the terms of the trust from Alienating by Anticipation the rents, dividends, or interest of the property which is given or secured for her separate use (a). The wife, or those claiming under her, can only claim any payments to be made to her in her separate character as the execution of a trust; it would be no execution of a trust if the terms of the trust were not pursued. "A feme covert," said Lord Eldon, "having power to aliene" (which she cannot do at law (b)), "is a mere creature of equity to the extent to which the settlement constitutes her a feme sole and no further" (c); if, therefore, she attempts to aliene in a manner prohibited by or not authorized by the settlement, she is acting as a feme sole without any authority. The qualification of the power of disposition by prohibiting anticipation, though contrary to the general rules of law, was introduced and has been supported by the Court of Chancery, in order to secure to the wife the desired protection against the marital rights, a simple gift to her separate use having been found to be ineffectual for that purpose (d). Such a prohibition is, as we have seen, void as against a man or an unmarried woman (e); each of them has the capacity to take and to aliene by the general law of the land, it is not given by the Court of Chancery; the Court of Chancery has therefore followed the law in treating all attempts simply to restrain alienation of trust property by a person *sui juris* as absolutely void (f). Every adult unmarried woman being a *cestui que trust* is entitled to call upon the trustees to convey to her the legal estate, if she is the only *cestui que trust*; and if it be necessary that the legal estate should remain in the trustee for the security of other persons (g), the office of trustee, as regards the legal estate, is limited by the purpose for which it remains in him; as regards the person immediately interested, he is a mere instrument, and subservient to his will; any trusts or restrictions inconsistent with the enjoyment of the estate given are void: as regards a married woman the character of the trustee is very different;

(a) V. *supra*, vol. i. p. 597, and p. 90 of his volume.

(b) V. *supra*, p. 492, n. (d).

(c) *Jackson v. Hobhouse*, 2 Mer. 487.

(d) *Brandon v. Robinson*, 18 Ves. 434; *Tullett v. Armstrong*, 1 Beav. 23; S. C. 4 My.

& Cr. 393-4.

(e) *Supra*, p. 89 n. (b), 90.

(f) The property may, as before noticed, be given over on alienation, or any attempt at alienation, *supra*, p. 89.

(g) V. *supra*, vol. i. 496.

he must then act according to the trust as declared, the married woman having no rights either of separate enjoyment or of alienation but what are given to her by the trust. However it is to be observed that a clause annexed to an absolute gift of real estate in fee or for life to a woman, even though at the time married, which simply declares that she shall not sell or encumber, is void, for it is a qualification inconsistent with the gift: it is not by any rule of equity that a married woman is in such case competent to take the estate in the manner in which it is given, not being given for her separate use, therefore there is no ground for the interference of the court in such a case; it is left to the law to govern her rights (a).

The present state of the law in respect of restraints on alienation by way of anticipation was lately expounded by the Vice-Chancellor K. Bruce, in a case where a real estate was devised to a married woman in fee for her separate use and she had joined her husband in granting a lease by way of security, to the following effect (b). With respect to a life interest given to a married woman for her separate use, it is admitted (c) that she may be effectually restrained from effecting, during her coverture, any act of alienation total or partial (without any clause of forfeiture, and without any limitation over taking effect upon such an act (d)); it being clear that a clause prohibiting alienation or anticipation by a married woman of her separate estate, (when there is no such provision of forfeiture or limitation over,) however the prohibition may be expressed, whether in terms confining it to a period of coverture, or in terms general and undefined, or in terms distinctly expressing a period beyond as well as during coverture, has by law validity allowed to it as to a life interest at least, but that this validity is by the same law (whatever the expressions) not permitted to extend to a period beyond coverture, that is, the law of its own force preventing the restriction from operation or effect as to any act done when coverture does not exist (e); and, added his Honour, I am at a loss to discover any sufficient reason why that, which holds good as to a life estate, should not equally hold good as to an absolute estate (f). It was attempted in the case above cited to distinguish the case of real from personal estate on the ground that the wife had a power to

(a) See *Baggett v. Meux*, 1 Coll. 147-9; and *Bradley v. Peiroto*, 3 Ves. 325; *Jackson v. Hobhouse*, 2 Mer. 487; *supra*, p. 89, n. (b).

(b) *Baggett v. Merry*, 1 Coll. 149.

(c) See *Brandon v. Robinson*, 18 Ves. 434; *Jackson v. Hobhouse*, 2 Mer. 483.

(d) *V. supra*, p. 89-90.

(e) See *int. alia*, *Brandon v. Robinson*, 18

Ves. 429; 1 Rose, 197; *Brown v. Pocock*, 2 Russ. & M. 210, reversing *S. C.* 2 My. & K. 189; *S. C.* 5 Sim. 663; *Jones v. Salter*, 2 Russ. & M. 208; *Newton v. Reid*, 4 Sim. 141.

(f) *V. supra*, p. 89, note (c); *Churchill v. Marks* is also reported 1 Coll. 441; and see p. 445 of that report.

dispose of real estate by the common law; but the decision of the Vice-Chancellor K. Bruce (a), which was confirmed by the Lord-Chancellor, on appeal, has settled the law on this point (b): so that it is now established that the doctrine as to separate estate, as settled in *Tullett v. Armstrong* (c), applies as much to an estate in fee as to a life estate, and to real property as much as to personal; the Court of Chancery having, or at least having assumed without contradiction, the power of *creating* (d), as regards both, a new species of estate, it has been considered as within its jurisdiction in both cases to modify the incidents of that estate (e). The law on this subject appears to be the same in Scotland as in England (f).

Primâ facie, as we have seen, the wife has a right, with some exceptions, to dispose of her separate estate as a feme sole; it is necessary, therefore, that there should be negative words to deprive her of that right. The decisions seem to require, as Lord Cottenham has observed, *in such cases alone*, that the intention of the testator should be expressed in a particular form of words, and that anticipation should be in terms prohibited (g). A direction to pay the rents or interest from *time to time* into the proper hands of the wife is not sufficient (h), though the words, "and not otherwise, and that the receipts of the wife alone for what shall be actually paid into her proper hands shall be sufficient discharges," be added (i). A trust to pay to such persons, &c. as the wife shall, by any writing under her hand, appoint, "except in any mode of anticipation," is sufficient (k). The words "the receipt of the lady alone, or of any person or persons to whom she may appoint the same rents and income respectively after the same shall have become due, shall be a valid discharge at law," are also sufficient to restrain her from anticipating the income of the trust property (l). Where there is a sufficient prohibition against anticipation in the clause creating the trust, it is not necessary that negative words should be introduced into the clause relating to the receipts (m). A gift to a married woman for her whole and sole use

(a) 1 Hare, 138.

(b) 1 Phillips, 627.

(c) 4 My. & Cr. 377; *supra*, vol. i. p. 597.

(d) *Ibid*.

(e) 1 Phillips, 628; 4 My. & Cr. *ubi sup*.

(f) *Rennie v. Ritchie*, 12 Cl. & Fin. 204.

(g) Lord Cottenham, *Scott v. Davis*, 4 My. & Cr. 89.

(h) Though Lord Thurlow had doubted as to this, see *Pybus v. Smith*, 1 Ves. J. 189; *S. C.* 3 Bro. 340; and see *Witte v. Dawkins*, 12 Ves. 501; *Browne v. Like*, 14 Ves.

302; 2 Rep. Husband and Wife, by Jacob, 232; *Hovey v. Blakeman*, stated 9 Ves. p. 524; Sir Wm. Grant had held that a direction to pay into the proper hands of a married woman was sufficient; but he seems to have himself departed from this opinion; 2 Rep. Husband and Wife, 234.

(i) *Acton v. White*, 1 Sim. & St. 429.

(k) *Moore v. Moore*, 1 Coll. 54.

(l) *Field v. Evans*, 15 Sim. 375.

(m) *Harrop v. Howard*, 3 Hare, 624; ix. Jur. 82. "If it be imperatively necessary,"

during her life free from the control of any *future* husband, with a restraint on alienation, has been held to extend as regards both to her then present as well as every future coverture (a).

There was for a time a conflict of opinion as to whether in case a general power of appointment were given, with a proviso against anticipation, and following that a direction in default of appointment to pay the income into the proper hands of the married woman for her separate use, her receipts to be a sufficient discharge, the married woman might not abandon the power, and act upon her interest without reference to the restriction, that not being in terms incorporated with the clause giving the property to her separate use in default of appointment. The Vice-Chancellor of England, in *Brown v. Bamford* (1842) (b), held that she might (c), and Lord Lyndhurst, on appeal, (in 1844,) affirmed that decision (d). Afterwards the question came before the Vice-Chancellor K. Bruce (e), and the case of *Brown v. Bamford*, which had not yet been affirmed, was cited. There was, said the Vice-Chancellor, a specific difference between the language of the instrument before him and of that in *Brown v. Bamford*, whether important or material or not he did not say, but he held that the effect of the instrument in the case before him was to restrain the wife from anticipation altogether. In a subsequent case (1844) (f), the Vice-Chancellor of England decided that when the power of appointment was given to a married woman without restriction, but the restriction against alienation was attached, in terms, only to the interest given in default of appointment, she might aliene the property in the exercise of the power. In 1845 the question came before Lord Langdale (g); *Brown v. Bamford*, which had then been

said the Vice-Chancellor Wigram, "that *negative words* should be used to restrain anticipation, upon which I give no opinion," (and see *Blacklow v. Laws*, 2 Hare, p. 49, *supra*.) "I think such words are sufficiently used in that member of the sentence I am now considering." *Pybus v. Smith*, 3 Bro. 340; *S. C.* 1 Ves. J. 189; *Wagstaff v. Smith*, 9 Ves. 520; *Acton v. White*, 1 Sim. & St. 429; and *Glyn v. Baster*, 1 Yo. & Jer. 329, are instances of the terms being held not to be sufficient to restrain anticipation.

(a) *Steedman v. Poole*, 6 Hare, 193. *Maiber v. Hobbs*, 2 Yo. & Coll. 326, may be referred to as showing that the husband and wife may by their acts preclude themselves from annulling a settlement to the separate use of the wife, which but for such acts would not have been binding on them.

(b) 11 Sim. 127. In the previous case of *Barrymore v. Ellis*, 8 Sim. 1, also decided by the Vice-Chancellor of England, there were peculiar circumstances, see 1 Coll. 57.

(c) See, as to the distinction between power and estate, *Cox v. Chamberlain*, 4 Ves. 631; and *Roach v. Wadham*, 6 East, 289; *supra*, vol. i. p. 549; and *sup.* p. 495 of this volume.

(d) See 8 Beav. 188.

(e) *Moore v. Moore*, 1 Coll. p. 54. In that case there was a fund (arrears), which was properly charged; the costs of the mortgagees were ordered to be paid out of that fund, as to have given the costs generally would have charged the wife's fund by anticipation.

(f) *Medley v. Horton*, viii. Jur. 853; *S. C.* 14 Sim. 222; *Moore v. Moore*, *supra*, was cited.

(g) *Harnett v. Macdougall*, 8 Beav. 188.

affirmed, and *Medley v. Horton*, and also *Moore v. Moore*, and *Harrop v. Howard* (a) before the Vice-Chancellor Wigram, were cited: Lord Langdale came to the same decision as the Vice-Chancellor K. Bruce. In July, 1846, Lord Lyndhurst, on a rehearing, which he had called for, reversed the decision of the Vice-Chancellor of England and his own affirmance in *Brown v. Bamford*, so that the law in cases of this description is settled (b).

It is no objection that the woman is unmarried at the time of the creation of the trust (c). If however the separate-use clause, either with or without a restriction against anticipation, is confined to the then existing or then intended coverture, a second husband will not be excluded from his marital rights (d); but if the intention is plain that every husband shall be excluded, and that the clause against anticipation shall continue, during coverture, on every successive marriage that the woman may contract, though the woman whilst single and when she becomes a widow has the absolute dominion over the property, yet if she do not dispose of the property so as to put an end to the trust, and she should marry again, not only the separate-use clause, but together with it the restriction against alienation will be revived, and remain in force, with all its consequences, during such subsequent marriage, indeed on every subsequent marriage so long as the property is held upon the original trust; "The one," said Lord Cottenham, "is only a restriction and qualification of the other; the two must stand

(a) 3 Hare, 624.

(b) The clause in *Brown v. Bamford* was as follows:—"Upon trust, from time to time during the natural life of his daughter Sophia Bamford, or until she should be duly declared a bankrupt or take the benefit of any act for the relief of insolvent debtors, to pay the clear rents, interest, dividends, and proceeds thereof unto such person or persons for such intents and purposes, and in such manner as Sophia Bamford, by any writing or writings under her hand, when, and as the same should become due, but not by way of assignment, charge, or other anticipation thereof, should, notwithstanding her then present or any future coverture, direct or appoint; and in default of any such direction or appointment, or so far as the same, if incomplete, should not extend, into her proper hands, for her sole and separate use, independent of the debts, control, or interference of her then present or any future husband; for which purpose, the testator thereby directed that the receipts in writing, under the hand of his daughter Sophia

Bamford should, notwithstanding any such coverture as aforesaid, be good and sufficient discharges for the last-mentioned rents, interest, dividends, and proceeds, or so much thereof as should in such receipts, respectively, be expressed to have been received; and from and after the decease of his daughter Sophia Bamford, or such her bankruptcy or insolvency as aforesaid, which should first happen, then in trust for all and every, or such one or more of her children as therein mentioned."

(c) *Davies v. Thornycroft*, 6 Sim. p. 420; *Anderson v. Anderson*, 2 My. & K. 427.

(d) *Barton v. Briscoe*, Jac. 603; *Benson v. Benson*, 6 Sim. 126; *Knight v. Knight*, *ibid.* 121; *Bradley v. Hughes*, 8 Sim. 149; *Jones v. Salter*, 2 R. & M. p. 208. In a late case, *Re Gaffee's settlement*, (xiii. Jur. 39,) which was a settlement very inartificially worded, the Vice-Chancellor Wigram followed these cases. A power of appointment may be confined in like manner; *Morris v. Howes*, 4 Hare, 599; x. Jurist, 955, on appeal.

or fall together" (a). But the trustees cannot withhold the property from a widow who desires that it shall be transferred to her or to her disponent, on the ground that the clause against anticipation would be good in the event of a future coverture (b).

The income of a wife's separate estate, she being of unsound mind, will be paid to the husband for her support, if he is unable to maintain her (c).

Where property is conveyed by the husband to trustees for the support of the wife as part of an arrangement for separation, this it has been held does not become her separate estate so as to give her the power of alienation; as it is impossible by any contract between the husband and wife or any acts done by them to make her a feme sole and liable to be sued (d), the husband might still be liable to be sued, and to pay money on her account, and it would be plainly contrary to the intention to allow her to denude herself of her property, or to do any act that would have that effect, so that the husband could obtain no indemnity (e).

The doctrine as to a trustee buying the property does not, it seems ap-
ply, at least in full force, to a trustee to preserve contingent remainders, and to pay the rents and profits to the separate use of the wife (f).

The mode of administering the estate of a married woman, who has by will charged her separate estate with the payment of her debts, has been adverted to in a preceding page; what are her debts must, it is presumed, in such case be determined on the same principles as if no such charge had been made, which subject has been considered in a former page (g). We now proceed to consider those peculiar trust deeds, arising out of marriage, which are called Deeds of Separation (h).

(a) *Tullett v. Armstrong*, 1 Beav. 1; *S. C.* on appeal, 4 My. & Cr. 390; *Scarborough v. Borman*, 1 Beav. 34; *S. C.* 4 My. & Cr. 377, the prior authorities are observed upon in Lord Cottenham's elaborate judgment; *Johnson v. Johnson*, 1 Keen, 648; *Clark v. Jaques*, 1 Beav. 36; *Dixon v. Dixon*, 1 Beav. 40; *Newlands v. Paynter*, 4 My. & C. p. 418; *Newnham v. Pemberton*, 17 Nov. 1847; and see *Sugd.* on Pow. 203-6.

(b) *Woodmeston v. Walker*, 2 Russ. & My. 197, overruling the decision to the contrary by Sir J. Leach; *Brown v. Pocock*, 2 Russ. & My. 210, reversing *S. C.* 2 My. & K. 189.

(c) *Edwards v. Abrey*, 2 Phillips, 39.

(d) See *Marshall v. Rutton*, 8 T. R. 545; 3 Ves. 343-4.

(e) *Hyde v. Price*, 3 Ves. 443-4-5; see *inf.* 527, n. (c).

(f) Lord Eldon, *Parkes v. White*, 11 Ves. 226; in that case the sale of the wife's life interest, and the ultimate reversion, were supported; see 2 *Rop. Husband and Wife*, by Jacob, p. 262; but see *Davidson v. Gardner*. *Sugd. V. and P.* 890, § 14, 11th ed.; and *S. C.* 2 *Rop. Husband and Wife*, 260, 2nd ed.; and *Dalbiac v. Dalbiac*, 16 Ves. p. 116; but more particularly *Scott v. Davis*, (4 My. & C. 87,) before Lord Cottenham; there the sale was set aside; however there were special circumstances in that case.

(g) *Sup.* p. 324-5; the authorities referred to by Lord Cottenham, where he says the debts are to be paid *pari passu*, were probably *Anon.* Mosel. 328; and *Anon.* 18 Ves. p. 258, which was cited in *Murray v. Barlee*.

(h) See, on this subject, 2 Bright, 305, *et seq.*

It not unfrequently occurs that after marriage, differences take place between the husband and the wife which lead to a voluntary separation, in some instances connected with, in others without any reference to, proceedings for divorce in the Ecclesiastical Court. It is usual in these cases to secure to the wife a separate maintenance during the separation. In some cases this provision is secured by a covenant or legal obligation on the part of the husband, in others by an actual transfer of a fund by the husband to trustees in trust for the wife. Where the latter mode is adopted the enforcing of the terms of the arrangement is of course peculiarly the province of the Court of Chancery; when the husband enters into a covenant with trustees on the part of the wife, to secure a certain provision for the wife, this of course brings the subject within the cognizance of courts of law, though the Court of Chancery may be called upon to exercise its jurisdiction in such a case also where the covenant points at the settlement of any specific property. Where the contract is between the husband and the wife, of course there can be no remedy in a court of law, and if the Court of Chancery is resorted to by the wife in such a case, it must be on the ground, as will presently be more particularly noticed, that some consideration has passed from her to the husband (*a*), or from some one on her behalf. When the subject is brought before the Court of Chancery, that court in almost all cases follows the law in adjudicating upon the validity of the contract, at least in reference to public policy; therefore, although it is not intended to enter at any length into the doctrines of the common-law courts on this subject, the general principles established by the decisions at law must to some extent be adverted to (*b*).

"If," said Lord Eldon, in reference to the validity of articles of separation, "the question whether the courts would or would not act upon articles of this sort were not prejudiced by any decision, I should say that I think no court ought to act upon them; for whether the contract of marriage be, as it is represented by some, a civil contract only (*c*), or whether it be both civil and religious, it is one of a peculiar nature; it is one which the parties cannot dissolve; one by which they impose duties on themselves and by which they engage to perform duties with respect to their offspring, duties which are imposed as much for the sake of public policy as of private happiness.

(*a*) *V. int. al. Hobbs v. Hull*, 1 Cox, 445; *Nunn v. Ladbroke*, 8 T. R. 521; *et v. infra*.

(*b*) See Lord Eldon's observations, 5 Bli. N. S. 400.

(*c*) See Spence's *Inquiry into the Origin of the Laws and Institutions of Modern Europe*, pp. 366-71.

The circumstance that the complaint against an instrument on grounds of public policy is made by one who was a party to it is of no consequence, for the relief is given to the public, and not to the individual" (a). However, notwithstanding these and similar objections which have been made to contracts in deeds and articles of this description on grounds of morality and public policy, contracts contained in deeds and articles of separation are under certain restrictions supported and carried into effect; their efficacy having been established by the authority of judges of the highest eminence at law and in equity (b).

A contract which contemplates an immediate separation, not amounting to an attempt to release the marriage contract, is good at law, and its provisions, so far as it relates to property, will be carried into execution by the Court of Chancery (c): this is clear where persons competent to contract are parties; for instance, the husband and trustees on the part of the wife: but generally speaking no contract between the husband and wife alone is of any validity at law or in equity as against the wife, she not having the power to enter into a binding contract (d), unless, indeed she have a separate estate, which, as we have seen, she may bind equally as may the husband his own estate (e): but such a contract will be binding on the husband if a

(a) *Earl of Westmeath v. Countess of Westmeath*, Jacob, 135, and see 138; 141, *ibid.*; and see Lord Stowell's judgment in *Evans v. Evans*, 1 Haggard's Consist. R. 36; see however Lord Langdale's observations on the Policy of Deeds of Separation, 9 Beav. 56, 58-60. Mr. Jacob has entered much at large into the consideration of the subject of deeds of separation, in reference to public policy and morality; page 274, *et seq.* Lord Langdale's views are much in accordance with those of Mr. Jacob; see particularly p. 277 of his note.

(b) See Lord Eldon's observations, *Westmeath v. Salisbury*, 5 Bli. N. S. 339. The subject of the legality of deeds of separation is discussed much at large in the case of *Jones v. Waite*, 5 Bing. N. S. 341, in the Exchequer Chamber, and in *Hindley v. Marquis of Westmeath*, 6 Barn. & Cr. 200.

(c) *Jones v. Wade*, 9 Cl. & Fin. 101; *Warrender v. Warrender*, 2 Cl. & Fin. p. 488; Sugd. Law of Prop. 177-79; *Wilson v. Wilson*, *infra*; affirmed in the House of Lords, xii. Jur. 467; (S. C., on another point, arising out of the articles, namely, repugnance, 15 Sim. p. 487;) and see 2 Rep. Husband and Wife, by Jacob, 269, n. (a). Lord Eldon's commendation of this part of Mr. Roper's work, Jacob's R. 141, and again in the House of Lords, may justify me in merely referring to it. The cases as to the validity of contracts relating to property, founded on the

separation of the husband and the wife, are collected by the Vice-Chancellor of England, in *Wilson v. Wilson* (1845), 14 Sim. 416-18, including *Bateman v. The Countess of Ross*, 1 Dow. 235; and *Jones v. Waite*, 9 Cl. & Fin., in the House of Lords; and *Clough v. Lambert*, before himself, 10 Sim. 174; and *Wellesley v. Wellesley*, 4 My. & Cr. p. 554; and see *Palmer v. Fraser*, 3 Y. & Coll. 491, 500. In that case Lord C. B. Alexander strongly states the distinction between a separate provision made on marriage and by deed of separation, as to the power of the wife to raise money upon it, but he thought that the authorities were against any such distinction; see *Hyde v. Price*, *sup.* p. 525, but the terms were materially different in that case; it was not cited before the L. C. B.

(d) *Legard v. Johnson*, 3 Ves. 352 (14 Sim. 416); Lord Rosalyn (*ibid.* p. 361), and Lord Eldon (11 Ves. 532), expressed their dissatisfaction with *Guth v. Guth*, 3 Bro. p. 614, in which case Lord Alvanley, after an examination of all the authorities, enforced an agreement entered into by the wife, contained in a deed-poll: the wife however, as after mentioned, may, through her trustees, be indirectly compelled to perform her engagements towards her husband.

(e) *V. supra*, p. 513; and see *More v. Ellis*, Bunb. 205; 1 Bro. P. C. 237; 2 Rep. Husband and Wife, 294.

consideration has passed from the wife (*a*); and even in some of the cases where no consideration beyond the fact of actual separation appears to have existed, a promise in writing made to a third person on behalf of the wife has been enforced against the husband (*b*). Adultery, as has before been observed, is no answer to the wife's claim to a separate maintenance which is secured to her by a constituted trust or by a security which may be enforced at law (*c*).

To support a provision for a wife in a deed of separation, as against creditors or purchasers, a valuable consideration must have passed to the husband (*d*). If there be a covenant in the deed by the trustees to indemnify the husband from the debts of the lady, that is a valuable consideration (*e*); but if the deed by mistake or accident be prepared without such a covenant, it seems that the defect is one that cannot be supplied by a court of equity, for it is said that a court of equity cannot correct such a deed (*f*). The relinquishment by the wife of alimony to which she has become entitled by the misconduct of the husband is a valuable consideration as against creditors (*g*).

The Court of Chancery will not restrain the husband from suing for the restitution of conjugal rights after an agreement even for a perpetual separation, and *à fortiori* the wife will not be restrained, for she cannot contract (*h*); and a covenant in a deed of separation purporting to preclude the parties from instituting any suit for the restitution of conjugal rights would not be enforced at law or in equity (*i*); in fact, as the breach of the contract, at least on the part of the husband, can

(*a*) *Hobbs v. Hull*, *ubi infra*: and see *Angier v. Angier*, Prec. Ch. p. 496; *et v. infra*, p. 530.

(*b*) *Head v. Head*, 3 Atk. pp. 547, 551; 2 Rop. Husband and Wife, p. 297; *et v. infra*, *ubi sup.*

(*c*) *Seagrave v. Seagrave*, 13 Ves. p. 439; *Jee v. Thurlow*, 2 Barn. & Cr. 547; *Hodgens v. Hodgins*, 11 Bli. N. S. 62; 4 Cl. & Fin. 323; Sugd. Law of Prop. 171; 2 Rop. Husband and Wife, p. 317, note (*a*); but the husband may maintain an action for *crim. con.*, notwithstanding separation by agreement (*Chambers v. Caulfield*, 6 East, 244), for such a crime is a bar to their coming together again.

(*d*) It appears from *Fitzer v. Fitzer*, 2 Atk. 511, (and see *Jones v. Marsh*, Forrest. 64, there cited,) that if there be any consideration moving from third persons, the court will not nicely weigh the amount: the relinquishing to the wife a portion of the property of the wife, which the husband has acquired by the marriage, cannot be sustained as against creditors; *ibid.*

(*e*) *Stephens v. Olive*, 2 Bro. p. 90 (Jacob, 142); Rop. Husband and Wife, 283, *et seq.*; *Westmeath v. Westmeath*, Jac. R. 138, 141; *Hindley v. Marquis of Westmeath*, 6 Barn. & Cr. 200; *Wellesley v. Wellesley*, 10 Sim. p. 256. In *Elworthy v. Bird*, 1 Jac. 143, note; S. C. 2 Sim. & St. 372, an agreement to execute such a deed was enforced against the husband; and see the cases collected, 3 Ves. 359. It will be remembered that all voluntary settlements are considered as fraudulent, and therefore void against creditors and purchasers, under the stat. 13th and 17th of Eliz.

(*f*) *Westmeath v. Westmeath*, Jacob, 141; and see *Wilson v. Wilson*, 14 Sim. 424-5: and see S. C. 15 Sim. 494; but the evidence on this point was excluded on general principles.

(*g*) *Hobbs v. Hull*, 1 Cox, 445.

(*h*) See *Fletcher v. Fletcher*, 2 Cox, 99, 107, Buller, J.; *Westmeath v. Salisbury*, 5 Bli. N. S. 375, 402; *St. John v. St. John*, 11 Ves. 526, 534, 535, Lord Eldon.

(*i*) See Jacob's note, 2 Rop. Husband and Wife, pp. 270-1; and Sugd. Law of Prop. 177; *et v. infra*, *Wilson v. Wilson*.

hardly involve any question of property, it seems wholly out of the range of the jurisdiction of the court. Whether a covenant on the part of the husband to resign the care of some of the children to the wife is legal has been questioned (a); but it is presumed that the Court of Chancery, for the reason above suggested, has no jurisdiction simply to enforce such a covenant.

There are conflicting decisions as to the validity of contracts having in view a future separation (b); but in *Westmeath v. Salisbury*, Lord Eldon and Lord Lyndhurst expressed very decided opinions against the legality of provisions for future separation, and such appears to be the law (c). In one case the validity of a contract in a marriage settlement for securing to the wife a separate maintenance in the event of separation, was established by the House of Lords in Ireland before the Union: the wife was entitled before marriage to two annuities of 400*l.* each; the separation took place by reason of the cruelty of the husband, and it having been provided by the articles that in the event of the separation taking place by reason of the husband's conduct or through his means, the wife should have the whole of her income, the House of Lords gave her the whole; the court below having given her a moiety only, which according to the settlement she was to have if the separation took place by her means (d). A husband and wife who had separated, entered into an agreement to live together upon certain conditions, and it was agreed that if the wife should again accuse the husband of infidelity they should again separate and that

(a) See Jacob's note, 2 *Rop. Husband and Wife*, 273; *v. infra*, p. 532.

(b) See *Rodney v. Chambers*, 2 East, 283; *Durant v. Titley*, 7 Price, pp. 577, 590; the Court of Exchequer had held that a covenant contemplating future separation, though at the pleasure of the wife, was valid at law, and gave judgment accordingly; that judgment was reversed in the Exchequer Chamber (1819); and that reversal was followed in *Hindley v. Westmeath*, 6 Barn. & Cr. 200, (5 Bli. N. S. 394,) and was considered by Lord Lyndhurst to have settled the law; *ibid.*, and p. 414: and see *Jee v. Thurlow*, 2 Barn. & Cr. 551; (5 My. & Cr. 243;) and the other cases cited, 2 *Rop. Husband and Wife*, p. 280. Upon the case of *Rodney v. Chambers* being referred to, in the subsequent case of *Chambers v. Caulfield*, (6 East, p. 244,) both of which were cited in *Durant v. Titley*, Mr. Justice Lawrence said, "The court, in that case, only decided that a covenant for separation and separate maintenance, with the consent of the trustees, was good; not that a covenant was good

generally that a wife might separate from her husband whenever she pleased, for that would be to make the husband tenant at will to the wife of his marital rights:" and see, on this subject, Mr. Jacob's note, 2 *Rop. Husband and Wife*, 281.

(c) *Per* Lord Cottenham, *Vandergucht v. De Blaquiere*, 5 My. & Cr. 244; and see 5 Bli. N. S. p. 366; 1 Dow. & Cl. 519; Sugd. Law of Prop. p. 178: and *Cocksedge v. Cocksedge*, 14 Sim. 244: on this case coming on before Sir J. Wigram, (5 Hare, 397,) the cases as to whether a provision in an antenuptial settlement for securing an annuity to the wife in case of separation, is good, were cited; the Vice-Chancellor did not state any opinion, but sent a case for the opinion of a court of law on the point: I have not heard the result.

(d) *Hoare v. Hoare*, 2 Ridgway's Parl. C. 268. Mr. Clancy (p. 423) observes that this is the only case to be found in the books of an agreement before marriage for a separate maintenance in the event of separation being supported.

in such case the wife should receive the income of her own fortune, which her husband was entitled to receive, and that her mother should indemnify him against her debts—they did live together, and afterwards, as had been anticipated, separated; and the wife having instituted proceedings in the Ecclesiastical Court for a divorce obtained a sentence to that effect, and 380*l.* for alimony. The wife during the latter separation accepted a bill for 225*l.* in favour of a person who had supplied her with goods; Lord Cottenham, without deciding whether or not the agreement in respect of the future separation was valid, yet as it had not been disputed, but had been treated as valid and subsisting as between the husband and the wife, his Lordship at the instance of the creditor restrained the husband from paying over the income to the wife till the creditor should have been satisfied (*a*).

As regards what is a good and sufficient consideration as between the husband and the wife, it is to be observed that an agreement to put an end to a suit in the Ecclesiastical Court for nullity of the marriage on the ground of impotency is good, it is not against public policy, for it affirms the status of the parties, and is a good consideration for supporting an agreement for the payment of a separate maintenance to the wife; so is a covenant by a third person to pay the husband an annuity, or to indemnify him against the existing debts of the wife, though not extending to future debts (*b*); and it seems now to be established that a covenant on the part of trustees to indemnify the husband against the wife's debts contracted and to be contracted is not a necessary ingredient in such cases (*c*). The waiving of her conjugal rights would also appear to be a sufficient consideration on the part of the wife (*d*). An agreement by the wife to waive an indictment against the husband for an assault, is not against public policy and does not vitiate an agreement entered into by the husband to provide a separate maintenance for the wife, and it would seem that the wife may obtain a specific performance of a contract entered into by the husband founded on such consideration (*e*).

(*a*) *Vandergucht v. De Blaquiére*, 5 My. & Cr. 242-3.

(*b*) *Wilson v. Wilson*, 14 Sim. pp. 419-20: see also Sugd. Law of Pr. 179-80; that is if instituted *bonâ fide*, 14 Sim. 420: *S. C.*, on appeal to the House of Lords, xii. Jur. 467, 470; and see *Ros v. Willoughby*, 10 Price, 2.

(*c*) *Ibid.*; and see the note to *Haworth v. Bostock*, 4 Yo. & Coll. 6.

(*d*) See *Head v. Head*, 3 Atk. 547, 551; *Frampton v. Frampton*, 4 Beav. 287; *Clough v. Lambert*, 10 Sim. p. 178; *Jodrell v. Jodrell*, 9 Beav. 60.

(*e*) *Elworthy v. Bird*, 2 Sim. & St. p. 373; there was the additional consideration that the father and brother of the wife had covenanted to indemnify the husband against the wife's debt: and see *Westby v. Westby*, 1 Conn. & L. p. 547. Mr. Baron Alderson, in *Garth v. Earnshaw*, 3 Y. & Coll. p. 584, held that such an agreement was void as against public policy, and that it was ineffectual, being made between husband and wife; but *Elworthy v. Bird*, and the authorities there referred to, were not cited. However, in *Keir v. Leeman*, Excheq. Chamb., 9 Q. B. Rep. 371, a compro-

It is unnecessary to show any consideration at all where the husband has created a constituted trust for his wife, for, as we have seen, a constituted or executed trust may be enforced by any volunteer, and if the husband has given a bond or other legal security, the wife may compel the trustees to enforce the security at law (a).

In the late case of *Joddrell v. Joddrell*, (Nov. 1845,) a bill was filed by Lady Joddrell to carry into effect a deed entered into between herself, her husband, and trustees under the following circumstances: In 1836, differences having arisen between Lady Joddrell and her husband, a suit was instituted by her for a divorce; on that occasion an arrangement was entered into whereby Sir R. Joddrell assigned a house in Portland-place, with the furniture, to the trustees in trust to permit Lady Joddrell, during the joint lives, to occupy such house, &c., and to accommodate and provide for the children therein; and Sir Richard assigned all his freehold estates to the trustees in trust to pay to the wife 4000*l.* a year, of which 300*l.* was for pin money and the remaining 3700*l.*, or so much as she might require, for her separate use; the residue of the rents to be paid to Sir Richard: out of the 3700*l.*, Lady Joddrell was to keep up the house in Portland-place, for the benefit of herself and her children, which establishment was to be upon such a scale as Lady Joddrell should think fit, and all expenses she might incur at any place she might temporarily go to out of London; the surplus, if any, to be paid to Sir Richard: and it was provided that so long as Sir Richard should be desirous to reside in Portland-place, and to conform to the *spirit and intention* of the deed of arrangement, and to partake of the benefit of the establishment to be kept up therein, he should be at liberty so to do. Lord Langdale was of opinion that this arrangement was not against public policy, that there was a sufficient consideration, and that it was sufficiently definite; he therefore over-ruled a demurrer put in by Sir R. Joddrell to a bill filed by Lady Joddrell, founded on this arrangement; and his Lordship was of opinion that the contract might be enforced not only against the husband but against the wife through the trustees (b).

A wife being entitled to separate estate, an agreement for separation was entered into by the husband and wife; the wife by deed, in consideration of the husband releasing his marital right in the future acquired property of the wife, charged her separate estate with an

mise of an indictment for riot and assault was held to be an illegal consideration.

(a) *Fitzer v. Fitzer*, 2 Atk. 511; *Seagrave v. Seagrave*, 13 Ves. 439; *Yea v. Yea*, 2 Rop.

Husband and Wife, 297; and see *Fletcher v. Fletcher*, 4 Hare, 78; and *supra*, p. 52.

(b) *Joddrell v. Joddrell*, 9 Beav. 45.

annuity to her husband: Sir J. Leach held that the deed was valid, and might be enforced, through her trustees, against the separate estate of the wife (a); but a contract in a separation deed cannot affect the property of the wife if not settled to her separate use, or reduced into possession during the coverture (b).

The court will not directly or indirectly enforce a separation against the parties personally (c). But the court will interfere to prevent the doing of any personal acts which if done would be in violation of an agreement respecting property entered into on the separation (d); it is only however in respect of their contracts as regards property that the court can properly exercise jurisdiction; and such contracts, as we have seen, though accessory to the separation, will be enforced where there is a consideration (e).

If the agreement for separation be for the lives of the parties, or until both agree to live together again, the husband cannot, so far as regards any permanent provision which he has secured to his wife, put an end to the arrangement without his wife's consent (f); indeed to hold that he could do so would be equivalent to saying that such a contract was not binding; but a *bonâ fide* offer on the part of the husband to take back his wife, there being no substantial reason to prevent her returning to him, will, it seems, release him from his liability where the agreement contemplates a temporary separation only (g).

It is clear, notwithstanding what may be found in some of the Reports, that Reconciliation puts an end to a deed of separation: this rests upon public policy, as it must not be permitted to parties to make agreements for themselves to hold good whenever they choose to live separate (h).

(a) *Logan v. Birkett*, 1 My. & K. 225.

(b) *V. int. al. Stamper v. Barker*, 5 Mad. 157.

(c) *Wilkes v. Wilkes*, 2 Dick. 791; *Worrall v. Jacob*, 3 Meriv. 268; *Head v. Head*, 3 Atk. 550; *v. sup.* p. 529.

(d) In *Wilson v. Wilson*, (*supra*; see xii. Jur. 470,) an injunction was granted against the husband, to restrain a personal act; it was to prevent an unjust use being made of the wife's proceedings, instituted for a different purpose, with a view to the agreed arrangement as to property not being disturbed. In *Green v. Green*, (note to 5 Hare, 400,) the Vice-Chancellor of England granted an injunction to restrain, in effect, the husband from continuing in possession of a house of residence, the wife's personal estate. It has been observed by a learned writer in the Jurist,

(xii. part ii. pp. 69, 70,) that the injunction was something like a divorce *a mensa et thoro*, and the order is strongly objected to on principle (p. 70): there was violation of contract in that case.

(e) See *Worrall v. Jacob*, *ubi sup.*; and see *Bateman v. Countess of Ross*, 1 Dow. p. 239; *Jacob's* note to *Rop. Husband and Wife*, 276; *et v. ibid.* 288; and *Sugd. Law of P.* 179.

(f) See 2 *Rop. Husband and Wife*, 314.

(g) *Head v. Head*, 3 Atk. 547; 2 *Rop. Husband and Wife*, 314.

(h) Lord Eldon, *Lord St. John v. Lady St. John*, 11 Ves. p. 537; *Bateman v. Countess of Ross*, 1 Dow. p. 245; *Fletcher v. Fletcher*, 2 Cox, 99; *Jee v. Thurlow*, 2 Barn. & Cr. 547; *Angier v. Angier*, *Prec. Ch.* 499; *Scholey v. Goodman*, 8 Moore, 350; 1 *Car. & P.* p. 36.

On the subject of Equitable jointures and jointures settled upon Infants, and of the relief granted to jointresses in Equity, I beg leave to refer to Mr. Bright's work, chapter xx. secs. ii., iii., vi.

Generally the husband must be a party to all suits brought against the wife in respect of her separate property; but if her husband be out of the jurisdiction she may be sued alone to make good her engagements in respect of her separate property (a). As already observed, no personal decree can be made against her, the court can only affect her estate in the hands of her trustees; therefore, in all cases where the separate estate of a feme covert is sought to be charged, the trustees must also be made parties (b); where her trustees are not made parties to a bill, and no particular fund is sought to be charged, but only a personal decree against her, the bill is demurrable, and cannot be sustained (c): a writ of *ne exeat regno* may issue against the wife when sued in respect of her separate estate, though not when sued as administratrix she having no separate property (d).

The husband must not join in a suit to obtain property given for the separate use of the wife, such a suit will be taken to be the husband's suit, and he cannot obtain it in such a suit (e). A bill was filed by the husband and wife in right of the wife to recover some property to which the wife was entitled, making no mention of any settlement; the husband then became bankrupt and the wife filed a supplemental bill, stating that the property had been settled for her separate use by a settlement made on the marriage. Lord Langdale, Master of the Rolls, after remarking that this case furnished an instance of the advantage of not allowing the husband and wife to sue together for claims made in her right, as it constantly gives rise to difficulties and embarrassments, held that the wife would not be entitled to any benefit of the original suit unless her next friend should make himself answerable for the costs which had been incurred in the original suit; and in case any increased costs should have been occasioned by reason of the omission to state the settlement in the original bill, his Lord-

As to what may be the effect of an accidental temporary cohabitation, see *Wilson v. Mus- hett*, 3 B. & Ad. p. 743; *Westmeath v. West- meath*, 1 Dow. & Cl. p. 519; and see Sugd. Law of Prop. 178-9.

(a) *Norton v. Turvill*, 2 P. W. 144; *Bell v. Hyde*, Prec. Ch. 328; *Dubois v. Hole*, 2 Vern. 613.

(b) See 1 Fonbl. 109-112; *Aylett v. Ash- ton*, 1 My. & Cr. 111; *Francis v. Wigzell*, 1

Mad. 258.

(c) *Francis v. Wigzell*, 1 Mad. 262; *Aylett v. Ashton*, 1 My. & Cr. 111.

(d) *Moore v. Meynell*, 2 Vernon, p. 614, Raithby's note; *Pannell v. Tayler*, Turn. R. 101; *Clancy*, 361-2.

(e) *Simons v. Horwood*, 1 Keen, 9; *Wale v. Parker*, 2 Keen, 59; *Owden v. Campbell*, 8 Sim. 551.

ship held that the next friend ought to pay them: on those terms his Lordship made a decree in the supplemental suit (a).

The wife must answer a bill brought against her by her husband in respect of her separate estate (b).

Where the court gives effect to the absolute power of a feme covert over her separate property, no examination in court is deemed necessary, as it is where she is parting with an equity (c). The wife cannot by examination in court exercise any greater or other power over her settled property than is reserved to her by the settlement (d): the contrary doctrine, in *M'Cormic v. Buller* (e), has been overruled (f). In those cases where an examination in court of the wife is necessary, the property does not pass by force of the examination or the intervention of the court, but the equity, by the consent of the wife, being put out of the way, the court makes its decree upon the right of the husband, which is only qualified by the equity so disposed of (g). Whilst it was in doubt whether an assignment for valuable consideration would not bind the wife surviving, her consent was, in some instances, taken to the application of the proceeds arising from the sale of her reversionary interest in stock (h); but, as before noticed, it is now settled that such a sale is not binding on the wife, and that her consent cannot be taken to any disposition of her reversionary interests.

(a) *Howard v. Prince*, 10 Beav. 296. See also, on the subject of proceedings by and against the wife in her separate character, Daniel's Ch. Pr. by Headlam, *int. al.* pp. 95-98, 119-122, 161, 170, 813.

(b) *Brooks v. Brooks*, Prec. Ch. 24.

(c) See *Sturgis v. Corp.*, 13 Ves. 192; *Fraser v. Baillie*, 1 Bro. C. C. 518; as to the cases where the wife's consent ought to be taken, and where not, see *Richards v. Chambers*, 10 Ves. p. 580; and *Box v. Box*, 1 Drury, 42; *supra*, p. 476.

(d) *Richards v. Chambers*, 10 Ves. 583.

(e) Cited in *Sperling v. Rochefort*, 8 Ves.

170, and since reported 1 Cox, 358.

(f) So stated in *Sperling v. Rochefort*, 8 Ves. 174, and in *Richards v. Chambers*, 10 Ves. 583.

(g) See *Richards v. Chambers*, 10 Ves. 587, *supra*.

(h) See *Woollands v. Crowcher*, 12 Ves. 177-8. There Sir Wm. Grant, following the precedents cited to him, but against his own opinion, took the consent of a married woman *de bene esse* to the application of the proceeds of the sale of a sum of stock, in which she had a reversionary interest; and see *Doswell v. Earle*, 12 Ves. 473; add. note, No. 3.

ADDITIONAL NOTE.—No. I.—P. 426.

Power of Husband to sue alone on his Wife's Bill of Exchange or Note.
Smith v. Marsack.

A bill was drawn by one Cath. Warner payable to her order, and accepted by one Marsack, the defendant, and indorsed by C. Warner to the plaintiff. C. Warner before and at the time of the indorsement was a married woman, wife of E. Warner,

and he had not sanctioned the indorsement; the question was whether in an action on a bill of exchange by the indorsee against the acceptor it is an answer that the drawer had no capacity to indorse by reason of her being a married woman at the time of the drawing and the indorsing of the bill. The court was of opinion that it was not, because a person cannot dispute the power of another to indorse an instrument when he asserts by the instrument that the other has such power; "But," said Mr. Justice Maule, in delivering the judgment, "we do not mean at all to impugn the proposition that if a bill or note is made payable to a married woman, the property in it will pass by the indorsement of the husband or he may sue on it either joining his wife as a party to the action or in his own name at his option, and consequently it cannot be denied that the defendant may possibly be compelled to pay the bill in question twice; but that was a consequence following from his own act of accrediting the capacity of a married woman to indorse, by his acceptance of the bill payable to her order;" *Smith v. Marsack*, xii. Jur. p. 1050, Com. Pl. A promissory note given to the wife for money advanced by her during the coverture equally survives to the wife if not reduced into possession, *Gaters v. Madeley*, 6 Mees. & W. 425.

ADDITIONAL NOTE.—No. II.—*Supra*, p. 485.

Course of Practice where Husband applies to the Court to obtain Principal Money or Interest to which he is entitled in right of his Wife.

"Where the husband applies for payment of money, either principal or interest, to which he is entitled in right of his wife, the first questions are whether the money for which he asks is subject to any settlement already made, and if not, whether the wife consents to the payment desired being made to her husband; if she does not, the next question is, what settlement should be made; and if necessary it is referred to the Master to inquire into the subject. Except under special circumstances she has not been held entitled to have the whole of the capital fund settled upon herself and her children, or to have the whole of her income secured to be paid to herself alone, wholly excluding her husband; and there may be cases in which, under the circumstances, she may not be entitled to have any settlement made out of the particular fund in question. The amount or proportion of the sum to be settled or secured is not subject to any fixed rule, although it seems not unusual to agree to a certain proportion." Lord Langdale, *Wilkinson v. Charlesworth*, 10 Beav. 326. As to the affidavit and other requisites, in order to ascertain whether the fund has been the subject of any prior settlement and other points of practice relating to this subject, see 1 Bright, Husband and Wife, 90, and the cases there referred to.

ADDITIONAL NOTE.—No. III.—*Supra*, p. 487 and p. 534.

Case of Doswell v. Earle.

In *Doswell v. Earle*, (12 Ves. 473,) the testator gave a legacy of 250*l.* to his daughter Jenny, a married woman; he then directed that it should be retained by the executors and invested, and the interest paid to the testator's wife for life; he made the same

direction as to 250*l.* given to another daughter; and on the death of the wife he gave the two sums of 250*l.* equally between the daughters, which, it is to be observed, was surplusage, as he had before given the legacies to them: the executors, with the consent of the tenant for life, paid the 250*l.* to Jenny's husband. Sir Wm. Grant held that this was a reduction into possession. Here it will be observed that there was a gift of the legacy to the daughter; it was not a gift to or in trust for the wife and on her death to the daughter; she had a present interest, with a postponement of enjoyment, for a particular purpose; so that this case might possibly be supported without interfering with the decision in *Whittle v. Henning* (but see *Box v. Box*, 2 Conn. & L. 610). This case however may now perhaps be considered as overruled: and see *Brandon v. Woodthorpe*, 10 Beav. 464.

ADDITIONAL NOTE.—No. IV.—V. *supra*, pp. 496, 497.

Limitations of Personal Estate in Default of Appointment to "Executors and Administrators," "Personal Representatives," and the like—and of the Construction of those Words generally; Palin v. Hills, 1 My. & K.; Booth v. Vicars, 1 Coll.

In the late case of *Holloway v. Clarkson*, the testator had bequeathed legacies to females, some of whom were married and some single, for their separate use for their respective lives, and after their deaths to such persons as they should respectively appoint, and in default of appointment to their respective executors, administrators, and assigns; it was held that all of them, married and unmarried, were entitled on petition (which was considered as equivalent to an appointment) to have their legacies paid to them. In giving judgment the Vice-Chancellor Wigram said, "The disputed cases have generally arisen out of bequests to 'representatives,' 'legal representatives,' 'personal representatives,' and similar words, and not upon the words 'executors, administrators, and assigns,' which occur in the present case. In *Bulmer v. Jay* (1), and in some other cases, however, a question has arisen upon the effect of the words 'executors and administrators.' If I were compelled to give an opinion upon this part of the case, I should say, that the conclusion to be drawn from the modern, not unsupported by some of the earlier cases, is this,—that under a gift simply to 'representatives,' 'legal representatives,' 'personal representatives' (2), and to 'executors and administrators,' the hand to receive the money is that of the person constituted representative by the ecclesiastical court; but that such person will, in the absence of a clear intention to the contrary, take the property as part of the estate of the person whose representative he is, and not beneficially:" citing *Evans Charles* (3), *Ripley v. Waterworth* (4), *Wellman v. Bowring* (5), *Price v. Strange* (6), *Palin v. Hills* (7), *Hames v. Hames* (8), *Grafftey v. Humpage* (9), and *Daniel v. Dudley* (10). "In the last case," continued his Honour, "Lord Cottenham strongly ex-

(1) 4 Sim. 48; S. C. 3 My. & K. 197.

(2) If the intention of the settlement appears to have been to exclude the husband, he will not be permitted to take under the term "personal representative;" *Bailey v. Wright*, 18 Ves. 56; affirmed, 1 Swanst. 39: "personal representative" has not necessarily the same meaning as "legal representative;" Lord Langdale, *Kilner v. Leech*, 10 Beav. 368.

(3) 1 Anst. 128, *per* Eyre, Chief Baron.

(4) 7 Ves. 425.

(5) 1 Sim. & St. 24; 2 Russ. 374; 3 Sim. 328, S. C.

(6) 6 Mad. 159, *per* Sir J. Leach.

(7) 1 Myl. & K. 470.

(8) 2 Keen, 616.

(9) 1 Beav. 46.

(10) 1 Phillips, 1; S. C. 11 Sim. 163.

pressed his disapprobation of *Bulmer v. Jay* (1). However, the decisions upon these cases have been by no means uniform. It has some times been decided that the persons intended were the representatives constituted by the ecclesiastical court; sometimes that next of kin were intended; sometimes, that the representatives constituted by the ecclesiastical court took beneficially; and sometimes, that they took as representatives, and consequently as trustees for the estate of the party whose representatives they were. It will be sufficient to refer to the cases generally as they are collected in *Saberton v. Skeels* (2), and in *Grafftey v. Humpage*. In considering the cases as they bear only upon the construction of the words (as words of description), and upon the question of the interest which the legatee takes, it will be found convenient to distinguish the cases in which a legacy has been given to an individual, and in case of his pre-deceasing the testator his representatives have been substituted or him, (as in *Bridge v. Abbot* (3), *Evans v. Charles*, *Palin v. Hills* (4),) from the cases of direct limitations to the representatives of an individual named not by way of substitution. In the former cases, the courts appear to have treated the representatives as *quasi* purchasers, and have thereby excluded all argument upon the words as words of limitation." Then, as applicable to the particular case before him, his Honour said, "In deciding this question, the court must lay wholly out of consideration the circumstance that a life estate is given, in the first instance, to the party to whose representative the corpus is afterwards given. There is *no analogy between real and personal estate in this particular*: but still, assuming that the executor or administrator is to take, and that he takes as executor or administrator and as trustee only, it would seem to follow that the party whose estate is represented must have a disposing power over this as over other parts of his estate, notwithstanding the peculiar manner in which it becomes part of his estate; and the language of Sir William Grant in *Anderson v. Dawson* (5), and of Lord Langdale, in *Grafftey v. Humpage*, with other *dicta* to be met with, tend obviously to support the principle; although there are some reported cases of an opposite tendency, such as *Horseman v. Abbey* (6), *Wilson v. Mount* (7), and *Sanders v. Franks* (8). I feel more difficulty with regard to the general power of the legatees who are married women. In the case of real estate, the estate for life of A., preceding mesne limitations, and followed by a remainder to the heirs of A., amounts to a fee; but the principle does not extend to give by analogy an absolute interest in personal estate to a married woman on a limitation to her for life, with remainder to her executors, administrators, and assigns. The mere fact of taking a life estate in personal property has not the effect of enlarging the operation of the gift in remainder to the same person. The married legatees may of course exercise the particular power which the will gives them: whether they can during their coverture in any other manner dispose of their shares in the fund, is a question (9) which the authorities induce me to abstain from deciding until it is regularly before me (10)."

It may be useful here to notice the case of *Palin v. Hills*, 1 My. & K. 470, more especially as the decision of Lord Brougham, reversing that of Sir J. Leach, has not

(1) In that case "executors and administrators" were construed to mean "next of kin."

(2) 1 Russ. & My. 587.

(3) 3 Bro. C. C. 224.

(4) 1 My. & K. 470.

(5) 15 Ves. 532.

(6) 1 Jac. & W. 381.

(7) 2 Sim. & St. 493.

(8) 2 Mad. 147.

(9) See 2 Rep. Husband and Wife, by Jacob, p. 213; *ibid.* vol. i. p. 254; and *Fredrick v. Hartwell*, (1 Cox, 193,) there cited.

(10) Sir J. Wigram, Vice-Chancellor, *Holloway v. Clarkson*, 2 Hare, 523-6; and see *Smith v. Palmer*, xiii. Jur. 95.

been universally approved. In that case the testator gave several legacies, adding, and in case of the death of any or either of the legatees in his lifetime, "I direct that the legacy given to the legatee so dying in my lifetime shall go and be paid to his executors or administrators." One of the legatees died in the lifetime of the testator, having by will appointed an executor and a residuary legatee. The question was whether the executor of the legatee should take beneficially, or in trust for the residuary legatee, or for the next of kin; the legacy, it will be observed, did not exist at the time of the death of the second testator. Sir J. Leach, apparently not much regarding the authorities, but reasoning on the presumed intention, and assuming that the original testator's objects of bounty might be united to those of his intended legatee in case he should make a will, held that the residuary legatee was entitled, thus in effect enabling a person specifically to dispose of property by will, to or in which the testator at his death had no title or interest whatever (see 1 My. & K. 175). On the appeal before Lord Brougham, the contest was between the next of kin and residuary legatee of the second testator, for it was agreed that the executors could not take beneficially. Lord Brougham, principally on the authority of *Bridge v. Abbot*, 3 Bro. 224, which was a gift of a residue to certain persons named, and in the event of any one dying in the lifetime of the testator, his share was to go to his "legal personal representatives," reversed Sir J. Leach's decree (see 1 My. & K. 482). Lord Brougham admitted that it is just possible that a person may be enabled to pass property which never by possibility can vest in himself, (*ib.* p. 485), but only where the words of the original testator are explicit to that effect; but in the case before him that was not done, and his Lordship held that the next of kin were clearly entitled. This case and the case of *Bridge v. Abbot* do not in any way interfere with the general rule as established by the declared opinion of Lord Eldon in *Ripley v. Waterworth*, 7 Ves. 438, and by *Daniel v. Dudley*, 1 Phillips 1, namely, that executors take in their representative character, and that the funds they so take are to be applied and administered *in the same manner as any other assets* that come to them in that character; they only qualify the rule to this extent, that in order that the provisions in the will as regards legatees or the claims of creditors may attach, the property sought to be administered must exist at the death of the testator or intestate: a legacy given to the executors of an intended legatee in case of his death before the donor of the legacy, is not property at the death of the donee, it has no existence at all, and cannot therefore be affected by the will of the donee, or attached by his creditors as any part of his property: see the Vice-Chancellor Wigram's judgment, *Morris v. Howes*, 4 Hare, 606-7. This subject has been considered, not exactly in the same view, by Mr. Jarman on Wills, ii. 41, *et seq.* and Mr. Roper on Legacies, by White, vol. i. p. 134, *et seq.*

In the case of *Booth v. Vicars* (1), the Vice-Chancellor Knight Bruce had to interpret the words "next legal representatives:" in reference to a similar gift. That learned judge after observing that the word "next" had no connection with executors and administrators, and that from other considerations in that will the executors must be excluded, said, "It follows if this conclusion be right that the words 'next legal personal representative' must in this will import in some form consanguinity; the next question is in what form? Now the words here are not 'next of kin,' there is no word strictly importing kindred: if the words had been 'next of kin' or 'nearest' or 'next in relationship,' it is possible that I might have applied the rule adopted by the Lords Com-

missioners in *Elmsley v. Young*, and have held that the representatives of whom the statute speaks were excluded; but that is not so, the words 'legal representatives' are the very words which in the Statute of Distributions are used to designate persons who being of kindred to the deceased come in as representatives of some one else. As to this part of the case I need do no more than refer to the language of the Master of the Rolls in *Rowland v. Gorsuch*, 2 Cox, 187, and to the expressions so recently used by Lord Langdale in *Cotton v. Cotton*, 2 Beav. 70, where he says, 'when it is said that the expression 'legal representatives' means next of kin, it is not that such is the force of the words themselves, but because the words are held to indicate the persons who upon the construction of the will are beneficially entitled in the place of the person to whom the gift was first made and who in that sense legally represent such persons. I must therefore refer to the Statute of Distributions, which points out those who are entitled to claim as the legal representatives in that particular sense of the words.' I am also of opinion upon this will that the words 'next legal representatives' mean the persons who by force of law in right of consanguinity would take the personal estate of those persons beneficially. The next question is whether they are to take *per stirpes* or *per capita*: my opinion is that they take *per stirpes*, the word, representatives, itself almost forces that interpretation; and when you consider that if one of the two persons mentioned in the will had survived the tenant for life only a moiety would have gone under the clause of substitution, that construction seems to be rendered absolutely necessary." Where stock was settled in trust for the husband for life, and if he should survive his wife in trust for his executors, &c., for his and their use and benefit, but in case the wife should survive in trust for her for life and after her death for the executors or administrators of the husband *for his and their own use and benefit*, it was held that the wife, who had taken out letters of administration to the husband, did not thereby become entitled to the corpus of the stock beneficially (1).

As to the question, what form of words will or will not enable the executors to take beneficially, see in addition, *Bulmer v. Jay*, 3 My. & K. 200; *Hames v. Hames*, 2 Keen, 650, 651: as to where "personal representatives" or "legal representatives" are or are not to be construed as meaning next of kin, see in addition *Baines v. Oltey*, 1 My. & K. 469, and *Robinson v. Smith*, 6 Sim. 48; *Walter v. Makin*, *ibid.* 151. Lord Alvanley in *Holloway v. Holloway*, 5 Ves. 402, laid down that these words, "personal representatives," must have their legal meaning, that is, executors or administrators, unless clearly intended to have a different meaning. On the question upon an ultimate limitation to the next of kin, as to whether the next of kin at the testator's death are to take or those at the time when such ultimate limitation is to take effect, see *Seifferth v. Badham*, 9 Beav. 370; where Lord Langdale has examined the authorities, and stated the general principles to be applied in such cases, p. 374, *et seq.*

ADDITIONAL NOTE.—No. V.—*Supra*, pp. 515, 516.

What will amount to a Charge on a Married Woman's Separate Property.—Judgment of Lord Langdale in Tullett v. Armstrong, 4 Beav. 323-4.

"It is perfectly clear that when a married woman has property settled to her sepa-

(1) *Marshall v. Collett*, 1 Y. & Coll. 232.

rate use, she may bind that property without distinctly stating that she intends to do so. She may enter into a bond (1), bill (2), promissory note (3), or other obligation (4), which, considering her state as a married woman, could only be satisfied by means of her separate estate; and, therefore, the inference is conclusive, that there was an intention, and a clear one on her part, that her separate estate, which would be the only means of satisfying the obligation into which she entered, should be bound. Again, I apprehend it to be clear that where a married woman having separate estate, but not knowing perfectly the nature of her interest, executes an instrument by which she plainly shews an intention to bind the interest which belongs to her, then, though she may make a mistake as to the extent of the estate vested in her, the law will say that such estate as she may have shall be bound by her own act. But in a case where she enters into no bond, contract, covenant, or obligation, and in no way contracts to do any act on her part,—where the instrument which she executes does not purport to bind or to pass anything whatever that belongs to her, and where it must consequently be left to mere inference whether she intended to affect her estate in any manner or way whatever, the case is entirely different, either from the case where she executes a bond, promissory note, or other instrument, or where she enters into a covenant or obligation by which she, being a married woman, can be considered as binding her separate estate.” In *Crosby v. Church*, 3 Beavan, 489, Lord Langdale made use of similar expressions.

ADDITIONAL NOTE.—No. VI.—*Supra*, p. 532.

Bond to remain in force in the event of Reconciliation.

A bond was given by the defendant John Mushett, to F. Wilson, conditioned for payment of an annuity by the defendant to Jane his wife, for her life, unless she should at any time molest him on account of her debts or for not cohabiting with him. On the same day a deed was made between the husband, the wife, and the trustee, reciting that the husband and wife had agreed to separate for their lives; and that the husband had agreed to assign certain property to the trustee for the benefit of the wife, and to secure her an annuity as he had done by the bond. The husband then assigned the property according to the agreement. The wife covenanted to maintain herself unless she and her husband should thereafter mutually agree to live together again; but it was provided that in case the husband and wife should mutually agree to live together again, such cohabitation should not affect the trusts of the deed, but it should remain in full force as well during cohabitation as during separation. The husband and wife then cohabited together for six years. The whole Court of King's Bench held that the cohabitation did not destroy the effect of the bond and sustained an action upon it; *Wilson v. Mushett*, 3 Barn. & Adolph. 750, principally on the authority of *Jee v. Thur-*

(1) *Hulme v. Tenant*, 1 B. C. C. p. 16; *Heatley v. Thomas*, 15 Ves. 596.

(2) *Coppin v. Gray*, 1 Y. & C. C. C. 205.

(3) *Bulpin v. Clarke*, 17 Ves. 365; *Field v. Sowle*, 4 Russ. 112.

(4) *Murray v. Barlee*, 4 Sim. 82; and 3 Myl. & K. 209; *Owens v. Dickenson*, Cr. & Ph. 48; and *Crosby v. Church*, 3 Beav. 485.

It is to be observed that Alimony differs materially from property enjoyed for the separate use of a married woman; the court does not exercise any jurisdiction as regards alimony, excepting in granting the writ of *ne exeat regno*, *Vandergucht v. De Blaquiére*, 8 Sim. 322.

low, 2 Barn. & C. 547. The cases relied upon by the defendant were *Hindley v. Westmeath*; *Fletcher v. Fletcher*, 2 Cox, 105; *Lord St. John v. St. John*, *Bateman v. Countess of Ross*, and *Durant v. Tittey*, *ubi sup.*

ADDITIONAL NOTE.—No. VII.

What Children will take under Provisions in Deeds of Separation.

Two cases have lately arisen, in which a question was agitated, as to what children were entitled to take under the particular terms of the provisions for children contained in the several deeds of separation referred to in those cases; they are *Hulme v. Chitty*, 9 Beav. 437, and *Swift v. Grazebrook*, xii. Jur. 87, Vice-Chancellor of England.

SECTION X.—Miscellaneous Doctrines in respect of Trusts usually found in Wills and Deeds, particularly as affecting Persons who are to take Property for Limited Interests, with Remainders over.

Leaseholds and Copyholds for Lives frequently limited to various Persons in succession. Trusts for Renewal.

May be Express or Implied.

Instances of Implied Trusts to renew.

Words apparently importing Discretion.

Where there is a Trust for Renewal, but Fund for Payment of Fines, &c. not pointed out.

Modern Rule in the absence of Directions—Expenses apportioned between Tenant for Life, and those in Remainder in proportion to their actual Enjoyment.

Rule where Tenant for Life renews without any Obligation.

No Distinction between Leases for Years and for Lives.

Where there are Directions.

Out of Rents and Profits.

When a Sale or Mortgage may be made.

Playters v. Abbott, before Sir J. Leach.

Where different Modes are pointed out.

Discretion in Trustees.

Mode of arranging, as between the different Parties, where a Mortgage is resorted to.

Greenwood v. Evans, before Lord Langdale.

Direction to raise by Sale.

Jones v. Jones, before the Vice-Chancellor Wigram (1846).

Tenant for Life entitled to Compound Interest on Sums paid for Renewals.

Gift of Residue to several Persons in Succession.

General Rule as between Tenant for Life and those in Remainder.

Conversion—liable to be controlled by the Intention to be gathered from the Will.

Authorities reviewed by the Vice-Chancellor of England in the case of Chambers v. Chambers, 15 Sim. R.

Cases where it has been held upon the Intention that the Tenant for Life was entitled to the Enjoyment of the Actual Income of the Residue in Specie.

Vaughan v. Buck, 1 Phillips.

Sutherland v. Cook, 1 Coll.

Question from what time the Tenant for Life is entitled to Interest, and at what Rate.

Cases reviewed by Sir J. Wigram, particularly in regard to the Question whether the Tenant for Life is entitled to the Actual Income of the Property which is in a proper state of Investment from the Death.

Taylor v. Clarke, 1 Hare.

Caldicott v. Caldicott, 1 Y. & Coll. C. C.

Four different modes of determining what is the Right of the Tenant for Life as regards Income or Interest for the First Year, to be collected from the Authorities.

Hinves v. Hinves, before Vice-Chancellor Wigram, 3 Hare.

Wrey v. Smith, 14 Sim.

Interest at 4 per cent. given, in some Cases, on such part of the Estate as was not in a proper state of Investment.

Question, where Specific Property is given, who is entitled to any Extraordinary Profit that may accrue—Bonuses.

Questions between the Tenant for Life and Remainderman as to Right to Timber, and Profits of Mines, &c.

Whether Estate settled or unsettled, no one allowed to take Advantage of his Wrongful Act.

When Tenant for Life entitled to Interest of the Produce.

Miscellaneous Doctrines in regard to Rights of Tenant for Life.

Tenant for Life, as a General Rule, not entitled to charge the Inheritance with Improvements.

Powers of Exchange and Leasing.

Remainderman cannot call upon the Court of Chancery to interfere with Tenant for Life exercising Legal Power of Exchange.

Remainderman may lose his Right to avoid Lease made by Tenant for Life by Acquiescence.

Power to Jointure clear of Charges—What are such Charges.

Power of Sale—Timber not to be sold separately.

Miscellaneous Cases.

As to the due Execution of Power given to Tenants for Life to charge the Estate in Settlement.

Apportionment of Dividends, &c.

Tenant for Life of Residuary Fund where there are Contingent Liabilities.

Gift of Life Annuity, as distinguished from Gift of Capital which would produce such an Annuity.

Additional Notes.

No. I.—Extract from Mr. Dalzell's Work on Conversion.

No. II.—What Rate of Interest or other Benefit, and from what Time the Tenant for Life of a Residue is entitled to—Lord Langdale's Judgment, Robinson v. Robinson, 1848.

No. III.—Apportionment of Rents, Interest, and Dividends between Tenant for Life and Remainderman.

No. IV.—Lord Cottenham's Judgment in Blewit v. Roberts—Gift of Annuity.

THE doctrines of the Court of Chancery in regard to some of the questions which arise between the tenant for life and those in remainder as regards real and personal property settled by deed and by will, have been incidentally adverted to in the preceding pages, and more especially in the Introductory Chapter; but they are of so much importance and of such constant occurrence that it will be necessary to enter into a more minute examination of the modern authorities in

which these subjects have been discussed : it will also be proper here to notice some others of the questions arising between the tenant for life and remaindermen, which are of most frequent occurrence.

It is very common in wills and marriage settlements to limit Leasehold estates and Copyhold estates held for lives, to several persons in succession, and it frequently becomes a question as to whether a trust is imposed for keeping the leases renewed, and as to how the fines and expences of renewal of leaseholds and copyholds are to be raised, and by whom and in what proportions they are to be borne.

Trusts for Renewal (a) are sometimes expressly created, but there may be an implied trust in this as in other cases of trust. Thus, where a testator devised a college lease to his wife for life, with remainder to her son, and directed her to pay an annuity to the son during *her life*, this was considered as affording a necessary implication that the wife was to renew (b). If leaseholds are settled upon trust for several persons successively ; though the trustees may not be in so many words directed to renew, yet if the means are given, and the purpose expressed, there is no doubt that they are to apply those means to that purpose (c). In a case where the testator declared that it should be lawful for the trustees, "from time to time as occasion shall require, as they shall think proper," during the continuance of the trusts of the property, to apply for renewal and to do their endeavours to renew the leases, Sir John Leach, in giving judgment, said, "It could not be intended that the trustees should have a discretion whether they would or would not renew ; they were appointed for the purpose of protecting future interests and could not abandon them : the expression, that 'it should be lawful for them,' meant only that it should be lawful *as against the party in possession* and out of the rents and profits to pay the expences of the renewal ;" and his Honour held that the tenant for life and the trustees were bound to renew (d) : but where an absolute discretion is

(a) This subject is treated of in Hill on Trustees, p. 438, *et seq.* ; Lewin on Trusts, pp. 300-317, and Bisset on Estates for Life, chap. 10, p. 246, *et seq.*

(b) *Lock v. Lock*, 2 Vern. 666 ; the Master was to settle the proportions of the expences as between her and the son ; as to this see *Jones v. Jones*, *infra*. The case of *Hulkes v. Barrow*, Tamlyn, R. 264, is another instance.

(c) *Verney v. Verney*, Amb. 88, 1 Ves. 428 ; *Lord Montford v. Lord Cadogan*, 17 Ves. 488, Sir Wm. Grant ; S. C. affirmed with some variations, 19 Ves. 638, 2 Meriv. 3. Sir Wm. Grant, in reference to the obligation of trustees to renew, said, "The lease being made the subject of settlement, it was clearly meant that it should be kept on foot by

renewals." "The trustees," he added, "are not in so many words directed to renew, but the means being given and the purpose expressed, there is no doubt that they were to apply those means to that purpose. If it was not to be done by the trustees it was not to be done at all, the tenants for life having an interest the other way, as such an application was in diminution of their incomes : " the trustees were held personally liable for not having renewed, the tenant for life being answerable in the first instance : the lease was renewable by custom ; see 19 Ves. 637, 639 ; and see *White v. White*, 4 Ves. 31, Lord Alvanley.

(d) *Lord Milsington v. Lord Mulgrave*, 3 Mad. 491 ; 5 Mad. 471 ; and see *Colegrave v. Manby*, 6 Mad. 87 ; 2 Russ. 238.

clearly conferred the ordinary rule before adverted to must of course be applied to the case (a).

Where there is a trust for renewal, either express or implied, and no specific and explicit directions, as to out of what fund the fines and expences are to be paid or how they are to be raised, are given; in ordinary cases, the estate itself, if there are no directions to the contrary, must bear the burthen, and this can only be done by sale of a part or by mortgage of the estate; the trustees therefore must have impliedly a power for that purpose (b). But how this is to be effected so as to do justice to the tenant for life, and those who are to take in succession after him, is a question which has greatly perplexed the judges who have had to decide the question.

In the absence of any express or definite direction, the modern rule is to apportion the charges for the renewal of leaseholds between the tenant for life and the remainderman, according to their respective interests in the estate; that is in proportion to the *actual* enjoyment they have of the lease renewed, not an extent of enjoyment to be determined by mere speculation or by a calculation of probabilities (c); and there is no distinction in this respect between leases for years and for lives (d). But there is less difficulty in the case of the renewal of leaseholds held for a term, than of estates held on lives: as regards the former it is known when the amount to be paid for fines, &c. will be wanted, and in most cases what will be the amount, so that what is required may more readily be retained from time to time out of the rents, where that is the mode pointed out (e); but as regards the latter when the sum required may be wanted is necessarily uncertain (f).

Where the tenant for life is one of the *cestuis que vie*, it seems to be admitted that where he has the legal estate in such leasehold interest,

(a) *V. supra*, p. 85, &c.; *et v. infra*. See *Lawrence v. Maggs*, 1 Eden, 453, as to the extent of discretion conferred by the words "as they shall think proper," and the like; and *Polley v. Seymour*, 2 Yo. & Coll. 721.

(b) *Maynel v. Massey*, 2 Vern. 1; *Allan v. Backhouse*, 2 Ves. & B. 75; *Buckeridge v. Ingram*, 2 Ves. J. 666; *Earl of Shaftesbury v. Duke of Marlborough*, 2 My. & K. 111; and see the next note.

(c) *Shaftesbury v. Duke of Marlborough*, *supra*; *Allan v. Backhouse*, 2 Ves. & B. p. 65; affirmed by Lord Eldon, (see 5 Hare, 457). In this case Sir T. Plumer, upon the construction, directed a sale, though the trust was to raise the expenses, &c. "out of the rents and profits" of the leasehold premises: the testator declared that the renewed leases should be held on the same trusts as the free-

hold and copyhold estates, "to the end that they might be enjoyed therewith so long as might be;" but there was nothing else in the will to give to the words "rents and profits" the abridged sense of *annual* profits: see also *Greenwood v. Evans*, 4 Beav. p. 44; there the trust was to renew "out of the rents and profits of the premises, or by mortgage thereof, if found expedient," and *Jones v. Jones*, 5 Hare, 461-63-65; and see *Reeves v. Crenwick*, 3 Y. & Coll. 715; *Bull v. Birkbeck*, 2 Y. & Coll. C. C. 447; but in these cases there was no direction for renewal.

(d) Vice-Chancellor Wigram, *Jones v. Jones*, 5 Hare, 460; *v. supra*, p. 304.

(e) As in *Montford v. Cadogan*, 19 Ves. 635.

(f) See *Earl of Shaftesbury v. Duke of Marlborough*, 2 My. & K. 121.

it is not competent to the remainderman to call upon him to contribute, because he can have no interest in the renewal, though a doubt has been entertained where it is a trust estate (a). In a case before Lord Thurlow, where a tenant for life, herself being *cestui que vie*, renewed without any obligation being imposed on her so to do, the money paid as the fine for renewal was fixed as a charge upon the estate (exclusive of the wife's life) with interest from the time of its having been advanced (b). Where the tenant for life not being a *cestui que vie* renews, as the remainderman takes that interest in the renewed term which is *ultra* so much of the renewed term as may expire in the life of the person who renewed the term, the remainderman must pay the value of that interest; and, considering that the purchase of that interest is made at an antecedent time, simple interest would not be a satisfaction, as the tenant for life has laid out his money totally, therefore compound interest is given on such a proportion of the amount paid as is equivalent to the proportional value taken by the remainderman (c).

Where there is an express trust for renewal, and the fund is pointed out from which the fines and expences are to be paid, of course those directions must be followed as far as is practicable, and according to a reasonable interpretation; but difficulties have frequently arisen in carrying such directions practically into effect.

Where the fines and expences are directed to be raised out of the rents and profits of the estate settled to one for life with remainder to others in succession, *primâ facie* this would seem to be a gift to the tenant for life of the surplus of the rents, after so much as shall be sufficient to raise the amount of the requisite fines and other expences attendant on the anticipated renewal shall have been set apart or accumulated. If upon the construction of the instrument the direction for renewal overrides every beneficial estate, then the first and every successive taker must be content to abide by the will, and until the amount required for the fines and expences for the then next anticipated renewal shall have been raised by means of the rents and profits, no person within the limitations can receive anything. This seems to have been the principle on which *Stone v. Theed*, by Lord

(a) Lord Hardwicke, and see *Harvey v. Harvey*, 5 Beav. 138-9, and the references; 1 Ves. 429 (4 Ves. 33).

(b) *Adderley v. Clavering*, 2 Bro. p. 659: 2 Cox, 192; this was a case of a legal estate.

(c) Lord Thurlow and Lord Eldon, *Nightingale v. Lawson*, 1 Bro. 440; *White v. White*,

9 Ves. 557: *Nightingale v. Lawson* is the case in which the modern rule of contribution between the tenant for life and remainderman was settled: and see *White v. White*, 4 Ves. 32-36; *Giddings v. Giddings*, 3 Russ. 260; Lewin, p. 314; *et v. supra*, pp. 344, 345.

Thurlow (a); and *Earl Shaftesbury v. Duke of Marlborough* (b), by Sir J. Leach, were decided.

It has been already stated that a direction to raise any fund which must be paid in gross, as fines and expences of renewal necessarily must, will authorize a sale, unless there be an express or implied prohibition (c).

In *Shaftesbury v. Duke of Marlborough*, before referred to, it was held that the trust to renew was confined to the rents and profits: in the late case of *Garmstone v. Gaunt*, though the trust was to renew by and out of the rents and profits *or otherwise*, the Vice-Chancellor K. Bruce held that the trust authorized a mortgage only and not a sale (d). Where there is no other mode of raising the required amount, there must be a sale of a sufficient part of the estate (e).

Where in the case of leases for lives the renewal is to take effect immediately upon the death of the testator, the trustees must in the first place have recourse to a mortgage, since no rents can have accrued; and Lord Eldon observes, in *White v. White*, that in such a case there seems no other mode of obtaining from the tenant for life his proportion of the expences of renewal according to his enjoyment than by compelling him to give Security to that effect; for if such security be not given, the remainderman can only resort to the uncertain assets of the tenant for life (f).

Where a man creates a trust term for payment of debts, and declares the trust of the term to be by *perception* of rents and profits, *or* by leasing, *or* by mortgaging, to raise sufficient money for the payment of his debts, according to a reported dictum of Lord Hardwicke, it restrains it merely to a payment out of rents and profits; if it had been a trust of the rents and profits, said his Lordship, the term might

(a) 2 Bro. 243; stated from Reg. Book by Mr. Campbell, 5 Hare, 450.

(b) 2 My. & K. p. 111; Sir J. Leach says (p. 122), that the expence is from time to time to fall upon those who happen to be in possession. I presume it is to be carried out thus: sufficient of the rents, as they are received, must be reserved to effect the next anticipated renewal; when that has been done, the tenant for life will be entitled to the rents from that time: when a life drops, or the term is about to expire, the reserved fund will be applied to effect a renewal, and then the trustees must again commence collecting a fund for the next anticipated renewal; if this be so no testator can know what he is doing in making such a gift. And see *Reeves v. Creswick*, 3 Yo. & Coll. 715; *et v. Milnes v. Slater*, 8 Ves. 307.

(c) *V. supra*, p. 316; and see *Allan v. Backhouse, supra*, p. 545, n.

(d) *Garmstone v. Gaunt*, ix. Jur. 78; see the cases cited by Mr. Hill, on Trustees, 442; and see, on this subject, *Wilson v. Halliley*, 1 Russ. & M. 560; *Heneage v. Lord Andover*, 3 Yo. & J. 360; *supra*, pp. 316, 317; and *Monday v. Monday*, 1 Ves. & B. 223; and *Calvert v. Godfrey*, 6 Beav. 97—cases relating to infants.

(e) *Grantley v. Garthwaite*, 6 Mad. p. 96; money might have been raised by mortgage with an insurance of the life on which the premises were held, but the Vice-Chancellor said he had no authority to enforce an insurance; see *Greenwood v. Evans, infra*.

(f) See 2 My. & K. 122.

have been sold (a); but where the trust is created for raising fines for renewal and the like, any such general rule must give way to effecting the purpose of the trust; and where the fines, &c. are directed to be raised *primâ facie* out of the rents and profits only, still there may be sufficient upon the general intention to be collected from the whole of the instrument, according to the general rules of construction, that a sale or mortgage should be resorted to.

Where there is an express direction that the tenant for life in possession shall renew, he must do so, or he will be liable to the other parties taking in succession for his default; it is the condition on which he takes the estate (b); but where the direction is that the fines, &c., shall be raised out of the rents, it is not the probable intention that the tenant for life or person in immediate possession should bear the whole burthen, and that others should reap the benefit at his expense, and his *primâ facie* liability may be controlled on the context of the instrument.

In *Playters v. Abbott* (c), the testator devised his real estates to trustees upon trust out of the rents and profits, or by mortgage, sale, or other disposition to raise such sums as should be necessary for the payment of the fines and expences which his trustees would incur on admission to his copyholds and the other expences of the trust, and subject thereto in trust to pay to his wife an annuity of 250*l.* for her life, and the residue to his daughter for her separate use for her life, with remainders over. The rental of the estates devised was only 800*l.*, the amount immediately required for fines for admission to the copyholds was 1400*l.* Sir John Leach construed this direction to the trustees as giving them an authority to raise the requisite sums by sale or mortgage *when* that should be necessary, and as the widow's annuity was given in lieu of dower, he considered that she was evidently not to wait for payment until the fines were paid out of the rents, and therefore the tenant for life should not; he therefore directed the fines and expences to be raised by sale or mortgage, and that the daughter, the tenant for life, should bear the interest of the mortgage only, when the money was so raised.

Where a testator points out different modes of raising fines and expenses, all of which have reference to the convenience of the estate, as out of the rents and profits, or by sale or mortgage, it seems to be inconsistent with the intention that the parties are to enjoy the estate

(a) Lord Hardwicke, *Ridout v. Earl of Plymouth*, 2 Atk. 105. S. C. 5 Sim. p. 181. *Wadley v. Wadley*, 2 Coll. 11.

(b) *Bennett v. Colley*, 2 My. & K. p. 225; (c) 2 My. & K. 97.

in succession, that their rights should be altered by the manner of proceeding, unless there be an inevitable necessity for such alteration (a); but if the testator has empowered the trustees to raise the fines and expenses in the one way or the other, and they should have chosen that which throws the burthen upon one party at the expense of the other, in a manner therefore inconsistent with the general rule, unless upon the construction of the particular instrument it should appear that such an interference would be unauthorized, the court will put the general rule in operation (b).

Where the court has to decide upon a direction to renew a renewable lease out of the rents and profits or by mortgage, there is great difficulty in making any arrangement as regards the interests of the different parties to take in succession. "If a mortgage be resorted to," said Lord Langdale, in a late case (c), "then, if the tenant for life should be held to be bound only to keep down the interest on the mortgage, the person in remainder may become entitled to the lease when near its expiration, and yet have to bear the whole of the principal money raised by mortgage for its former renewal; the remainderman will thus bear a considerable burthen without deriving a corresponding benefit (d); and if the tenant for life pay the interest merely, and no fund is provided for paying off the mortgage, the estate may be wholly exhausted by the accumulation of moneys charged on the estate for the purposes of renewal. And to attempt to make the parties bear the burthen in proportion to their enjoyment, is attended with great difficulty, as in many cases it is impracticable to arrive at anything like an accurate calculation of what ought to be considered as the relative liabilities of the parties. It is almost impossible to determine this *ab ante* without the hazard of determining wrong" (e). His Lordship in that case gave countenance to the plan of raising the amount to be contributed by the tenant for life by means of an insurance, which had been adopted by Mr. Baron Alderson (f).

A direction that the fines and expenses shall be raised by *sale*, without more, may be a strong argument for saying that the corpus of the

(a) Vice-Chancellor Wigram, 5 Hare, 462. His Honour declined to express any opinion as to whether there is any difference as to the application of the general rule between cases which arise under settlements by deed and cases under wills; *ibid.* 464.

(b) V. *ibid.* p. 464.

(c) *Greenwood v. Evans*, 4 Beav. 44. In that case it was proposed that a fund should be provided by means of an insurance on the lives of the *cestui que vies*; a reference to the Master was directed, so that that proposal

might be carried out if found to be consistent with the practice of the court. In *Reeves v. Creswick* (3 Yo. & Coll. p. 715), before Mr. Baron Alderson, the principle of insurance was adopted and carried out; *sed v. Grantley v. Garthwaite*, *supra*.

(d) See *White v. White*, 9 Ves. 557, Lord Eldon.

(e) And see the dict. of Lord Eldon, 9 Ves. 556-7; *et v. infra*, *Jones v. Jones*.

(f) In *Reeves v. Creswick*, *supra*.

estate is to bear it, and that the estate is intended to be settled subject to the subordinate direction that it is to undergo a perpetual diminution, with a view to a part being preserved (a).

The Vice-Chancellor Wigram had occasion to consider this subject in the late case of *Jones v. Jones* (1846), so often referred to;—the testator having renewable leases for lives and for years, directed that the fines for future renewal should be raised out of the rents and profits or by mortgage,—his Honour, in giving judgment, used the following expressions in reference to the general question:—"The tenant for life having paid the whole, if he has not the whole enjoyment, his estate will have a lien for whatever ought to be paid by the remainderman. The case is one of much greater difficulty where the renewal is made by or at the expense of the remainderman, or (which, as to this difficulty, is the same thing,) where the trustee is to raise the money and to charge it on the corpus; in that case, unless some course be taken to protect the interests of the remainderman, the tenant for life may enjoy the estate during his whole life, without bearing any greater charge than the interest on the debt created by the renewal, and he may leave no assets to pay his proportion of the principal money; this is one of the difficulties noticed by Lord Eldon, in *White v. White*: that inconvenience may perhaps be avoided by requiring the tenant for life to give Security, a course to which Lord Eldon points in that case. The late cases of *Greenwood v. Evans*, and *Reeves v. Creswick* (b), are authorities which recognise the course of giving security as a course proper to be pursued where no other means are open for providing for a proper apportionment." His Honour, in answer to the difficulties which would present themselves in that case, said, "The tenant for life may, in the first instance, be required to give security for an amount calculated upon the assumption that his life will last during a portion of the renewed lease; if he should die within the time during which it was assumed that his life would last, the security would of course be more than sufficient to satisfy his proportion of the fine, and it would be void for the excess: if he outlived that time he might, if necessary, be called upon to give a further security, to cover the additional proportion then to be attributed to him" (c). It is therefore left to the judge in each particular case, where there

(a) Vice-Chanc. Wigram, *Jones v. Jones*, 5 Hare, 461.

(b) *Ubi supra*.

(c) *Jones v. Jones*, 5 Hare, pp. 466-7. The decree declared that the tenant for life ought to contribute to such renewal, and to the fines, &c. attending the same, in proportion to such

benefit as he had derived or might derive from such renewals; and the Master was to inquire what sum ought to be paid or secured by the tenant for life, in respect of his proportion, and what security he ought to give in respect of the same, without prejudice to whether the tenant for life might not be ultimately

are no specific directions, to make such an arrangement as will, in the best manner that circumstances will admit, secure a renewal, and impose the burthen upon those who are to have the enjoyment, in proportion to the actual benefit that they may receive from such renewal. If the tenant for life should die during the continuance of the existing lease, it would seem that he is in no case liable for any of the expences of the anticipated renewal, unless the burthen is expressly imposed upon him in the whole or in part: none of the cases seem to justify that the tenant for life should be made to pay on the basis of any calculation of value looking to the renewals as making one estate, if indeed any such calculation could be made.

Where the remainderman renews, on the omission of the tenant for life, he having been bound to do so, whether he actually could or could not have renewed, his estate must pay a proportionate part of the fine paid for the renewal (a).

If the rents have been directed to be accumulated with reference to a renewal which turns out to be impracticable the accumulation will be stopped, and the tenant for life will receive the whole of the rents (b).

As regard Incumbrances on the estate, the tenant for life is bound to keep down the interest, and, however hard upon him, to pay any arrears that may have accrued prior to his life estate. If the estate be sold, the tenant for life will have the interest of what remains of the money produced by the sale: if the mortgage be paid off he is bound to contribute in proportion to the benefit he derives from the liquidation of the debt; the old rule that he should pay a gross definite sum, equally as in the case of renewals, is entirely at an end (c). The doctrine in regard to the keeping up of a charge paid off by the tenant for life has been stated in a former page (d).

Where the tenant for life had purchased the land-tax, of which he took an assignment to himself, it was held to be part of his personal estate, though he was entitled to the reversion in fee subject to an estate tail in his children (e).

liable to pay more or less than the amount for which the security should be given: *ibid.* p. 468.

(a) *Colegrave v. Manby*, 6 Mad. 86-7; *Bennett v. Colley*, 5 Sim. 181; 2 My. & K. 225.

(b) *Tardiffe v. Robinson*, stated 2 Russ. 246, and 6 Mad. 83, n.; and *Richardson v. Moore*, stated *ibid.*

(c) Lord Alvanley, *Penrhyn v. Hughes*, 5 Ves. 106-7; *White v. White*, 9 Ves. 554; *v. infra*, p. 574. Mr. Justice Story, relying

on some American cases and *Thynn v. Duvall*, 2 Vern. 117, considers that where the tenant for life and remainderman join in a sale without any agreement as to the division of the purchase-money, the principal of the purchase-money is to be divided between them in proportion to their respective interests, to be calculated on the tables as to the probabilities of life; *Story on Equity*, § 448 a.

(d) *Supra*, pp. 344-5.

(e) *Trevor v. Trevor*, 2 My. & K. 678, *et v. sup.* p. 345.

It may be well here again to advert to the question that is continually arising as between the tenant for life and the remainderman as to a Residue of a testator's estate given to several persons in succession where it consists, in part or in the whole, of property that is wearing out, or of a permanent fund such as Bank Stock, £4 per Cents. or other stock not being £3 per Cents. which latter description of stock is alone recognized by the court as the fund for permanent investment (a).

The general rules on this subject have been adverted to in treating of the duties of trustees in reference to indefinite trusts. Where there is no direction, the general rule, as settled in *Howe v. Lord Dartmouth*, applies (b): but, as before stated, the general principles of sound construction require, that, where an intention is to be gathered from the particular language of the will that although the residue of the personal estate is given in succession to several persons, and it consists of property that is wearing out, yet a portion of the residue shall remain either absolutely or during a limited period in the state in which it was at the testator's death, there such intention should be acted upon (c). It may be well here to state more particularly some of the late cases that have occurred in reference to these rules.

As regards the right of tenant for life to enjoy the actual income accrued, upon the intention to that effect to be collected from the will, the following are the most important modern authorities, and in which almost all the previous cases bearing on the point are referred to.

In *Vaughan v. Buck*, before Lord Lyndhurst (1841) (d), the testator

(a) £3 per Cent. Consols is the fund which is usually selected by the court for investment, but £3 per Cent. Reduced is frequently resorted to for convenience, as where quarterly payments have to be made.

(b) *Supra*, p. 42-3. It may be useful to add, in addition to the cases there cited, *Fearn v. Young*, 9 Ves. p. 552, where Lord Eldon says, "It is clear if the testator had died possessed of a bond, by the condition of which the money had been secured to him, to be paid in two or three years after his death without interest, between the tenant for life and the remainderman, a value must have been put upon it at that time; and of its present worth, at least, the tenant for life would be entitled to interest." In the case itself Lord Eldon gave interest from the death to the tenant for life: see the additional note, No. 1. It should be noticed that in *Mehrtens v. Andrews*, 3 Beav. p. 72, where there was an express direction for conversion, and part of the property consisted of a leasehold estate to which it was alleged the

testator had in fact *no title*, Lord Langdale directed that a value should be put upon it in reference to the actual enjoyment, not its intrinsic value at the end of the year from the death, as that might have been found to be nothing. Where the property consists of a redeemable annuity not saleable it seems the proper course is to invest the payments; *Crawley v. Crawley*, 7 Sim. 427. Mr. Cooper, in his notes to *Turner v. Newport*, 1 Rep. temp. Cottenham, has collected many of the cases on this subject.

(c) Vice-Chancellor Knight Bruce, *Caldecott v. Caldecott*, 1 Y. & Coll. C. C. 322, referring to *Bethune v. Kennedy*, *Collins v. Collins*, and *Pickering v. Pickering*, stated *infra*; the general rule is also stated to the same effect by the Vice-Chancellor Wigram, in the late case of *Pickup v. Atkinson*, 4 Hare, 628, cited *supra*, p. 43; and see *Turner v. Newport*, *supra*.

(d) 1 Phillips, 75.

first gave to his wife the whole of his property during her life, after her death the whole was to be equally divided between her children, excepting a sum to apprentice his eldest and second son; he then gave to his two sons Henry and Charles, on their coming of age, 100*l.* each, and the same to his daughters, his furniture he gave to his wife; then the will proceeded as follows: "The property, my house, 21 North Street, let on lease at 48*l.* a-year, 1000*l.* New £4 per Cents., 1500*l.* in the £3 per Cent. Consols, 645*l.* in the Threes Reduced, and 24*l.* per annum in the Long Annuities; all this I give to my wife with the residue and interest, should there be any." The testator, at his death, had another leasehold house in the same street, purchased after his will; he had also some gas-company shares, and he had increased the amount of his stock in the funds. The Vice-Chancellor of England declared that the widow was entitled during her life to the income of the general residue, and that the stock and the Long Annuities mentioned in the will, or such of them as the testator should appear to have possessed at his death, formed part of his general residue: the shares in the gas company, and the 24*l.* a-year Long Annuities, and the leasehold houses were ordered to be sold, and the proceeds to be invested. The appeal was against the latter part of the decree; it was contended that the last clause gave to the widow the enumerated particulars absolutely, or at least that it gave her the right, contrary to the general rule, to the enjoyment of them in specie for her life. Lord Lyndhurst held that the natural construction of the will was to consider the last clause as being an enumeration in detail of what he had before given in general terms, so that it was not to be construed to be a distinct gift, and the will would run as if he had given the whole residue enumerating the particulars in the first clause, so that the case was similar to *Bethune v. Kennedy* (a); the Lord Chancellor therefore reversed so much of the decree of the Vice-Chancellor as directed that the Long Annuities and leasehold house mentioned in the will should be sold, thereby giving the income in specie to the widow.

A testator gave to his wife, during widowhood, the interest of "all the money I have or may possess in the funds or other securities;" the widow was held to be entitled to the dividends on the testator's £3½ per Cent. Stock, East India Stock, and Danish Bonds; the interest of his other property was also given to the widow, that was directed to be converted (b).

(a) 1 My. & Cr. 114, cited *supra*.

(b) *Per* Vice-Chancellor of England, *Oakes v. Strachey*, vii. Jur. 433; 13 Sim. 414, dis-

tinguishing it (p. 417) from *Mills v. Mills*, 7 Sim. 501.

The Vice-Chancellor of England, in the late case of *Chambers v. Chambers* (1846), reviewed the authorities on this subject. His Honour, after observing that there appeared to have been formerly some fluctuation of opinion on the question, stated that Lord Eldon had laid down the rule very distinctly, in *Howe v. Lord Dartmouth*; but that Lord Cottenham seemed to have had a disposition to escape from it. In *Pickering v. Pickering* (a), said his Honour, where there was an enumeration of particulars, Lord Cottenham thought that as the enumeration showed an intention to give the things *specifically*, the aggregate, though given merely as a residue, was to be treated differently from what it would have been, if the simple word "residue" had been used. That case, continued his Honour, and all the other cases that are deviations from the rule laid down by Lord Eldon, can only be supported by the particular expressions in each will. In *Bethune v. Kennedy* (b), his Honour observed, there was first of all a gift of a sum of Long Annuities, and in the set of words which constituted the gift of the residue there was a reference to money in the funds and to copyhold estates, which might be a very good reason for saying in that particular case Lord Eldon's rule should not be adopted. In the case of *Collins v. Collins* (c), continued his Honour, which was decided by Sir John Leach, we find the emphatic words, "in every shape and in whatever manner it is situated," which also might have justified the departure from Lord Eldon's rule. In *Collins v. Collins* (d), which came before the Vice-Chancellor Knight Bruce, the testator directed the whole of the property to be sold in the event of the first taker dying without leaving issue to attain the age of 21 years: Now, observed his Honour, there cannot be two sales of the same property, therefore it was manifest that the directing the property to be sold on the happening of a future and contingent event prevented the operation of the general rule.

With regard to the case itself, it arose upon a will containing very special clauses. The Vice-Chancellor held that, independently of the general rule, the actual words of the will were such as to show that

(a) 2 Beav. 31, confirmed on appeal, 4 My. & Cr. 289. It is to be observed that in *Daniel v. Warren*, (2 Y. & Coll. C. C. page 293,) the Vice-Chancellor Knight Bruce expressed his approbation of the principle laid down in this case (pp. 298-9), and decided the case before him on the intention to be collected, that the leaseholds should be enjoyed by the tenant for life *in specie*.

(b) 1 My. & Cr. 114.

(c) 2 My. & K. 703; and see *Alcock v.*

Sloper, 2 My. & K. 699. It appears however that what is reported in *Collins v. Collins* as a decision, was a dictum only, and that when the case came before Lord Langdale, a sale was ordered *by consent*; 1 Phillips.

(d) *Goodenough v. Tremamondo*, 2 Beav. 512, stated *infra*, was a case to the same effect; see as to this case 4 Hare, 631, where *Hinves v. Hinves*, 3 Hare, 609, stated *infra*, and several of the cases before cited are observed upon.

the person who was to take in remainder was to take *that thing which* was to be enjoyed in the first instance by the tenant for life; but as regards the leaseholds, the person to take in remainder could not take the same if the leases under which the premises were held had expired in the lifetime of the tenant for life: therefore, said his Honour, by force of the rule laid down by Lord Eldon, and by force of the particular words to be found in this will, my opinion is that the leaseholds must be sold (a). It was declared that the leaseholds should be sold and the proceeds invested in the £3 per Cent. Consols, and the dividends paid to the tenant for life during her life; the question as to any bygone payments was not adverted to, so that the case forms no precedent on that question (b).

In a late case (c), the Vice-Chancellor K. Bruce decided, on the authority of *Alcock v. Sloper*, *Collins v. Collins*, *Bethune v. Kennedy*, and *Pickering v. Pickering*, that where the property given consisted in part of leaseholds and Long Annuities, and there was an express power to the trustees to sell the leaseholds at such time as they in their discretion should think fit, the gift must be considered as specific both as regards the long annuities as well as the leaseholds—in other words, the tenant for life was entitled to enjoy the income of both *in specie*—though independently of authority he would have been inclined to a contrary decision as regards the Long Annuities. In the case of *Goodenough v. Tremamondo* (d), the testator gave the residue of his estate to trustees in trust to permit the *rents*, issues, profits, &c., thereof to be received by his son Richard for his life, and after his death, upon trust for the two daughters of his son, when they should attain 21, with power for the trustees after the death of the son to apply the rents, &c., towards the maintenance of the daughters until the vesting of their shares: on the force of the use of the word *rents*, there being no other property but leaseholds to which it could be applied, it was held by Lord Langdale, that the tenant for life was entitled to the enjoyment of the income of the leaseholds *in specie*: and in the later case of *Harvey v. Harvey*, it was held by the same learned judge, that a direction that the tenant for life should have the full and entire enjoyment of the testator's real and personal estate,

(a) *Chambers v. Chambers*, 15 Sim. 189; the Vice-Chancellor of England decided, *Benn v. Dixon*, 10 Sim. 638 (though his Honour appears to have approved of *Pickering v. Pickering*) on the same principle: but the authority of that case, and of *Mills v. Mills*, 7 Sim. 501, has been disputed; see 3 Hare, 611.

(b) It was heard as a short cause.

(c) *Burton v. Mount*, xii. Jur. p. 934; the same learned judge also followed *Alcock v. Sloper*, 2 My. & K. 699; *sup.* 42, in *Daniel v. Warren*, 2 Yo. & Coll. C. C. 290.

(d) 2 Beavan, 512.

entitled the tenant for life to the income of the testator's leaseholds *in specie* (a).

In *Sutherland v. Cooke* (b), the testator gave "all his money in the Long Annuities," money in the funds, securities for money, debts and the residue of his estate, to trustees in trust by sale of a sufficient part to pay his debts and legacies, and subject thereto "to pay to or permit and suffer my said brother Robert Cooke to receive and take the dividends and interest *thereof* for his own use and benefit during his natural life, and after his death to permit Hannah, the wife of Robert Cooke, to receive the dividends for her life," and after the decease of the survivor he gave the *principal of the said trust fund*, and the stocks, and securities, wherever the same should be invested, to the children of his brother George Cooke. It was contended, principally on the authority of the last-cited case (c), that the tenants for life were entitled to the enjoyment *in specie* of the income of the testator's Long Annuities, and also of his leaseholds. No leaseholds were referred to in the residuary clause, and, as the Vice-Chancellor observed, they would not produce dividends or interest. The Vice-Chancellor K. Bruce, in reference to the use of the word dividends in *this* will, considered that it could not be considered as having the effect of entitling the tenants for life to the enjoyment of the income of the Long Annuities. His Honour thought it would be raising distinctions of a dangerous nature to hold that there was anything of sufficient substance in this case to justify a departure from the general rule.

In the late case of *Hinves v. Hinves*, before the Vice-Chancellor Wigram, (1844) (d), the testator, after giving the whole of his property to his executors, and directing them to dispose of it in the manner after pointed out and to pay all his debts, bequeathed as follows:—"viz., to my wife Sarah the hole (*sic*) income of my property of all description whatsoever for her natural life at her own disposal, but not to sell without the hole consent of all parties." After some other bequests and directions, he gave the residue of his property to his five brothers. The testator by a codicil left to his wife all the benefit of his houses at Gravesend—the main question was whether the widow was entitled to the specific enjoyment of such part of the residuary property as consisted of leaseholds and Long Annuities during her life.

(a) *Harvey v. Harvey*, 5 Beavan, 138-9; and see *Att.-General v. Potter*, *ibid.* 164.

(b) 1 Coll. 498; and see *Sargent v. Roberts*, xii. Jur. 429-30.

(c) Also *Alcock v. Slopier*, and *Bethune v. Kennedy*, *supra*, and *Vincent v. Newcombe*, Younge, R. 599.

(d) 3 Hare, 609.

Sir J. Wigram, in that case, examined all the authorities in which up to that time the tenant for life had been held, upon the intention to be collected from the will, to be entitled to enjoy the income of the testator's property *in specie* during his life, noticing also those where a contrary decision had been made (a); and he decided in this case, that looking to the directions the testator had given for the enjoyment of his property by the *cestuis que trust* and for the management of it, he could not hold that the Long Annuities and leaseholds were not to be enjoyed *in specie* without in effect deciding against the cases he had referred to.

In the still later case of *Hubbard v. Young* (b), the testatrix after giving all her property, with some exceptions, to her granddaughter, and then providing that in case she should die without leaving issue, all her property should go over to certain other persons, proceeded thus:—"If my daughter and myself should die before my granddaughter is of age, it is my desire that Mrs. Jane Hubbard may have the care of her till she comes of age, at which time she is to receive the dividends herself, but not the principal; that is not to be spent; my property is in the Bank and India House." The question was whether the granddaughter, as tenant for life, was entitled to the dividends *in specie* of 1000*l.* East India Stock, and 3090*l.* £3 10*s.* per Cent. Stock, part of the testatrix's estate; it was held that she was. According to the doctrine of the present day, said Lord Langdale, the question does not depend upon the legacy being *specific* or not; but you are to collect from the will whether the testator intended that the property should at all events be enjoyed by those in remainder after the expiration of the prior interest. His Lordship remarked that the fund was permanent, though not such a species of investment as the court recognises; and his Lordship thought upon the words of the will the granddaughter was to have the dividends of the property as it stood for life, and the others were to take the *same*, that is the identical property after her, and that the rule of conversion, though of great importance in many cases, was of very little importance in the present.

(a) See particularly pp. 612, 613. The Vice-Chancellor particularly notices (p. 612) those cases in which the disposition of the personal estate being in the same clause as contained a devise of land has been held not to be material, and where it has been held to be material, as in *Bethune v. Kennedy*, before Lord Cottenham. His Honour said it had always appeared to him that in the more mo-

dern cases (unless, perhaps, the cases of *Mills v. Mills*, 7 Sim. 501, and *Benn v. Dixon*, 10 Sim. 636, must be excepted) the court in applying the rule had leant against the conversion as strongly as was consistent with the supposition that the rule itself (established by *Howe v. Lord Dartmouth*) was well founded, 3 Hare, 612; *et v. supra*, p. 554.

(b) 10 Beav. 203.

Another question arises in these cases, as before adverted to (a), namely, what income, or what amount of interest, and from what time is to be allowed to the tenant for life, in cases where it is admitted that the residue must be converted. Sir James Wigram has reviewed the cases relating to this subject, particularly in the following case, more especially in regard to the right of the tenant for life to receive the income which has actually accrued upon such part of the residue as has been found to be or has been placed within the year after the testator's death in a proper state of investment. "The court, in these cases," said the Vice-Chancellor, "considers the interest of the legatees as the general and primary object of the testator, and treats his direction to convert and invest as a particular and secondary object—a mode, in fact, of carrying the primary object into effect and nothing more; in many cases it would be impossible to get in the property in a reasonable time, in some it could only be done at a ruinous loss to the estate: to obviate this and other inconveniences," continued his Honour, "the court feigns the property to be converted at the end of one year from the death, and from that time at least gives to the tenant for life the precise income which would have been produced if the property were actually so converted and in its proper state of investment" (b).

In *Taylor v. Clark* (c), the case above referred to, part of the testator's property consisted at his death of capital in a partnership-business in Portugal, which according to the will was to be withdrawn by instalments in the course of three or five years at the discretion of his executors, it bearing interest in the mean time—the testator by his will gave the whole of his residuary estate in Great Britain and elsewhere to trustees in trust to sell and invest the same in the English funds, and to pay the interest as the same should become due, to his wife for life, and after her death the whole of the residuary estate was given to other persons. The principal question was whether the widow was entitled to the whole or any part of a sum of 3378*l.*, of which 2827*l.* arose from interest of the capital of the partnership, and 551*l.* from interest of simple-contract debts; though other questions arose. It was contended, on behalf of the parties interested in the residue, that the widow was not entitled, according to the intention as expressed in the will, in respect of the property in

(a) Most of the cases on the subject now under consideration are collected by Mr. Hill, on *Trustees*, p. 390, *et seq.*

(b) *V. supra*, p. 44; and see 1 Hare, pp.

167-8, and *Gibson v. Bott*, and *Walker v. Shore*, 19 Ves. 387, there cited.

(c) 1 Hare, 161, *supra*, 44

Portugal, to any thing, until it was actually got in and invested. The Vice-Chancellor said, that to such a strict and literal interpretation of the will all authority and daily experience were opposed; and his Honour, following *Sitwell v. Bernard*, held that the widow was not excluded from taking the interest, to be computed upon the supposition that the whole was converted at the end of one year, not saying however that she would be entitled to receive such interest until the property in respect of which it was payable was actually gotten in: his Honour also held that the widow was not entitled to the actual interest received on the testator's property in Portugal after the first year from the testator's death; he could not, he said, treat the testator's directions as to his property in Portugal as of the essence of his will, and at the same time treat as merely directory those other parts which according to a strict interpretation would exclude her from any benefit until the property was gotten in; it was only by treating the directions for realizing and investing the property as subordinate to the testator's primary object of benefiting his legatees, that the tenant for life, under the general rule of the court, gets an income from the property *before it is actually converted* (a).

As to the question, What are the rights of the residuary legatee for life during the first year after the testator's death, where the residue is directed to be invested in a particular manner, and the income produced by such investments is to be paid to the residuary legatee? The Vice-Chancellor in the case last referred to adverted to the four possible solutions of this question that may be suggested, and in favour of each of which the highest authorities, and of modern date, may be cited (b). They are as follow, namely—1st. The tenant for life may be held to be entitled to nothing until the expiration of a year from the testator's death in whatever state of investment the property may be (c); this mode of disposing of the question, it may be observed, though objectionable in principle as is hereinafter noticed, has this recommendation, that it affords a definite rule, applicable to all cases. 2nd. He may be entitled to the income of such parts of the estate as are in a proper state of investment, or may become so invested in the course of the year, but not to the income of property not so invested, that part of the income being applied as capital (d):

(a) *Ibid.* p. 170; and see *Tucker v. Boswell*, 5 Beav. p. 607; *Entwistle v. Markland*, 6 Ves. 528, n.: and *Walker v. Shore*, 19 Ves. 387.

(b) *Ibid.* v. *supra*, p. 44.

(c) *Stott v. Hollingworth*, 3 Mad. p. 161; *Taylor v. Hibbert*, 1 Jac. & W. 308; and the

Vice-Chancellor Wigram thinks that Lord Eldon's language, in *Sitwell v. Bernard*, supports this proposition (1 Hare, 171).

(d) *La Terriere v. Bulmer*, 2 Sim. p. 18; see, as to this case, Mr. C. P. Cooper's note, 1 Rep. temp. Cottenham, p. 184.

this is Sir A. Hart's rule in *La Terriere v. Bulmer*, which, as the Vice-Chancellor Wigram observed, is supported by *Gibson v. Bott* (a); it is however, as is more fully stated hereafter, liable to this obvious objection, that it makes the income of the tenant for life depend, at least to some extent, upon the activity and regularity of the trustees in making the investments. 3rd. The tenant for life may be entitled to the income of the property for the first year in its existing state (b); a rule, as hereafter observed, that would give to the tenant for life the whole residue in the event of a testator dying in the same year that the Long Annuities will expire if he should have no other property. 4th. The tenant for life may be entitled for the first year to so much interest as would have accrued for that year, on such a sum of £3 per Cent. stock as the residue would have produced if invested in such stock at the end of the year; it was on this principle that Lord Lyndhurst decided *Dimes v. Scott* (c). His Honour having stated the authorities, expressed his approbation of Sir A. Hart's doctrine in *La Terriere v. Bulmer*, referred to above; and so far as that decision was impugned by *Dimes v. Scott*, the latter decision, his Honour thought, was to be regretted. In reference to the 3rd and 4th modes of disposing of the question his Honour observed: "To give to the tenant for life—as in *Angerstein v. Martin*, and *Douglas v. Congreve* (d)—the income of property not in a proper state of investment, is to give him," said his Honour, "what the testator has neither given him nor intended him to have (e): to give to the tenant for life an income during the first year, calculated upon the principle of a supposed conversion of the property into £3 per Cent. stock, is to make a distinction between the case of a residuary legatee and all other general legatees: *Dimes v. Scott*, as far as that point is concerned, is a case of first impression." The Vice-Chancellor in the case before him decided, following to this extent *La Terriere v. Bulmer*, that the widow was entitled to the income actually produced by such part of the property of the testator as was invested according to his will, from the time of such investments; but, not following that case so far as Sir A. Hart had decided, that the income before such investment forms part of the

(a) 7 Ves. 95.

(b) *Douglas v. Congreve*, 1 Keen, 410; and see *Angerstein v. Martin*, Turn. & R. 232 (1 Hare, 171).

(c) 4 Russ. 195.

(d) *Ubi supra*. Lord Langdale has followed his decision in *Douglas v. Congreve*, in the late case of *Robinson v. Robinson* (Nov. 1846), stated in the additional note, No. 2.

(e) Mr. Jarman appears to think that the

principle acted upon in the case of *Douglas v. Congreve* is the more convenient rule as well as the most just, but qu. to whom? vol. i. p. 542; Mr. Jarman's statement of the case of *La Terriere v. Bulmer*, (p. 542,) it may be observed, does not appear to be quite correct. *Fitzgerald v. Jervoise*, 5 Mad. 25, applies to a direction for conversion after the death of a third person (v. *ibid.* p. 542).

capital, his Honour did not exclude the widow, the tenant for life, from any interest in respect of that part which was not in a proper state of investment, though he held that she was not entitled, during the first year, to a larger income in respect of such part of the testator's property as was not so invested than the property would have produced if it had been invested according to the will; following in that respect *Dimes v. Scott* (a).

This case has been called to the attention of the court, in the more modern cases of *Caldecott v. Caldecott* (b), *Wrey v. Smith* (c), *Sparling v. Parker* (d); to his Honour's attention in *Pickup v. Atkinson* (e), and to Lord Langdale's in *Robinson v. Robinson*, (1846) (f). In the first of these cases the Vice-Chancellor Knight Bruce gave to the tenant for life the income of such parts of the residue as were at the testator's death, and had remained in a proper state of investment (g); so that the rule appears to be settled to this extent, that where conversion is directed expressly or is to be implied, the tenant for life will enjoy, during the first year, the income which shall accrue on such part of the property as is at the death or shall be placed, during the interval, and remain in a proper state of investment. Lord Langdale, in *Robinson v. Robinson*, seems to have followed, though without any express reference to the point, his decision in *Douglas v. Congreve* (h). In the case of *Wrey v. Smith* (i), the testator gave his money, securities for money, moneys in the funds, chattels, and all other his personal estate not otherwise disposed of, to trustees, in trust with all convenient speed to sell and convert into money such parts as they or the survivor of them or the executors of such survivor or their or his assigns *should think proper*, of any moneys in the funds, and to call in and convert into money all such parts of the rest of his said general personal estate as should not consist of money, and out of his said general personal estate and the moneys to arise thereby, to pay

(a) 1 Hare, p. 175. Such appears to be the effect of the judgment, taking the marginal note as explanatory of it.

(b) 1 Yo. & Coll. C. C. 320.

(c) 14 Sim. 209.

(d) 9 Beav. 526.

(e) 4 Hare, 626.

(f) See additional note, No. 2.

(g) 1 Y. & Coll. C. C. 324. Interest not exceeding four per cent. was given upon such parts as were not in a proper state of investment, as stated in a subsequent note, v. *infra*, p. 563; four per cent., it is to be observed, was given in *Walker v. Shore*, 19 Ves. 387; see 1 Yo. & Coll. C. C. 321, n.; *Wrey v. Smith*

is stated in the text. The points decided in the cases of *Sparling v. Parker*, and *Pickup v. Atkinson*, relate to different questions; in *Sparling v. Parker*, upon the special circumstances, as after stated (*inf.* p. 562, n.), the actual income was given from the death; in *Pickup v. Atkinson* the question was whether there was to be a conversion; the special circumstances were not considered as sufficient to give the tenant for life the right to the enjoyment *in specie*.

(h) The question does not appear to have been specifically raised in *Turner v. Newport*, before Lord Cottenham, referred to *infra*.

(i) 14 Sim. 202.

his, the testator's, debts and legacies. The testator then directed that the trustees, and the survivor, &c., should invest the residue of the moneys to arise from his said general personal estate which should remain, after answering those purposes, in their or his names; and that they might from time to time alter and vary, at their discretion, as well the same stocks, funds and securities, as also such of the stocks, funds or securities as they should not think proper to sell and convert into money. The Vice-Chancellor of England observed on these words, that he understood that they gave the trustees an option generally as to what parts of the testator's residuary estate they should sell and convert into money, and what parts they should leave unsold and unconverted; but the first direction to them was to sell and convert the whole into money with all *convenient speed*; so that they were to exercise a discretion as to what was convenient speed. The testator then directed that the trustees should stand possessed of the testator's said trust moneys, stocks, &c., which should be purchased as aforesaid, and which should remain unconverted, upon trust, during the life of the plaintiff, to pay the interest, &c., *as and when the same should be received*, to such persons as she should appoint, but without anticipation; and in default of appointment, to her own hands, for her separate use. It was urged by the plaintiff that the Long Annuities, East India Stock, and Bank Stock, of which the estate in part consisted, was not required for the payment of debts and legacies, so that no sale was required. Nothing appeared as to whether the trustees had exercised any discretion in regard to what was convenient speed, beyond the fact that in Sept. 1843 and Jan. 1844, (the testator had died in April, 1843,) the trustees had sold the Long Annuities, &c. above referred to. The Vice-Chancellor said, "It was plain that if the trustees, having exercised their discretion as to what was a convenient time for selling or converting any part of the testator's residuary estate, have not found such a time, the income of that part belongs to the tenant for life, as well as the income of that part which, in the exercise of their discretion, they have found a convenient time to sell or convert; and the decree declared that the plaintiff was entitled to such interest as *actually accrued* upon the clear residuary personal estate of the testator during the first year after the death of the testator" (a). The decision, as will have been observed, turned upon the peculiar penning of the will.

(a) In this case, *Caldecott v. Caldecott*, amongst other cases, was cited; but it is to be remarked that, according to the Vice-Chancellor's construction, there was no part of the property which was not, in reference to

the terms of the will, in a proper state of investment; the terms of the trust were, as will be seen, special. In *Sparling v. Parker* (1846), *supra*, *et v. ante*, p. 43 (now reported in 9 Beav. p. 524), a similar decree, without

Interest has been given, in some cases, to the tenant for life, upon the unconverted property, at four per cent. (*a*). Where a portion of the testator's estate consisted of a debt, and the debtor's estate was insolvent, and for some years nothing was recovered, either for principal or interest, but at length a sum was realized, Lord Cottenham held that the proper order, as regards the tenant for life, was to ascertain what the bond would have realized if the debtor's estate had been administered at the end of a year after the death of the testatrix, and to allow the tenant for life interest at four per cent. on that amount (*b*): though this was not a direct decision upon the point as regards the amount of interest, for it was in part founded on a suggestion of the counsel of one of the parties, which was acquiesced in by the counsel for the other parties, it may be taken as an indication of his Lordship's opinion as to the rate of interest to be given. Where the executors or trustees have an option to invest on real or government securities, and they have omitted to do either, it is the settled practice in the court of the Master of the Rolls to allow interest at three per cent. only, or such interest as would have been produced by an investment in the £3 per Cent. Consols, though there is no such settled practice in the other branches of the court, and there are authorities which would give to the tenant for life the larger interest which might have accrued from an investment on real security, according to the option given to the trustees (*c*). It appears therefore that the

reference to the general doctrine, was made on the intention to be collected upon the construction of the will, giving the tenant for life the income produced since the death. The property was not of a perishable nature; there was nothing in the will pointing at an immediate sale and investment; the trustees were to sell and invest the personal estate, "as soon as may be," in the purchase of lands most convenient to the estates the testator already possessed; see p. 527.

(*a*) *Caldecott v. Caldecott, and Gibson v. Bott*, *supra*, p. 44. The decree in *Gibson v. Bott*, *ibid.* contains a special declaration as to the reason of the exception as to the leasehold estate, on which Lord Eldon directed that a value should be put, and that the tenant for life should have four per cent., from the testator's death, on the value; but it does not appear from the decree what rate of interest was given on the residue of the property, between the testator's death and the conversion; see 1 Y. & Coll. C. C. 320, n. By the decree in *Caldecott v. Caldecott*, on further directions, (1 Y. & Coll. C. C. 738,) as regards the interest on that part of the property not in a proper state of investment, it was declared, that as to the

shares in the fire and life insurance companies, the plaintiff was entitled to so much of the dividends, &c. as had accrued since the death of the testator as would not exceed four per cent. per annum on the sums ascertained to be the value thereof respectively, at the end of one year from the testator's death, and to so much of the dividends, &c. thereafter to accrue on the same until they should be sold, as would not exceed interest at the same rate; the same principle was applied to the Bank Stock which had been sold; and see the remainder of the decree, p. 738-9; and see the Vice-Chancellor Knight Bruce's judgment in *Sutherland v. Cooke*, *sup.* p. 44; 1 Coll. 505; his Honour, it should be stated, added "and I think that, consistently with *Hove v. Lord Dartmouth*, and *Dimes v. Scott*, I may do so in the present case."

(*b*) *Lord C. Turner v. Newport*, 2 Phill. 18, on appeal: S. C., 1 C. P. Coop. R. p. 147: no question was raised as to the time from which the interest should begin to run; in fact the Master was directed to make the calculation from the end of one year.

(*c*) See *Robinson v. Robinson*, additional note No. 2. In *Marsh v. Hunter*, 6 Mad. 295,

question as to whether the tenant for life shall be entitled to the actual income of the property not converted, or what rate of interest, if any, he shall receive on the unconverted portions of the residue, not being in a proper state of investment, during the first year, is not definitively settled.

If the question—as to what amount of interest the tenant for life should receive, and from what time, where the residue given in succession consists of various particulars, some of which are wearing out or otherwise not in a proper state of investment—had always come for decision with reference to the mere matter of right as between the tenant for life and those in remainder, perhaps there would not have been any discrepancy in the decisions, whether there were an express direction for conversion or not. Where a residue, consisting of particulars of the above description, is given *simpliciter*, without any indication of intention beyond what the direction that the residue shall be enjoyed in succession implies, it is obvious, that the enjoyment of the property, which is wearing out, cannot be secured to each of the persons to whom it is given, unless it be converted (*a*); the law therefore implies a direction for conversion, though it be not expressly given (*b*): as the will speaks from the death, the title of the tenant for life must, it would seem, vest at the death; if so, it is obvious that the conversion, if it be practicable, ought to take place immediately on the death of the testator. In some cases, for instance, where the residuary estate consists of Long Annuities only, this may be done without any loss or sacrifice; and putting loss and sacrifice out of consideration, a conversion, in many cases, *might* be made immediately; and where it is delayed only to prevent a loss from falling on the *corpus* of the estate, that ought not, it would seem, in a question of

Sir J. Leach held that the executors were only liable for the principal sum omitted to have been invested; and Sir J. Wigram, in *Shepherd v. Moulds*, 4 Hare, 505, followed that case; the Vice-Chancellor Knight Bruce, in *Rees v. Williams* (1847), also decided in conformity with *Shepherd v. Moulds*: none of these cases were cited in *Robinson v. Robinson*, though Lord Langdale appears to refer to them in his judgment, and perhaps the reference to the case in 4th Hare ought to be to *Shepherd v. Moulds*. It would seem to follow from these cases, if they should be taken as the law, that where there is an option to invest in real or government security, and no investment is made, the tenant for life ought not to be confined to the interest which would have accrued

on an investment in the funds. This point seems to require to be set at rest by Lord Cottenham or the House of Lords. The interest usually charged against the trustee who commits a breach of trust, such as omitting to convert and invest, not wilfully, is four per cent.; *Mousley v. Carr*, 4 Beav. 49, 53; and see the other cases, Hill on Trustees, 541.

(*a*) *V. supra*, p. 42.

(*b*) "I cannot read the words 'in trust to be by them (the trustees) from time to time, as they shall think fit, turned into moneys for the payment of my debts and legacies,'" said the Vice-Chancellor Knight Bruce, in *Caldecott v. Caldecott*, (1 Y. & Coll. C. C. 322,) "as expressing more than the law would direct or imply without them;" *et* *vide* *ibid.* p. 323.

right, to be allowed to operate to the prejudice of any particular person who has an interest in the property.

Then does an express direction for conversion make any difference? If an express direction is no more than the law implies, the question is answered. But it may further be observed, that if real estate is directed to be converted with all convenient speed, or in words of similar import, though it is well known that, in many cases, it cannot without danger of loss be converted immediately, yet it is treated as converted from the day of the testator's death, and the tenant for life is held to be entitled to the rents and profits from the death of the testator (*a*); and it is the same where the estate is directed to be converted after the death of a person who has a life interest in the estate (*b*). Why should a different principle be applied to a direction for the conversion of personal estate with a view to investment, so far as the rights of the parties as between themselves are concerned (*c*). A year from the day of the testator's death may indeed, as a matter of convenience, be taken, in the latter case, as the time for ascertaining the amount—for, as regards personal estate, time must be given to get it in and to see what is really residue (*d*);—but, if this be the only reason, surely it ought not to affect any question of right as between the residuary legatees themselves; it does not affect the general legatees so far as regards their title to their legacies, it only affects the question of interest on the legacies; one year from the death of the testator being considered as a reasonable time to be allowed to the

(*a*) Lord Thurlow, *Hutcheon v. Mannington*, 1 Ves. Jun. 367. (The case itself (see 8 Ves. 655) turned on what was meant by the words "in case the legatee of a residue of personalty should die before he received it;" under the circumstances, which were special, Lord Thurlow held that it vested at the testator's death, though the case ended in a compromise.) *Cassamajor v. Strode*, 19 Ves. 390, in the note; *Elwin v. Elwin*, 8 Ves. 554, (v. *infra*, n. (*c*)); and see *Browne v. De Laet*, 4 Bro. 536; *Vigor v. Harwood*, 12 Sim. p. 172; and see Dalzell on Conversion, p. 50.

(*b*) *Fitzgerald v. Jerroice*, 5 Mad. p. 29: the construction was confirmed by the circumstances in that case; the marginal note, as Mr. Jarman has observed, is incorrect.

(*c*) "Where there is a trust," says Lord Thurlow, in *Hutcheon v. Mannington*, *ubi sup.*, "that is *always* considered here as done which is ordered to be done." Where there is a direction for the accumulation of the interest of a residue directed to be laid out, the interest is not given from the death; the tenant for life

is there made to wait a year; *Sitwell v. Bernard*, 541-2. The construction put upon the words "with all convenient speed," as respects personalty, *as between the executors and the persons interested in the estate*, is, that it is to be considered as converted within a year, that being considered as the time within which in the generality of cases it may be converted with ordinary diligence; Lord Eldon, *Gibson v. Bott*, 7 Ves. 95-6; see also Sir Wm. Grant's observations, *Elwin v. Elwin*, 8 Ves. p. 553; the question in that case was as to the vesting of a legacy upon the construction of the words of the will; there the vesting was postponed till *after the sale*, distinguishing it from *Hutcheon v. Mannington*. I may here observe that Mr. Jarman on Wills (i. pp. 542-3) draws a conclusion from this case and *Sitwell v. Bernard*, which I cannot trace to those cases: *et v. Brooke v. Lewis*, *supra*, p. 42, and *Sitwell v. Bernard*, *supra*, p. 43.

(*d*) See *Sitwell v. Bernard*, 6 Ves. p. 533, 542, Lord Eldon.

executor for getting in the personal estate and paying the debts, the executor is not considered, before the expiration of that time, as in default for not paying the general legacies; until that time therefore the legatees are not entitled to claim any interest: but no question of interest arises in respect of the tenant for life of a residue; the *corpus* of the gift to him is a life interest in the residue, commencing, as I apprehend upon every analogy, from the death of the testator, let the amount of such residue be ascertained when and how it may.

Besides, notwithstanding the allowance of the year to the executors, no one denies that the executors *may* convert the whole the next day after the testator's death, if that be practicable, and not only may they pay the general legacies immediately, but it would seem that where the fund is clear they ought to do so (a); and it is now established, as we have seen, that if they do make such conversion, and invest the proceeds in proper securities, the tenant for life will be entitled to the income of the property so invested. Surely on principle the tenant for life, looking to the matter of right as between himself and those in remainder, is equally entitled to the interest or dividends which might have accrued if a conversion and proper investment had been made: if the question be made to depend on whether such a conversion might have been made, the particulars of every case would have to be examined into, an inquiry that might be "endless and immeasurable" (b), and even if it should appear that an immediate conversion could not have been made without a sacrifice as regards the corpus of the property, would it follow that the tenant for life should be excluded from the benefit which he would derive from such immediate conversion, if he would be the loser, and those only in remainder be the gainers by the delay?—a consequence which in all probability must result if he should be held to be entitled only to that which is in a proper state of investment during the year.

Then, on the other hand, as regards the right of the tenant for life to the *actual* income of the unconverted property; as modern authority and experience is against the construction that would exclude the tenant for life until actual conversion (c), it seems to be equally contrary to principle that any delay in the conversion should give to the tenant for life the income of property which, at the end of the year, will be or even may be of less value than it was at the death of the testator.

(a) Lord Redesdale, *Pearson v. Pearson*, 1 Scho. & Lef. 12; Lord Eldon, *Garthshore v. Chalié*, 10 Ves. 13.

(b) See *Sitwell v. Bernard*, 6 Ves. 540.

(c) *V. supra*, pp. 43-4.

It would appear therefore that, independently of authority, the only true principle would be, in settling the question of right, to disregard the twelve months allowed for collection or to use it only as the medium for ascertaining what the residue actually is, and put it out of the question in determining what the rights of the tenant for life and remainderman are as between themselves. This mode of treating the subject would give to the tenant for life from the time when, as I have assumed, his title equally as that of a general legatee accrues, namely, the testator's death, the interest on the actual residue to be ascertained in the manner above referred to; and this is the principle on which Lord Lyndhurst appears to have founded his decision in the case of *Dimes v. Scott*, though possibly, as has been intimated by the Vice-Chancellor Wigram, Lord Lyndhurst may, in coming to that decision, have, to a certain extent, disregarded some of the previous authorities. It is however to be observed, as regards some at least of those authorities, as well as of those which have subsequently occurred (a), that the executors or trustees had, in the particular case, from inadvertence or error in judgment, allowed the tenant for life, for several years, to enjoy the income of the property which ought to have been converted; so that to have applied the strict rule of right would have borne very hard upon the executors and upon the tenant for life, who, after the lapse of several years, had been suddenly informed that he was a debtor. Hence in such cases some principle appears to have been searched for on which to relieve the executor and the tenant for life in the particular instance. Some cases, as will have been seen, have gone so far as to give to the tenant for life, and thus to the executors, the benefit of the year allowed for collection and conversion, and to allow him for that year the income actually received; a purpose which appears to be quite foreign to that for which the allowance of the year was originally introduced, and which, if followed out, as it must be if founded on principle, might, in some possible cases, give to the tenant for life the whole of the residue, as in the instance of the testator dying the year that his Long Annuities or his leasehold interests, of which the entire residue may consist, shall expire. In other cases, in some instances perhaps from similar motives, four per cent. has been allowed upon the value, taking it to have been converted at the death or at the end of the year. Lord Lyndhurst's decision certainly put aside all such merciful considerations: Sir A. Hart's decision in *La Terriere v. Bulmer*, putting, as it has been held in some of the more modern cases, a forced construction on the direction for conversion, went to the other extreme.

(a) V. *int. al. Sutherland v. Cooke, supra*, p. 44.

The Vice-Chancellor Wigram appears to object to the principle of the decision in *Dimes v. Scott*, because it makes a distinction between the case of a residuary legatee and all other general legatees; but as regards the question now under consideration is there not an essential difference between the two? to refuse to the tenant for life any part of the income during the first year is, in effect, to deprive him of part of his capital; the capital of the general legatee is not touched by not allowing him interest for the first year.

There may be cases where the principle of the case of *Dimes v. Scott* may be found to be difficult of application; if however that principle in all its integrity were finally established, it would furnish a clear and definite rule, applicable without difficulty, in most cases, and perhaps not offering any serious difficulty in any: the case of debts which cannot be collected for years has been overcome (*a*). It might for a time no doubt bear hard upon executors and tenants for life, in particular cases, where they may have acted upon some of the decided cases; but if the rule were settled, the frequent recurrence of instances in which it would have to be applied would soon make it known to those who have to advise in such cases; and instead of the tenant for life being able to produce decisions or dicta to show that he is entitled to the actual income received, or at least to interest at four per cent., and the remainderman to produce authorities to show that the tenant for life is entitled to nothing until the conversion is made, or to three per cent. or the dividends of a supposed amount of three per cent. stock only, and that only from the end of a year (*b*), thereby forcing the executor to act under the indemnity of the Court of Chancery, or to act under the peril of personal risk, there would be a definite rule to which each party interested might be referred, and the executor might safely act without resorting to a suit. It is therefore of the utmost importance that some case distinctly raising the question, in which all the authorities might be reviewed, should be, as no doubt will speedily happen, brought for decision before Lord Cottenham.

The principle of *Howe v. Lord Dartmouth* has been held not to apply to the case of property invested in Indian securities given by a testator resident there, during the time the parties are living in India (*c*). Where the personal estate is to be converted and invested in the purchase of lands, as a general rule the interest of the personal fund

(*a*) See *Turner v. Newport*, *supra*; 1 C. P. Coop. R. temp. Cottenham, 151-2, on appeal from the decision of the Vice-Chancellor of England, 14 Sim. 33.

(*b*) *V. supra*, p. 559.

(*c*) *Holland v. Hughes*, 16 Ves. 111: S. C. 3 Meriv. p. 685; it was held that the infant being resident here, was entitled to have the fund then remitted to this country.

which accrues for the first year only is to be considered as capital, though there be a direction to accumulate until the purchase be actually made (*a*). Where there is a trust for accumulation which exceeds the legal limits, the accumulations which at the end of the 21 years should have been made upon the principal sum will generally form part of the capital of the residue (*b*).

In the case of bequests of specific property to different persons in succession, a question frequently occurs as to who is entitled to any extraordinary profit that may accrue in any particular year. The general rule is that Bonuses, whether given in stock or money, will be considered as capital and must be laid out (*c*). In *Price v. Anderson* (1847) (*d*), the testator gave the dividends and interest of whatever stock he might possess in the Royal Exchange Assurance Company to his granddaughter for life, for her separate use, and after her death the principal was to be sold: the company gave a bonus in addition to the usual dividends, and the question was, whether the tenant for life was entitled to it. "The question," said the Vice-Chancellor of England, "must be determined by the mode in which the company have dealt with their profits. The company might have declared, if they had thought proper, that part of it should be dividend and part capital, but instead of doing so, they have declared the whole to be dividend; and therefore," said the Vice-Chancellor, "the tenant for life is entitled to the whole." The Vice-Chancellor considered that the Lord Chancellor's order of the 4th of April, 1838, applied only to the Governor and Company of the Bank of England, and not to any other company, and that it manifested that what other companies declared to be dividend should be taken as dividend (*e*).

Where a sum of stock is given to trustees, in trust, for a married woman for life, with remainder to her children, being infants, the court will not ordinarily give its sanction to the fund being sold out and invested on mortgage, so as to give the tenant for life a greater interest, though power may have been given to the trustees to lay out the property on real security, and though they join in the petition,

(*a*) *Sitwell v. Bernard*, *ubi sup.*; (see Lord Cottenham's observations as to the principle of this case, *Casamajor v. Pearson*, 8 Cl. & Fin. 94-5; *;) Noel v. Lord Henley*, 7 Price, 241; *Kilvington v. Gray*, 2 Sim. & S. 396; *Vickers v. Scott*, 3 My. & K. 500, 1 C. P. Coop. R. temp. Cottenh. 167; *Tucker v. Boswell*, 5 Beav. 607.

(*b*) *Crawley v. Crawley*, 7 Sim. 429.

(*c*) *Paris v. Paris*, 10 Ves. 185, 190; *Clayton v. Gresham*, *ibid.* 288, 290; and see *Ward v. Combe*, 7 Sim. 634.

(*d*) 15 Sim. 473; and see *Mills v. Mills*, 7 Sim. 501.

(*e*) The case principally relied upon on the part of the tenant for life was *Barclay v. Wainwright*, 14 Ves. 66.

particularly as in such cases the expenses frequently more than counterbalance the advantage derived by the tenant for life from the increase of income (a).

Questions frequently arise between the tenant for life and those in remainder as to the right to the Timber on settled estates, and in regard to the working of Mines and Quarries. As a general rule, if timber is severed from the estate by the act of a trespasser or a tempest the timber belongs either to the tenant for life without impeachment of waste, if in possession, or to the person who has the inheritance in case there be no such tenant for life (b). But a tenant for life without impeachment of waste, though himself entitled to cut down timber, cannot it seems claim timber severed during the prior estate of a person not entitled to cut timber, it vests in the owner of the inheritance; and a tenant for life impeachable of waste is in the same condition as regards underwood improperly cut by a preceding tenant (c).

Tenant for life impeachable of waste is only allowed to fell timber when, where, and in such manner as that it will be for the benefit of the succession; and perhaps it is almost necessary that he should first apply to the Court of Chancery, in order that the felling may take place and the produce may be laid out under its directions, for the tenant for life is not entitled to the timber when cut (d).

A tenant for life without impeachment of waste may fell trees fit for the purposes of timber, though young and not such as would be felled in a course of husbandlike management of the estate (e); but he will be restrained, though having the *legal* right so to do, from what has

(a) *Barry v. Marriott*, xii. Jur. 1043; Vice-Chancellor Knight Bruce; and see, *In re Fust* (1817), C. P. Coop. Rep. temp. Cottenham, 157; *et v. ibid.* 158.

(b) Vice-Chancellor of England, *Tooker v. Annesly*, 5 Sim. 241; *Bowles's* case, 11 Rep. 79; *Skelton v. Skelton*, (Lord Nottingham), 2 Swanst. 171 (15 Ves. 427). Lord Talbot, in *Bewick v. Whitfield*, 3 P. W. 267, says, "to him who has the first estate of inheritance;" but this had reference to a case of simple tenant for life: see *Williams v. Duke of Bolton*, 1 Cox, 72; 3 P. W. 268, n.; fully stated in *Eden on Inj.* 215-8; see the other cases, *Bisset*, 314, 315. As to what is the meaning of the words "voluntary waste excepted," see *Garth v. Cotton*, 1 Dick. 183; and *Bisset*, 316. As to injunctions to restrain the tenant for life from committing waste, see *Drewry on Injunctions*, in which learned work the leading au-

thorities down to 1841 are stated or referred to; *et v. supra*, vol. i. pp. 671-2; and *infra*, title *Injunction*.

(c) *Per Buller, J., Pigot v. Bullock*, 1 Ves. J. 484; 3 Bro. 539.

(d) *Bewick v. Whitfield*, 3 P. W. 267; *Hussey v. Hussey*, 5 Mad. 44; and see *Aston v. Aston*, 1 Ves. p. 264; *Knight v. Duplessis*, 2 Ves. 362; *Burges v. Lamb*, 16 Ves. 179, *et v. infra*. As to the application or laying out of the produce of timber directed to be cut because running into decay, see *Eden on Injunc.* 218, *et seq.*; *Cowel v. Chambers*, Rolls, 1833, *Drewry on Inj.* 142; and *infra*, p. 572.

(e) *Smythe v. Smythe*, 2 Swanst. 251; *S. C.* *Wilson*, 426; *et v. Burges v. Lamb*, 16 Ves. 174, 177; *Aston v. Aston*, *supra*. As regards tenant for life of a term of years unimpeachable, see *Sir S. Bridges v. Stephens*, 2 Swanst. 150, and the next note.

been termed malicious, extravagant, or humoursome waste, for instance, the total destruction of a wood or coppice. So he will be restrained from cutting down trees planted or left standing for ornament, whether really or fancifully ornamental, but not merely because they may be *really* ornamental: and the protection extends not only to trees about the mansion, but to those in rides and avenues, and to trees and clumps of trees wheresoever growing and though at a considerable distance, if planted or intended for ornament, and though planted by himself (a). It would seem that scarcely any alteration in circumstances can justify such an act on the part of the tenant for life: it makes no difference that the original mansion-house is pulled down; another may possibly be built for the sake of the trees (b): and such an act, and the pulling down of houses, are equitable waste, though the inheritance may have been actually improved by it (c). Whether timber was intended or left standing for ornament by the deviser of a tenant for life may be proved, in case of doubt, from his conduct in regard to it (d). It may be observed however, as previously noticed, that the Vice-Chancellor of England, in a late case, did not acquiesce in Sir John Leach's doctrine in *Lord Ormonde v. Kinnarsley*, that the tenant for life was to be considered, as regards equitable waste, in the light of a trustee for the persons entitled to the inheritance (e).

In all such cases the Statute of Limitations, whether it is to be considered as directly affecting the case, or only as followed by analogy, does not run until the death of the tenant for life so committing the waste (f); and the estate of the tenant for life is liable for the amount received, and interest at four per cent.: there may however be a

(a) *Abraham v. Bubb*, 2 Freem. 53 (see Lord Eldon's observations on this case, in *Williams v. Williams*, 15 Ves. 427; *Anon.* 2 Freem. 278 (cases of tenant in tail after possibility of issue extinct); *Cooke v. Whaley*, 1 Eq. Ab. 400; and *Bishop of London v. Web*, 1 P. W. 527, case of lessee for years without impeachment (and the early authorities are collected in the notes to this case); *Marquis of Downshire v. Sandys*, 6 Ves. 107, 112; and *Wombwell v. Belasyse*, cited in note to that case, p. 110; *Day v. Merry*, 16 Ves. 375: there the trees had been planted to exclude objects from view; *Attorney-General v. Marlborough*, 3 Mad. 498. It is not sufficient that the timber is in fact ornamental; per Lord Eldon, *Burges v. Lamb*, 16 Ves. 183; *Coffin v. Coffin*, Jac. R. 70, 71, on original hearing, 6 Mad. 17; and see *Newdigate v. Newdigate*, 1 Sim. 131; and *Wellesley v. Wellesley*, 6 Sim. 497. The leading cases on this subject, down to

1841, will be found in Mr. Drewry's work on Injunctions, p. 142, *et seq.*

(b) *Morris v. Morris*, 15 Sim. p. 510; xi. Jur. p. 178, confirmed on appeal, xi. Jur. 196; *Wellesley v. Wellesley*, 6 Sim. 497, is there observed upon; and see *Duke of Leeds v. Lord Amherst*, 14 Sim. 357. In *Morris v. Morris*, it was proved that the copper-works in the neighbourhood had rendered the place unfit for the growth of trees.

(c) *Duke of Leeds v. Earl Amherst*, x. Jur. 509; 14 Sim. 357: affirmed by Lord Chancellor, 2 Phill. 117.

(d) *Lushington v. Boldero*, 6 Mad. 149; and see 16 Ves. 173; as to underwood, see *Brydges v. Stephens*, 6 Mad. 279; *et v. infra*, title Injunction.

(e) *Kingham v. Lee*, 15 Sim. 399; v. *supra*, p. 305.

(f) *Duke of Leeds v. Lord Amherst*, x. Jur. 509, *supra*.

release or an abandonment of right on the part of the person injured : in the case from which the last observations are taken it was held that there was nothing amounting to abandonment (a).

It is a settled rule in the Court of Chancery that, whether the estate be settled or unsettled, no person who commits a trespass shall, by his own wrong, have any benefit from the timber cut. With respect to unsettled estates the point was decided in the case of *Tullet v. Tullet* (b). There an infant was seised in fee, and the mother, who was his guardian, cut down the timber as upon the part of the infant : the heir of the infant brought his bill to have the money which arose from the sale of the timber secured ; and the court held, that no benefit whatever should result to a person who when she did the act might become next of kin of the infant ; but that the money should be reserved for the benefit of the party entitled to the inheritance. With respect to the case of a settled estate, what took place in the case of *Williams v. Duke of Bolton* (c) shows that a tenant for life who is impeachable of waste shall have no benefit from the timber that has been improperly cut down (d). But if the tenant for life has not done the wrongful act, then he has been permitted to receive the dividends of the stock in which the produce of timber has been invested (e). Where there is a settled estate, and the court has ordered timber to be cut down, (which kinds of orders are made not for the personal benefit of the parties but for the benefit of the estate itself that is the inheritance (f),) a tenant for life impeachable of waste will have the interest of the produce paid to him for his life (g) : and if the timber be cut by the authority of a trustee in whom the legal fee is vested and who has

(a) *Same Case*, on appeal (20th Nov. 1846), x. Jur. 957 ; and see, as to the effect of laying by, so as to lead the party committing the unlawful act to suppose that it is acquiesced in, and thus to spend his money on what he may consider to be improvements, *Brydges v. Kilburne*, cited in *Jackson v. Cator*, 5 Ves. 689 ; and *inf.* p. 575, 576 ; *et v.* 6 Hare, 273.

(b) 1 Dick. 322 ; Amb. 370 ; and see *Mason v. Mason*, there cited ; and Mr. Blunt's note, *ibid.* 370.

(c) 1 Cox, 72.

(d) Vice-Chancellor of England, *Tooker v. Annesley*, 5 Sim. 241.

(e) See the dict. of Sir W. Grant, *Wickham v. Wickham*, 19 Ves. 423 ; and *Osborne v. Osborne*, cited 19 Ves. 423 ; 5 Sim. 242.

(f) *Hussey v. Hussey*, 5 Mad. 44, Leach, Vice-Chancellor ; "The court does not cut timber in such cases, only because a provident owner might do so ;" Vice-Chancellor Wigram, 4 Hare, 382.

(g) *Tooker v. Annesley*, 5 Sim. 242. In this case the estate was settled on tenant for life, subject to impeachment for waste, with remainders over. By the decree it was referred to the Master to inquire whether there were any and what timber trees standing in the woods and plantations on the testator's estates, which were in a state of decay, and which would not improve by standing, or the standing of which would be prejudicial to other trees, and which it would be for the benefit of all parties interested in the estate to have felled and sold. The Master reported that the timber trees and saplings mentioned in his report were in a state of decay, on that report an order was made for a sale of such timber for sale, and afterwards the order mentioned in the text. The Vice-Chancellor Wigram said he had frequently made similar orders, applying to timber in a state of decay and timber which would be prejudicial to other trees ; 4 Hare, 382.

a superintending control over the estate, and it appears that the timber has been such as the court itself would have ordered to be cut, the tenant for life impeachable of waste will equally be entitled to the interest (a). If the estate be sold to pay debts, the court gives the interest of the surplus to the tenant for life, though the sum is increased by the price of timber which belonged to the inheritance, and would have yielded no profit to the tenant for life (b). Lord Hardwicke is reported to have said, that notwithstanding the tenant for life is without impeachment of waste, he must keep the tenant's houses in repair, unless the charge be excessive: but it has been decided that no account can be had against him for dilapidations (c).

The tenant for life, unless authorized by the will, is not entitled (d) to open or work any Mines of coals or minerals or Quarries which had not been opened or were not in a state of working at the time of the death of his testator; the mines and quarries belong to the inheritance (e). If the tenant for life should open any new mines or quarries, or lease them to others, the remainderman will be entitled to all the moneys realized by the tenant for life, within six years from the filing of the bill, in respect of any coal, stone or minerals gotten by him, and any rent he may have received from the tenants, and an injunction will be granted to restrain the tenant for life from any future acts. But where mines have been opened before the tenancy for life began, the tenant for life may continue the working, and may open new pits or shafts if necessary for that purpose (f).

Where an estate is given to or in trust for a person for life, if the tenant for life shall allege that he has expended money in substantial repairs and improvements, generally speaking the court will not direct an inquiry as to the amount and nature of the improvements with a view to charging the inheritance (g). If the mansion-house is

(a) *Waldo v. Waldo*, 7 Sim. 262.

(b) *Tracy v. Hereford*, 2 Bro. 139.

(c) *Parteriche v. Poulet*, 2 Atk. p. 383, (see Lord Redesdale's observations on this case, *Clinan v. Cooke*, 1 Scho. & Lef. p. 35); *Marquis of Lansdowne v. Lansdowne*, 1 Jac. & W. 522.

(d) *Ferrand v. Wilson*, 4 Hare, 388. In that case the will gave to the tenant for life liberty to cut down timber and wood, and get stone for buildings and repairs, but for no other purpose, 4 Hare, pp. 345-6. It is to be observed, though in anticipation, that the Jurisdiction in regard to waste, by cutting down timber improperly, where the title is legal, is limited to discovery, unless an injunction is

prayed, and then an account also will be directed, *Jesus College v. Bloom*, 3 Atk. 262; *Piers v. Piers*, 1 Ves. 521, and the cases in the note, 2 P. W. 241, last ed.; and see 1 Fonbl. 13, 14. The court in such case would decree an account of ore dug, though the remedy at law may have been lost, as by the death of the party; as that is in the nature of a trade, 1 P. W. p. 406; *Lansdowne v. Lansdowne*, 1 Mad. 116; and see 2 Atk. 630.

(e) See *Whitfield v. Bewit*, 2 P. W. 241.

(f) *Clavering v. Clavering*, 2 P. W. 389.

(g) *Caldicott v. Brown*, 2 Hare, 144; *Bosstock v. Blakeney*, 2 Bro. 656; *Nairn v. Majoribanks*, 3 Russ. 582, there cited.

affected by dry rot, it would be a substantial improvement to remove it; but that is an expense to which a tenant for life choosing to occupy the property must submit (a): but where the tenant for life had expended money towards finishing the mansion-house which the testator had begun, an inquiry was directed to ascertain whether it would be for the benefit of those in remainder that it should be completed, and it seems that the real estate might have been charged with this expense if there had been no personalty applicable for the purpose (b).

A tenant for life may have to pay the interest of legacies charged on the estate, though they may not be raisable until after the death of the tenant for life (c).

The relative rights of the tenant for life and of the trustees in whom the legal estate is vested, as regards the possession of the title-deeds, and the possession and management of the estate, have been adverted to in a former page (d).

Powers of sale and exchange, leasing and other like powers are not analogous to cases where there is an attempt to withdraw from present enjoyment the profits of or interest in land (e), and are, as has already been observed, amongst the usual forms introduced into settlements and wills (f): Courts of Equity, it may be observed, are not free in extending powers given to tenants for life to bind a remainderman (g).

Where the estates under a will are legal estates, the exercise of a power of exchange for lands of equal value by a tenant for life in possession and having the legal estate, cannot be questioned in the Court of Chancery on the ground of inadequacy of value by the persons in remainder; the power being limited to lands of equal value, if that value be not obtained the exchange is void, and no estate passes by the conveyance by which the attempt was made to effectuate it; for it is under the power alone that the fee can pass: in law and in equity the conveyances are innocent unless the exchange

(a) *Hibbert v. Cooke*, 1 Sim. & St. 552, overruling *Graves v. Graves*, cited *ibid.* 553 (2 Hare, 145). The Vice-Chancellor Wigram, 2 Hare, 146, said, Where a trust fund is to be laid out in purchase of lands cases may occur where it might be more beneficially employed in lasting improvements of the existing estates, so as to induce the court to sanction (on the part of persons not in existence, or not *sui juris*) such employment of the personal fund.

(b) *Hibbert v. Cooke*, *ubi sup.*

(c) *Lord Milltown v. Trench*, 4 Cl. & Fin. 276; see Sugd. Law of Prop. pp. 438-42, as

to this case; *et v. supra*, p. 323, n. (c), and p. 551.

(d) *Supra*, pp. 45, 46; Hill, p. 382, *et seq.*

(e) *Supra*, p. 142.

(f) *Ferrand v. Wilson*, 4 Hare, 381. See Sir E. Sugd. Law of Prop. 465, *et seq.* as to Powers of Leasing and Jointuring; and as to the doctrine of Remoteness as applicable to this subject, *v. sup.* p. 93.

(g) *Per Master of the Rolls, Evelyn v. Evelyn*, 2 P. W. 666, instancing *Lady C. Orby v. Lord Mohun*, 2 Vern. 531, 542; *Jenkins v. Keymis*, 1 Lev. 239; *S. C.*, Hardr. 395, and 1 Ca. Ch. 103.

be valid. If an estate at law shall have passed by the conveyance, or if waste or destruction of the property taken or attempted to be taken out of the settlement were threatened or likely to take place, then there will on general grounds be a case for interference (a).

A testator, by his will, devised his real estate to the use of A. for life, with remainder to his first and other sons in tail; and he declared it should be lawful for every tenant for life or in tail in possession who should have attained 21, by an indenture to be sealed and delivered by them respectively in the presence of two or more witnesses, to demise all or any parts of the estates to any person or persons for any term not exceeding 21 years, to take effect in possession, and not by way of future interest, and so that there were reserved the most improved rent, &c., without taking any fine, &c., such lease to contain a condition for re-entry on non-payment of the rent, and the lessee to execute a counterpart, and to covenant for due payment of the rent, &c. The tenant for life entered into an agreement to grant a way-leave for 14 years to commence on the determination of an unexpired lease, and died without a lease being executed, but after the expiration of the original lease. On a bill filed by the infant tenant in tail for specific performance, the Vice-Chancellor K. Bruce held, that the agreement was *ultra vires* the deceased tenant for life, and the bill was dismissed with costs (b). Where an estate was devised to trustees with a power of sale, and the trustees, under the supposition that the tenant for life, he being unimpeachable of waste, was entitled to the timber, sold the estate and the timber separately, allowing the tenant for life to take the produce of the latter; this was held to be a bad execution of the power, and that it could not be cured by the tenant for life paying over the produce of the timber. Sir J. Leach, before whom the case was originally heard, said, that although a court of equity will, in favour of a purchaser, supply a defect in the manner of execution, yet that he could not interfere in this case, as a court of law (the decision of the Common Pleas on this point had been affirmed by the Exchequer Chamber) had held that this was *no execution* of the power. Sir E. Sugden states, in his late valuable work, that this is a case of first impression (c).

If there be tenant for life, with remainder over, and the tenant for life lets the lands for a longer term than he has power to make, and

(a) See *Ferrand v. Wilson*, Vice-Chancellor Wigram, 4 Hare, 385.

(b) *Ricketts v. Bell*, xi. Jur. 918; x. Law J. Ch. 105; 1 De G. & Sm. 335, 346.

(c) *Cockerell v. Cholmeley*, 1 Russ. & M.

418; 1 Cl. & Fin. p. 60; Sugd. Law of Prop. 492; this is an important case on other points, viz., as to the knowledge which a person must have of his rights, in order that a case of Confirmation may be relied on against him.

the person who takes the lease makes improvements, and the person entitled in remainder, who is conusant of the settlement under which he derives his title (a), stands by, and either encourages, or does not forbid it, the tenant shall enjoy his term; for *Qui tacet consentire videtur, et qui potest, et debet vetare, et non vetat, jubet* (b). But where a tenant for life with power to make leases under certain provisions, grants leases not authorized by the power, receipt of rent under those leases by the remainderman *in ignorance of their invalidity*, will not operate as a new agreement so as to prevent his setting aside such leases (c).

Where a son has a power to make a jointure not exceeding the clear yearly value of so much as he *shall receive*, the measure of the charges to be deducted is to be taken as things stood at the time of the making of the jointure: land-tax is not a charge from which the jointure is to be cleared; tithe is (d).

In the case of *Blake v. Marnell* (e) a power was given to a tenant for life, at any time he should think proper, to raise any sum of money not exceeding 1500*l.* without the control of the trustees; the tenant for life, without reference to the power, raised 744*l.* by granting an annuity of 150*l.* out of the lands; it was urged that this was not an execution of the power, it only had reference to his interest; but it was answered that where a person acts for valuable consideration he is understood in equity to engage with the person with whom he deals to make it as effectual as he has power to make it, and where the nature of the instrument is not according to the power, but demonstrates an intent to execute it, or where even it is equivocal, it shall have the operation of charging in the form in which the power allowed him to charge it (f); and it was declared that the deed of rent-charge was a due execution of the power; though Lord Eldon and Lord Redesdale in advising the House of Lords in this case said that it must not be understood that a grant of a rent-charge is *in all cases* to be taken as a good execution of the power (g).

(a) See, as to this point, *Blennerhasset v. Day*, 2 Ball & B. 137; and *Bennett v. Colley*, 2 My. & K. 232.

(b) *Lex Prætor.* 297; *Hanning v. Ferrers*, 1 Eq. Ab. 356, pl. 10; *Gilb. Eq. R.* 85.

(c) *Bowes v. E. L. Water Works*, 3 Mad. 375.

(d) *Earl Tyrconnel v. Duke of Ancaster*, 2 Ves. 504. The rule as to other particulars is there stated; and see *Trevor v. Trevor*, 13 Sim. 136.

(e) 2 Ball & B. 35.

(f) *V. ibid.* p. 39, note, Lord Redesdale; and *ibid.* p. 44, Lord Manners; and see *Camp-*

bell v. Leach, Amb. 740, *King v. Melling*, 1 Vent. 225; and *Cox v. Chamberlain*, 4 Ves. 631, cited *ibid.* 45, 46.

(g) 2 Ball & B. 48; affirmed in the House of Lords, 4 Dow. p. 248; approved by Sir E. Sugd. *Muskerry v. Chinnery*, Ll. & G. temp. Sugd. 227. Lord Eldon declared that this was as difficult a case as he had ever had to deal with. Lord Redesdale treated the grant as an informal execution of the power; and both Lord Eldon and Lord Redesdale stated that it was not to be taken that a grant of an annuity was in all cases to be held to be a good execution of such a power. Sir E. Sugden, a most

In the case of *Ward v. Hartpole* (a), which also came from Ireland, a tenant for life had power to make leases for one, two, or three lives certain, or renewable for ever, at the best and most improved rent, without fine, and also a power, with the consent of the trustees, to raise any sum of money, not exceeding 5000*l.*; the tenant for life with the assent of the surviving trustee under the power, in consideration of 300*l.* which was expressed to be in part of the 5000*l.* and a rent, granted to one Vere Ward part of the lands in settlement for three lives, with a covenant for perpetual renewal. The Lord Chancellor of Ireland held that the lease was void (b): but on an appeal to the House of Lords, Lord Mansfield was clearly of opinion, particularly having regard to the established usage in Ireland, that the 5000*l.* might be raised by fines, and that the lease was a good execution of the power; the lease however was set aside on the ground of gross inadequacy and fraud (c).

A tenant for life, who has power to charge for younger children any sum he may think fit, if he sell the estate and give the greatest part of the produce to the younger children, it will be a good execution of the power (d). A power given to a tenant for life to appoint an estate amongst his children for such estates, and in such parts, &c., and with such limitations over, such limitations over to be for the benefit of the same children, and in such form, &c. as the tenant for life shall direct, is well executed by directing the rents to be paid to a married daughter for her separate use for life; and appointing the estate, if she should survive her husband, to her in tail is a good execution of the power (e). But for a full development of the doctrine as to powers given to tenants for life, I must refer the reader to the very learned and elaborate work of Sir E. Sugden on Powers, and his late work which has been so often referred to.

By the stat. 4 & 5 Will. IV. c. 22, the representatives or assigns of the tenant for life are entitled to an Apportionment of the rents and the dividends on stock in the public funds, &c., which have accrued since the last day of payment previous to the death of the tenant for life, where the right to the payment is created by any instrument or will

competent judge, in his late valuable work, (*Law of Property, &c.*) to which I would particularly refer the reader, says he is satisfied that the grant was a good execution of the power, assuming it to be a legal one, and a benefit to the remainderman; *Law of Property*, p. 486.

(a) 3 Bli. 470; Llo. & G. temp. Sugd. 227.

(b) 3 Bli. 476.

(c) *Ibid.* 486, 489-90; Sir E. Sugden, Llo.

& G. temp. Sugd. 228, observes that the doctrine of Lord Mansfield agrees with the decisions in *Talbot v. Tipper*, Skin. p. 427; and *Long v. Long*, 5 Ves. p. 445; and see Sugd. *Law of Prop.* 482.

(d) *Long v. Long*, 5 Ves. 445; Llo. & G. temp. Sugd. 226.

(e) *Thornton v. Bright*, 2 My. & Cr. 230, 250, *et seq.*, reversing the decision of the Vice-Chancellor of England.

executed or coming into operation after the passing of the act. But the act does not apply to rents payable by tenants from year to year, unless the rent is reserved by an instrument in writing (a). Interest due on a bond or mortgage was always apportionable as the interest becomes due from day to day (b).

In the administration of an estate where the residue is to be settled on the tenant for life, with remainders over, it frequently becomes an embarrassing question as to what is to be done in respect of giving any allowance to the tenant for life, where there are contingent liabilities which *may* exhaust the estate. "It is only with the true residue," said the Vice-Chancellor Wigram, in a late case, "that the court can deal as between tenant for life and remainderman. If there are covenants which if broken may exhaust the estate, not only the capital but the interest must be impounded unless the tenant for life can give security to refund" (c).

A late case before the Vice-Chancellor of England, and afterwards before Lord Cottenham on appeal, affords an opportunity of adverting to the general doctrine as regards the distinction between the gift of an annuity for life and the gift of an amount of capital yielding a perpetual annuity to the amount specified. A testator bequeathed to his wife 600*l.* per annum during her life for her separate use, and after her death the said annuity was to be equally divided between A., B., C., D., E., and F., or the survivor or survivors; other annuities were given to the same persons with power to leave the annuities so given to any wife they might marry or any child they might have: the question was, whether the six annuitants were to take annuities for their lives, or were to take the capital of such sum in the £3 per Cent. Bank Annuities as would be sufficient to produce the sum of 600*l.* It was held by the Vice-Chancellor of England that the annuitants were entitled to so much capital stock (d). But Lord Cottenham reversed this decision, holding that the annuitants were only entitled for their

(a) *In re Markby*, 4 My. & Cr. 484; and see *Michell v. Michell*, Rolls, vii. Jur. 887. The statute 11 Geo. II. c. 19, only applies to devises and leases determinable on the death of the tenant for life; see the additional note, No. 3. The act extends to annuities, pensions, moduses, compositions, and all other payments made payable or coming due at fixed periods, and by 6 & 7 Will. IV. c. 71, § 86, to rent-charges payable in lieu of tithes: but the act only applies to cases in which the interest of the party entitled to the rents or other periodical payments determines by death or some other means, and does not apply to the

case of tenant in fee, or provide for apportionment of rents between the real and personal representatives of such person whose interest is not terminated by his death; *Browne v. Amyot*, 3 Hare, 173, 182. The act 4 & 5 Will. IV. extends to Scotland, Sugd. Law of Prop. 536.

(b) *Edwards v. Countess of Warwick*, 2 P. W. 176.

(c) *Fletcher v. Stevenson*, 3 Hare, 370; and see *Hawkins v. Day*, and *Simmonds v. Bolland*, there cited.

(d) *Blewitt v. Roberts*, 10 Sim. 491.

lives (a). "There is," said Lord Cottenham, "a marked distinction between the gift of the produce of a fund without limit as to time (b), and a simple gift of an annuity: an annuity may be perpetual, or for life, or for any period of years; but in the ordinary acceptation of the term used, if it should be said that a testator had left another an annuity of 100*l.*, no doubt would occur of the gift being an annuity for the life of the donee; it is the gift of an annual sum of 100*l.*, that is, of as many sums of 100*l.* as the donee shall live years" (c). Lord Hardwicke, in *Savery v. Dyer* (d), states the rule to be that "If one give by will an annuity not existing before, to A., A. shall have it only for life;" which doctrine Lord Cottenham approved and affirmed in *Blewitt v. Roberts*, above referred to.

A testator bequeathed two leaseholds to trustees, in trust, out of the rents to pay 50*l.* a-year to his daughter-in-law, during widowhood, and to invest the surplus in stock, in trust, for his wife for life, remainder to his granddaughters; and in case of the marriage of his daughter-in-law, to sell and invest the proceeds, in trust for his wife and granddaughters in succession. The lease expired during the daughter-in-law's widowhood; the surplus proceeds had been invested: it was held, that the daughter-in-law was not entitled to have the surplus proceeds so invested, applied towards making good her 50*l.* annuity; it was considered that the testator intended she should have an annuity out of the rents, only in case they should be sufficient to pay that sum; and if more than sufficient, a specific purpose was pointed out for which the surplus should be invested (e).

(a) *Blewitt v. Roberts*, 1 Cr. & Phill. 274; see the additional note, No. 4.

(b) See *Elton v. Shephard*, 1 Bro. p. 532; *Page v. Leapingwell*, 18 Ves. 463; and *Haig v. Swiney*, 1 Sim. & St. 487.

(c) In the case of *Tweeddale v. Tweeddale*, 10 Sim. 453, which was cited in the case last referred to, the Vice-Chancellor of England had said, "I do not see any substantial difference between a gift of an annuity out of personal estate generally and a gift of an annuity to be satisfied out of a particular fund,—because an annuity, when it is given generally, is to be provided for out of all the personal estate; and if a gift of 300*l.* a year out of the testator's funded property, would give to the annuitant the absolute interest in so much of the funded property as would produce 300*l.* a

year, what is the substantial difference between that gift and a gift of 300*l.* a year simply to be satisfied out of so much of the personal estate as would produce that sum? I confess I do not see any difference myself; I am very much inclined to think that the true construction is that if it be given simply it is given absolutely;" see however Lord Cottenham's judgment in *Blewitt v. Roberts*, additional note, No. 4.

(d) Ambl. p. 139; and see *Heron v. Stokes*, 1 Conn. & L. 278, 279, where Sir E. Sugden enters into the distinctions on this subject, as where the bequest is coupled with a fund; and he there discusses the case of *Blewitt v. Roberts*.

(e) *Darbon v. Rickards*, 14 Sim. 539.

ADDITIONAL NOTE.—No. I.—*Supra*, p. 565.*Doctrine as to Conversion of Personal Estate into Realty as regards the Interest of Tenant for Life.*

M. Dalzell—whose work on Conversion was lately highly commended by Sir J. Wigram—thus states the rule:—"It is submitted that, in the conversion by will of personalty into realty, the following conclusions are established by the preceding cases:—

"1st. That, generally, this conversion takes effect from the death of the testator.

"2ndly. That if the fund for this conversion into realty to be settled in strict settlement be constituted by residuary personal estate, with a clause for accumulation of interest until the whole can be collected in a mass for such conversion, in a question between the tenant for life and remainderman the operation of this clause will be restricted to one year from the death of the testator, when the tenant for life will begin to be entitled to the interest, in lieu of the rents and profits until the purchase is made.

"3rdly. That if there be no such clause of accumulation, although this fund be constituted of residuary personal estate, if it be clear and there is no inconvenience, there does not exist any reason why the tenant for life should not commence immediately to enjoy the interest.

"4thly. That upon the doctrine in *Gibson v. Bott*, if there be any increase of the testator's personal estate in the period between his death and the constitution of the fund for conversion, the tenant for life will be entitled to the benefit of the interest of that part of the fund formed by this increase.

"5thly. If the testator's personal estate to be converted into realty to be settled in strict settlement, should consist of the partnership of any trade, the dissolution of which is to take place, and the profits to be divided at stated periods after his death, in a question between the tenant for life and remainderman, upon the doctrine of *Fearns v. Young*, 9 Ves. 549, the tenant for life will be entitled to interest at a given rate, and not the profits, until the termination of the partnership; and then to an interest on the capital due to the testator out of the concern, the capital being valued with reference to the periods at which the instalments of it are payable; and if the personal estate should consist of any interest wearing out, or whose enjoyment is future, that a valuation should be made at the death of the testator, and the tenant for life be entitled to the interest arising from the supposed value of such interests, until the produce be laid out in land, when he will be entitled to the rents and profits." And see, on the subject of conversion as between tenant for life and remainderman, Jarman on Wills, i. 541, 552.

ADDITIONAL NOTE.—No. II.—*Supra*, p. 563.*What Rate of Interest or other Benefit the Tenant for Life of a Residue directed to be invested is entitled to, and from what Time.*

In the late case of *Robinson v. Robinson*, (Nov. 1848,) before Lord Langdale, xii. Jurist, 969; a testator gave his residuary estate to trustees in trust to convert into money and to invest the proceeds in government or real securities, and to

pay the income to his son A. R. during his life, and after his death to distribute the capital amongst such children of A. R. as should attain 21 or be married, with directions as to maintenance, &c. The residuary estate consisted *inter alia* of Bank Stock, London Dock Shares, money due from the Trustees of the Surrey and Sussex Roads secured on the tolls and toll houses, money due from the Commissioners of Sewers of Surrey and Kent, and secured on the rates. The trustees from 1840 to 1845 paid the income actually received to the tenant for life: in 1845 they converted all but the money due from the Trustees of the Surrey and Sussex Roads, and invested the proceeds in £3 per Cent. Reduced; there was a gain from the delay on the London Dock Stock, and a loss on the Bank Stock and on the debt from the Commissioners of Sewers; the income received from the residuary estate exceeded what it would have yielded if invested in £3 per Cents. at the end of one year, and even if it had been invested on real securities at 4 per cent.—The suit was instituted by the children of A. R. the tenant for life. The tenant for life had voluntarily made good the fund as if it had been invested in the £3 per Cents. at the end of the year; he insisted that he was at least entitled to 4 per cent. on the capital until invested. It was insisted on the part of the plaintiffs that as no investment had been made, the investment ought to be taken as if made in Consols, not as if invested on real securities; Lord Langdale said the result of his decisions was that the *cestuis que trust* had the option. In giving judgment, his Lordship, after deciding that the road bonds were not real securities within the meaning of the will, held that the trustees were liable for the loss which had been sustained in part, and could not claim for their own benefit the gain that had arisen on the sale of the other part of the funds (1). As regards the amount of interest to be allowed to the tenant for life, his Lordship said there was some difference of opinion (almost all the previous authorities on the subject had been cited), “but my opinion,” he continued, “has undergone no change.” (See *Ames v. Parkinson*, 7 Beav. 379: the appeal, 2 Phillips, 389, turned on a point of form; and *Mehrtens v. Andrews*, 3 Beav. 72.) “Here there was a trust to convert and invest in government funds or real securities; the trustees for a considerable length of time did not convert, but allowed the money to remain on securities which were not either government securities or real securities, and the question is, what interest the tenant for life is entitled to from the time when the money ought to have been invested. The tenant for life claims interest at 4 per cent.; it is said that the trustees had an option, and that if it had been invested on real security it might have produced 4 per cent.” “I confess that I could never comprehend how parties acting for *cestuis que trust* were entitled to have that considered as done which was most for their own benefit, and not for the benefit of the persons for whom they are acting. My opinion is that you cannot regard that which is most beneficial to the trustees and tenant for life.” And accordingly his Lordship held that the tenant for life was entitled to 3 per cent. only from the time the funds ought to have been converted, namely, from the end of the year (2).

(1) *Ex parte Lewis*, 1 Gl. & J. 69; case of an assignee who had bought in the property without authority; *Dimes v. Scott*, 4 Russ. 195. The trustees may be excused for the delay in the conversion, from the nature of the property, *Buxton v. Buxton*, 1 My. & Cr. 80; or in the investment, if they cannot find a good security; *Wyatt v. Wallace*, 1843, Vice-Chancellor of England, 1 Coop. R., temp. Cotten-

ham, 155. A fund which is directed to be laid out in land, cannot safely be left uninvested in the interval, see *Sowerby v. Clayton*, 3 Hare, 430; though the decision proceeded on the omission to comply with the directions of the previous orders.

(2) This seems to assume that he was justified in taking the actual income for the first year.

ADDITIONAL NOTE.—No. III.—*Supra*, p. 578.*Apportionment of Rent, &c. as between Tenant for Life and Remaindermen.*

According to the rule of the common law, as observed in Mr. Swanston's note referred to below, on the death of a lessor tenant for life in the interval between the two periods at each of which a portion of rent becomes due from the lessee, no rent can be recovered for the occupation since the first of those periods (1); and that doctrine rested on two propositions:—1. That an entire contract cannot be apportioned. 2. That under a lease with a periodical reservation of rent the contract for the payment of each portion is distinct and entire; and the doctrine was extended to annuities and dividends on government securities, indeed all cases of periodical payments becoming due at fixed periods and not as in the case of money secured on mortgage or by bond *de die in diem* (2). From the principle above stated it followed that on the determination of a lease by the death of the lessor before the day of payment had arrived no rent became payable. To prevent this loss the stat. 11 Geo. II. c. 19, was passed, which provided (§ 15) that if the tenant for life should die in the interval between the days of payment, his executors might recover from the undertenant a proportionate part of the rent from the last day of payment. If from any motive the undertenant should pay the entire rent after the death of the tenant for life, it was held that a right arose to take from the person so receiving the payment the portion to which he was not entitled (3). The first section of the stat. 4 & 5 Will. IV. c. 22, declares in effect that all rents received and made payable on leases which determine on the death of the person making them, or on the death of the life or lives for which such person was entitled to the lands demised, shall be within the provisions of the act of the 11 Geo. II. c. 19. The second section provides for the apportionment of rents, annuities, and other payments due at fixed or stated periods: it has been held that this clause applies only to cases in which the interest of the person interested in such rents or payments determines by his death or by some other means, as the death of another person, but does not apply to the case of a tenant in fee, or provide for any apportionment between the real and personal representatives of a person whose interest is not terminated by his death (4). The statute 4 & 5 Will. IV. c. 22, does not apply to rents payable by tenants from year to year which are not reserved by an instrument in writing (5); but it has been held that where at the death of the tenant in tail the estates are held by undertenants under parol demises, the representatives of the tenant in tail are entitled to an apportionment under the equity of the stat. 11 Geo. II. c. 19.

(1) The cases showing the state of the law prior to the act 4 & 5 Will. IV. c. 22, are stated by Mr. Swanston, in his note to *Ex parte Smyth*, 1 Swanston, 337, (approved 3 Hare, 180).

(2) See the authorities, 1 Swanst. 349-50, n. where the exception as to annuities given for

maintenance is noticed.

(3) *Aynsley v. Wordsworth*, 2 Ves. & B. 335, where the principle was extended to a composition for tithes between two incumbents.

(4) *Brown v. Amyot*, 3 Hare, 182-3.

(5) *In re Markby*, 4 My. & Cr. 484.

ADDITIONAL NOTE.—No. IV.

Lord Cottenham's Judgment in Blewitt v. Roberts.

Gift of Life Annuity as distinguished from Absolute Gift, v. supra, p. 579.

"The first gift is 600*l.* per annum to the testator's wife, for her life; and, after her death, the said annuity to be equally divided between six persons named, or the survivors or survivor. The Vice-Chancellor has decided that these six persons are entitled, after the death of the widow, to so much £3 per Cent. stock as would produce 600*l.* per annum. His Honour has decided the same point in *Tweeddale v. Tweeddale* (1), and is there made to express his opinion thus: 'I have always thought, that if there be a gift simply of 100*l.* a year to A., it is a gift of that sum which shall be sufficient to produce 100*l.* a year.' The cases referred to in the argument before me of this case, do not support that proposition. In *Clough v. Wynne* (2), the gift was of the interest of the residue to A. for life, and at her decease to the plaintiff, and Sir Thomas Plumer held, that the corpus of the residue passed. Giving the interest of personalty without limitation, passes the whole interest, unless there are words to confine it to a life interest. *Stretch v. Watkins* (3), decided by the same Judge, was an unlimited gift of the produce of stock. A very different principle applies to that case; for as the public funds consist only of perpetual annuities, an unlimited gift of the produce of stock necessarily exhausts the whole subject-matter. In *Philipps v. Chamberlaine* (4), Lord Alvanley thought that the terms used in the residuary clause were sufficient to carry the principal as well as the interest. In *Rawlings v. Jennings* (5), Sir Wm. Grant relied upon expressions showing an intention to give the capital. Those decisions are founded upon the general principle, that a gift, without limit as to time, of the produce of the fund, amounts to a gift of the fund itself; and when it is clear that the gift of the produce of the fund is without limit as to time, it is impossible not to adopt the conclusion that the fund itself is given; but if expressions are to be found showing an intention that the gift of the produce should be limited as to time, such limit will be the measure of the gift."

"There is a marked distinction between the gift of the produce of a fund without limit as to time, and a simple gift of an annuity. An annuity may be perpetual, or for life, or for any period of years; but, in the ordinary acceptance of the term used, if it should be said that a testator had left another an annuity of 100*l.* per annum, no doubt would occur of the gift being an annuity for the life of the donee. It is the gift of an annual sum of 100*l.*; that is, of as many sums of 100*l.* as the donee shall live years. In *Savery v. Dyer* (6), Lord Hardwicke says, 'If one give by will an annuity not existing before, to A., A. shall have it only for life.' In that case, the gift was of an annuity to A. during the life of B., and B. having survived A., the question was, whether the annuity had ceased, notwithstanding the express provision that it should be during the life of B."

"It is singular that no other case has been referred to, in which this question distinctly arose; but in *Innes v. Mitchell* (7), before Sir Wm. Grant, and before Lord

(1) 9 Law Journ. p. 147; now reported in 10 Sim. 453.

(2) 2 Mad. 188.

(3) 1 Madd. 253.

(4) 4 Ves. 51.

(5) 13 Ves. 39.

(6) Ambl. 139.

(7) 6 Ves. 464.

Eldon (1), upon appeal, the annuity was held to be for life only, although there were provisions leading more strongly than anything in this case, to an inference that the capital was intended to be given, such as the direction as to the 5000*l.*; without that direction the gift would be of an annuity of 200*l.* to the use of a mother and her children, for her and their use, and the longest liver of her and her children, subject to an equal division of the interest while more than one of them should live; a gift not very dissimilar from the present; and both those very able Judges held that the annuity determined with the life of the survivor. If the gift simply of an annuity of 100*l.* to A. is a gift of that sum which shall be sufficient to produce 100*l.* a year, there was sufficient in *Innes v. Mitchell* to give to the mother and her children such a sum as would be sufficient to produce 200*l.* per annum, without reference to the provision as to the 5000*l.*; and yet, notwithstanding that provision, it was held that there was no gift of any principal sum. It seems to have been supposed, that the direction that there should be an equal division of the annuity, implied that the principal producing the annuity was to be the subject-matter of the division; but there was a similar direction in *Innes v. Mitchell*, and in *Jones v. Randall* (2); and yet in neither of those cases was there any gift of the principal."

"It does not appear to me that there is any inconsistency in the cases. To hold that a simple gift of an annuity to A. does not give an annuity beyond the life of A., is not inconsistent with holding that a gift of the produce of a fund without limit as to time gives the fund itself. In the former case, there is no allusion to any principal sum. It is, indeed, the course of this court to secure an annuity by investing a capital sum; but a testator with an income much exceeding the annuity given is not very likely to contemplate any such investment. He may indeed be without the immediate means of making it; as, for instance, if his whole property consisted of long leaseholds. If a testator were minded to give 10,000*l.*, can it be supposed that he would set about effecting this object by giving 500*l.* per annum to the intended legatee, without making any mention of the 10,000*l.* or of any other capital sum? To carry into effect the gift of an annuity of 500*l.* by raising 10,000*l.* out of the estate, would, probably, be very foreign from the testator's intention. I feel no disposition to question the doctrine laid down by Lord Hardwicke, and followed in the cases I have referred to; and if I did, I should not feel at liberty to depart from a rule established upon such authority."

(1) 9 Ves. 212. The bequest in that case was as follows:—"I give to Mrs. Janet Innes, relict of my late nephew Alexander Innes, 200*l.* per annum, for the use of herself and children, which annuity is to be paid out of my general effects until it is convenient to my

executors to invest 5000*l.* in the funds in lieu thereof, for her and their use, and to the longest liver of her and her children, subject to an equal division of the interest while more than one of them alive;" 6 Ves. 463.

(2) 1 Jac. & Walker, 100.

SECTION XI.—*Of the Doctrines as to Election, Satisfaction, and Performance.*

Doctrine of Election, in the view of the Court of Chancery, to be considered in Cases where the Property of a Person is disposed of, and a Gift is made to that Person in the same Instrument.

Doctrine as stated by Sir T. Clarke, M.R., Lord Eldon, and Sir T. Plumer.

Rule applies whether done Purposely or by Mistake.

Application of the Doctrine as regards Persons and Subjects.

Applies to cases of Partial Disappointment.

Foundation of the Doctrine—Intention—Illustrations.

Applies to the Execution of Powers.

Where Legatee may renounce a Gift charged with a Burthen, and still take a Beneficial Interest.

Effect of Acquiescence and Laches.

Derivative Interest acquired from a Person who has elected against the Will.

Cases of Express Condition to be distinguished.

Questions of Construction which have frequently arisen upon Wills, where it has been doubtful whether the Property of another was intended to be devised, adverted to.

Extrinsic Evidence not to be admitted in these cases, excepting on General Principles.

Questions connected with this subject which have arisen as to Wife's Title to Dower.

Where the Testator is a Scotchman domiciled in England.

The Nature and Amount of the Property must be ascertained before a Person can be put to his Election.

What Acts will amount to an Election.

Where Interests are given to a Person and his Children in succession.

The Consequences which result from Election to take against the Instrument considered.

Whether Forfeiture or a Liability to make Compensation only.

The Doctrine of Satisfaction.

Satisfaction of a Debt by a Legacy.

Whether Parol Evidence can be admitted.

The Doctrines of the Court of Chancery as to Performance.

Mixed Cases of Satisfaction and Performance.

THE nature of Election, in the various senses in which it is used, has been stated in the former volume (a). The sense in which we are

(a) Vol. i. pp. 639-40. Mr. Swanston, and after him, Mr. Justice Story, § 1073, *et seq.*, have collected the principal passages in the Institutes, Code and Pandects of Justinian, from which this doctrine (with considerable modifications) may be supposed to have been,

now about to consider it, is that in which it is applied to dispositions of property not belonging to the donor or which is subject to claims which he has no right to disturb, coupled with a gift by the donor of property of his own to the person whose rights are interfered with by the donor.

The principle on which the doctrine of election, taken in that sense, rests, is, that he who accepts a benefit under a deed or will is bound to confirm the whole instrument, conforming to all its provisions and renouncing every right inconsistent with them : no one is allowed to frustrate an instrument under which he claims (*a*). The general rule, said Sir T. Clark, in *Clarke v. Guise*, (1755) (*b*), which has obtained since *Noys v. Mordaunt* (*c*), is clear, that where a man does by will more than he has strictly a right to do, and gives a bounty to the person to whose prejudice that is done, the person prejudiced by one part shall not insist upon his right, and at the same time upon the bounty. Lord Eldon, in a comparatively late case in the House of Lords, illustrates the rule thus : If I chose to devise my estate to A. B., and in the same will I dispose of an estate which is not mine, but his, a court of equity will say that he shall take no benefit from that will, unless he makes good the whole of the will ; and A. B. therefore will not take, unless he allows the whole of the will to be effectual, that is, suffers his own to be disposed of according to the will, or makes compensation for as much as he takes of mine : that is Election (*d*). If therefore a party taking what is his own would disappoint the testator's intention, he must elect (*e*). If the party should elect to take his own property, and thus to disappoint the provisions of the will, the court has considered itself at liberty to dispose of the property given to the person so electing, in such manner as will do justice to the disappointed devisee or legatee ; the language of the judges, says Sir T. Plumer, ascribes to the court an equity to lay hold on the estate thus taken from the devisee by the principle of election, and to dispose of it in favour of those whom he has disappointed ; not merely taking it from one, but bestowing it on another (*f*).

indeed no doubt was, adopted into our Code of Equitable Jurisprudence. This subject is elaborately treated by Mr. Roper, and Mr. White, his editor, in the Treatise on Legacies : I only propose to state the general doctrines.

(*a*) See *Dillon v. Parker*, 1 Swanst. 379 ; confirmed, on appeal, 1 Jac. p. 505 ; and in the House of Lords, 7 Bli. N.S. 325 ; 1 Cl. & Fin. 303. See, as to this case, Sugd. Law of Prop. 450, 453-8.

(*b*) 2 Ves. Sen. 617 ; see Mr. Swanston's

note, 1 Swanst. 400.

(*c*) 2 Vern. 581 ; Gilb. Eq. R. 2 ; but which was not, as stated by Lord Hardwicke, 2 Ves. 14, the first case on the subject ; see 6 Dow. 179 ; *et v. sup.* vol. i. p. 413, n. (*b*), and 640.

(*d*) Lord Eldon, *Lord Raneliffe v. Parkyns*, 6 Dow. p. 179 : as to what are cases for Compensation, *v. infra*.

(*e*) *Unett v. Wilkes*, Ambl. 432.

(*f*) V. Sir T. Plumer's judgment, *Gretton v. Haward*, 1 Swanst. 423.

Where the party bound to elect labours under any disability, as infancy or coverture, the court will refer it to the Master to inquire whether it will be most beneficial for the party to take under or against the will or deed, and will decree accordingly (*a*). Lord Redesdale considered that the rule of election was a rule of law as well as of equity, and that the principal reason why courts of equity are more frequently called upon to consider the subject (particularly in wills) than courts of law is, that at law, in consequence of the forms of proceeding, the party cannot be *put to elect* (*b*).

Whether the testator has by mistake devised another person's property (*c*), or has arbitrarily chosen to give what is not his own, the rule equally applies (*d*). Lord Northington held that it should appear that the testator *knew that he had no right* to dispose of the lands, and yet that knowing it, he took upon himself to dispose of them; and he would not allow that *general words* could be held to come within the rule (*e*): but Lord Eldon stated the rule to be that if a person, being about to dispose of his *own* property, includes in his disposition, whether by *mistake* or *not*, property of another, an implication arises that the benefit under that will shall be taken upon the terms of giving effect to the whole disposition (*f*). Lord Bathurst was of opinion that where a person supposes he has a lawful power to dispose of an interest, and this appears on the face of the will, that ought not to be considered as a case of election, as it is incapable of proof that he would have disposed of the estate if he had known he had no power to dispose of it (*g*); this rule of construction has however, as Sir E. Sugden observes, been very properly rejected (*h*) upon the ground of

(*a*) 2 Fonbl. 329, "for otherwise other persons might be injured for want of that election," 2 Sch. & L. 267; *et v. infra*, p. 588.

(*b*) *Birmingham v. Kirwan*, 2 Scho. & Lef. 450. The authorities on which Lord Redesdale founded his opinion, that election is also a rule of law, have been examined by Mr. Swanston, together with the other authorities bearing on the subject, 1 Swanst. pp. 426-430; note to *Gretton v. Harvard*: looking to these authorities, it would appear that the doctrine itself, at least as administered in the Court of Chancery, has been considered to be exclusively equitable (*et v. sup.* vol. i. p. 501, 640, as regards Dower); certain it is, that from the earliest times the judges of the courts of law considered that election was exclusively the subject of equitable jurisdiction (*v. sup.* vol. i. p. 413, note (*b*), the case referred to is taken from Mr. Cecil Monro's MS. collections). Sir E. Sugden, on the authority of the dictum of Lord Thurlow, *Robinson v. Hardcastle*, 2 Bro. 29, treats the doctrine as purely equitable,

though, as he observes, referring to Lord Mansfield's judgment in *Doe v. Lord G. Cavendish*, 4 T. R. 743, it was once considered as fit for legal cognizance; 2 Sugd. Pow. 146. It is obvious that the principle, so far as regards the consequences of election, could hardly be carried out at law in the simplest case.

(*c*) *Rumbold v. Rumbold*, 3 Ves. 69; *Strutt v. Finch*, 2 Sim. & St. p. 233. "Most of the cases," says Lord Hardwicke, (*Bor v. Bor*, 3 Bro. P. C. p. 179, note,) "have been founded on the testator's mistake;" and see 2 Fonbl. 328.

(*d*) *Whistler v. Webster*, 2 Ves. J. 371-2.

(*e*) *Forrester v. Cotton*, 1 Eden, 535.

(*f*) *Green v. Green*, 19 Ves. 667.

(*g*) *Cull v. Showell*, Amb. 727, 3 Woodd. Lect. Append. 1, Lord Bathurst, C.

(*h*) *Whistler v. Webster*, 2 Ves. J. 367; and see *Wright v. Rutter*, *ibid.* 673; *Rutter v. Maclean*, 4 Ves. p. 531; and *Doe v. Cavendish*, 4 T. R. 741, note.

the danger of speculating upon what the testator would have done had he known the fact (a).

As regards the Subject: the doctrine is applied to interests in respect not of their amount, but of the inconsistency with the testator's intention, so that it is not material whether the interests are immediate, remote, or contingent, of value or not of value (b): and the rule applies as well to copyhold as to freehold estates (c); and to deeds as well as wills (d). The doctrine applies even to interests of persons under disabilities, as Infants and Married women (e). A wife though during the coverture she has accepted a provision made for her after marriage in lieu of dower, may still, if she survive, claim her dower at common law; the statute 27 Hen. VIII. c. 10, provides that the period of election shall not be till after the right to dower has accrued (f). Cases of difficulty sometimes arise as regards election by married women; and in particular, as in a late case, whether an election of the wife, in respect of personal estate, can prevail against the dissent of her husband (g).

The principle equally applies where the disappointed party has received a partial satisfaction by taking property coming to him against the will, by reason of an election against the will having been made by some other person: thus where a person disappointed of 600*l.* a year, by the election of other persons took an estate of 145*l.* a year not given to him by the will, he was held to be entitled to satisfaction out of the estates in the hands of the court to the extent of the difference between 145*l.* and 600*l.* (h). Though part of the benefits given by the will may fail, the remainder may constitute a case of election (i). The

(a) 2 Sugd. Pow. 147, last ed.; Mr. Swanston's note, p. 407: but in *Moore v. Butler*, 2 Scho. & Lef. 267, Lord Redesdale seems to adopt Lord Bathurst's doctrine.

(b) *Wilson v. Lord J. Townsend*, 2 Ves. J. 696-7; *Ardesoife v. Bennet*, 2 Dick. pp. 463, 467; there a feme covert was held to have conclusively elected; Mr. Swanston's note, 1 Swanst. pp. 407-8, other cases are there cited.

(c) *Rumbold v. Rumbold*, 3 Ves. p. 65; *Wilson v. Mount*, *ibid.* p. 191; *Pettward v. Prescott*, 7 Ves. 541.

(d) *Moore v. Butler*, 2 Scho. & Lef. 249; *Green v. Green*, 2 Mer. 86; *Dillon v. Parker*, 1 Swanst. 359; Jac. 505; 2 Sugd. on Powers, 146.

(e) See, on this subject, 2 Sugd. Pow. 154, Mr. Swanston's note, 1 Swanst. p. 413, *et seq.*; Mr. Jacob's note, 1 Rop. H. and W. 28; and Stalman on Election, 184, where the case may be found, and the mode of putting a married woman to her election is stated.

(f) *Frank v. Frank*, 3 My. & Cr. pp. 171, 179.

(g) See *Wall v. Wall*, 15 Sim. 520-1; in that case a legacy was given to a married woman expressly in lieu of her claim under a settlement to a reversionary interest in stock. See as to the effect of the wife's election on the husband's interest as tenant by the curtesy, 1 Bright, Husband and Wife, 158; and, as to the general doctrine, Mr. Jacob's note to Roper, Husband and Wife, *ibid.* ii. p. 475.

(h) *Gretton v. Haward*, 1 Swanst. 432; 2 Sugd. Pow. 147.

(i) *Newman v. Newman*, 1 Bro. p. 186, on appeal. That was a case of an *express* devise in satisfaction; a real estate was devised (together with personal estate) to the wife, in lieu of her claims on the settled estates; the devise of the real estate failed, by reason of the will not being duly attested: this cannot now happen, for both would fail.

circumstance that a condition is expressed with reference to one individual and not the other, is not sufficient proof that there was no intention to raise a case of election as regards such other person; and if a case of election is raised by the operation of the will, notwithstanding an express condition may be introduced as to another estate, yet if any other property is given upon which election can be fastened, the court will apply it without express direction, and though there be an express direction with regard to another individual (*a*). Lord Hardwicke is reported to have said that if a particular benefit is given expressly in satisfaction of a particular claim, this will not exclude that party from another benefit, though it may happen to be contrary to the will, for the court will not construe it as meant in lieu of every thing else when the testator has said it is of a particular thing (*b*); but the same eminent judge held, that where a particular thing is given in discharge of a demand, the party insisting on his demand must waive not only the particular thing but all benefit which he could claim under the will (*c*).

The foundation of the equitable doctrine of election is, as will have been observed, the *Intention*, explicit or presumed, of the author of the instrument to which it is applied (*d*). It was on the principle that an indication of an *intention* to devise is sufficient, that the rule applied to the heir to whom an estate was devised prior to the late statute as to descent; so that if an estate were devised to the heir, although by the rule of law the devise was inoperative and he took by descent, still he was put to his election in the same manner as an actual devisee (*e*). But under the old law, it was held that for the purposes of election, where a person by a will, attested by two witnesses only, devised his real estate from his heir-at-law, and his personal estate to his heir-at-law, though it was a good will as to personal estate, it could not be looked at as containing a devise of the real estate: a judge, as Lord Alvanley expressed it, can say—for the Statute of Frauds enables him and he is bound to say—that if a man by will unattested gives both real and personal estate, he never meant to give the real estate at all (*f*). However, this question and the doctrine in regard

(*a*) Lord Eldon, *Dashwood v. Peyton*, 18 Ves. 39.

(*b*) Lord Hardwicke, *East v. Cook*, 2 Ves. 33, but the judgment is loosely reported; and see Mr. Swanston's note, 1 Swanst. p. 405.

(*c*) *Graves v. Boyle*, 1 Atk. p. 509, 510, and see the cases there cited; *Jenkins v. Jenkins*, one of the cases cited as stated in Eelt's Supp. to Ves. Sen. p. 250, does not go to the full extent of the proposition; *et v. inf.* 590-1.

(*d*) See Mr. Swanston's note, p. 401, and the authorities there referred to.

(*e*) *Welby v. Welby*, 2 Ves. & B. p. 187; and see *Rich v. Cockell*, 9 Ves. p. 369; and *White v. White*, 2 Dick. 522; Reg. Lib. B. 1775, fo. 650-55; Sugd. Pow. 394, 5th edit.; *Gretton v. Howard*, 1 Swanst. p. 409; Mr. Swanston's note, p. 404.

(*f*) *Buckeridge v. Ingham*, 2 Ves. J. 666; *Ex parte the Earl of Ilchester*, 7 Ves. p. 372;

to gifts of personal estate to an heir on condition that he should confirm a devise by a will not duly executed are put an end to, as regards wills executed or re-published since 1837, by the new Statute of Wills, 1 Vict. c. 26, by which the same solemnities are required for passing personal and real estate (a): and by the effect of the same statute, which gives a power to devise after-acquired estates, another question formerly of not unfrequent occurrence, as to whether an attempt to devise such after-acquired property would raise a case of election, can never or but seldom arise (b).

The doctrine applies to the execution of Powers; thus if there be a power to appoint to two, and the donee of the power appoints to one only, and gives a legacy to the other, he cannot claim the legacy and also dispute the validity of the appointment (c). But the doctrine of election can never be applied, unless, if an election be made contrary to the instrument, the interest that would pass by it can be laid hold of to compensate for what is taken away; in other words, there must be some free disposable property given to the person which can be applied in the way of compensation for what is taken away: where therefore there is a fund subject to the appointment of the father amongst his children, and the father appoints a part to some of his children, and the other part to persons not objects of the power, this is not a case of election; any child may claim his share of the portion of the fund improperly appointed as in default of appointment, although a specific portion of the fund should have been appointed to him, provided no legacy be given to him by the appointor (d): a case of election does not arise where the person who appoints to persons not objects of the power, adds that he makes the appointment only so far as he lawfully can (e).

A legatee may decline one benefit which turns out to be charged with a burthen not contemplated by the testator, without renouncing

Carey v. Askew, cited 8 Ves. p. 492; 2 Sugd. Pow. 152. The case of *Thellusson v. Woodford*, (13 Ves. 209; 1 Dow. 249; 2 Sugd. on Pow. 153); where the heir was held to be bound to confirm the devise of after-purchased estates, has become inapplicable since the passing of the 1 Vict. c. 26; see Sugd. Law of Prop. 448.

(a) The cases by which the doctrine above adverted to was established, are collected in Mr. Swanston's note, p. 406; v. *inf.* p. 592.

(b) See 1 Jarm. on Wills, 390.

(c) *Wollen v. Tanner*, 5 Ves. 218; *Whistler v. Webster*, 2 Ves. J. 367; *Vane v. Lord Dungannon*, 2 Scho. & Lef. 118; and see the other cases cited 2 Sugd. on Pow. 148-9, 150; Sir E. Sugden (p. 150) disputes the doctrine

of Lord Thurlow in *Robinson v. Hardcastle*, 2 Bro. 344.

(d) Lord Rosslyn, *Bristow v. Warde*, 2 Ves. J. 336; 2 Sugd. Pow. 149; and see *Routledge v. Dorrell*, 2 Ves. J. 366. Sir J. Leach held, in *Carver v. Bowles* (2 R. & M.), that it was not a case of election, as the testator had made an absolute appointment in the first instance. In *Church v. Kemble*, 5 Sim. 525, it was held that no case of election arose, because the appointer only intended to appoint to the incapable objects, in case she had power to do so.

(e) *Carver v. Bowles*, 2 Russ. & M. 301; 2 Sugd. Pow. 151; *Church v. Kemble*, 5 Sim. 525, *supra*, note (d).

another benefit unconnected with a burthen given to him by the same will (a); but where a legacy is given charged with a burthen, and there is also a beneficial gift, and it appears that the testator intended that the two should be taken as one gift, or that the testator plainly intended that the burthen should not fall upon his estate, the legatee must take both or neither (b).

A person may be estopped from putting in force even a clear case of election, by Acquiescence or by Laches, just as he may by the same means be deprived of any other equitable right (c). But an act done *diverso intuitu* will not have the effect of preventing a person from exercising the right of putting the party, who prevents him from enjoying what is intended to be given or secured to him, to his election. A woman on her marriage was entitled to 5000*l.* charged on an estate which was settled on herself for life, remainder to her children in tail; she was also entitled to a sum of stock for her life with remainder to her children absolutely: it being supposed that this sum of stock belonged to her absolutely, she by the settlement made on her marriage released the 5000*l.*, and settled the stock on her husband for life, remainder to her children. After the marriage, the mistake being discovered, the husband and wife signed a memorandum by which it was declared that the stock should remain upon the original trusts, but nothing was said as to the release; the wife died leaving her husband and three infant children surviving. It was held that the husband at the time of signing the memorandum had a clear right to compel the children to confirm the settlement of the stock, if they took the benefit of the release, and that he had not lost that right by signing the memorandum (d).

A person may take derivatively an interest not intended for him without being bound to elect, though he takes a benefit under the will and the election under which he collaterally derives a benefit disappoints some of the provisions in the will: thus, if a wife elects to take a real estate against a will, the estate she takes will be subject to all its incidents in favour of her husband; thus he may take as tenant by the curtesy, though he has accepted benefits under the will (e).

(a) *Andrew v. Trinity Hall*, 9 Ves. 534.

(b) *Talbot v. Earl Radnor*, 3 My. & K. 254, v. *sup.* 589.

(c) *V. int. al. Dillon v. Parker*, Jacob, 505, 513, on appeal to the Lord Chancellor; 1 Cl. & Fin. 304, on appeal to the House of Lords, see p. 318; and the account may be limited where a party is guilty of laches in bringing forward his claim, *Kidney v. Cousmaker*, 12 Ves. 158.

(d) *Seton v. Smith*, 11 Sim. 59.

(e) *Lady Cavan v. Pulteney*, 2 Ves. J. 544; 3 Ves. 384. In *Rich v. Cockell*, 9 Ves. 369, the husband was not put to his election in respect of a gift of the wife to him by will, of what she had power to dispose of by will, so as to prevent his claiming by his marital right property given away by the same will, but which she had no power to dispose of by will; but the circumstances are somewhat special.

The benefit of putting a party to his election does not extend to a Residuary legatee of the personal estate (*a*). The doctrine of election was not generally speaking applicable to Creditors taking the benefit of a devise for payment of debts; and also enforcing their legal claim against other funds disposed of by the will (*b*).

Cases of election are carefully to be distinguished from cases of express Condition, to which the doctrine of election cannot be applied (*c*). Thus, if the heir has a legacy upon an express condition that he will confirm the provisions of the will, he must do so or he cannot take the legacy or any part of it; this is not a case for compensation (*d*). Lord Hardwicke determined that where an express condition was annexed to a personal legacy in a will attested by two witnesses only purporting to contain a devise of real estate, the heir was bound to make good the devise of the realty or give up his legacy (*e*), and though this doctrine was disapproved on the ground that the devise ought not to have been looked to at all, it was always acted upon (*f*), but such a question cannot now arise.

In cases arising upon wills it frequently happens where the subject of the devise is not referred to in specific terms, that it is doubtful whether the testator, looking to the words he has used, did intend to devise the property or interest which belongs to the person to whom he has given part of his own property. This question has to be determined not on any principle applicable to cases of election only, but by the general rules of construction; that is, the meaning of the words used has to be ascertained by the application of those rules (*g*). *Primâ facie*, said Lord Eldon, it is not to be supposed that a testator disposes of that which is not his own (*h*); it must be by demonstration plain, by necessary implication—meaning by that the utter improbability that he could have meant otherwise—that the case is raised; but where there is that plain demonstration, that neces-

(*a*) Lord Rosslyn, *Earl of Darlington v. Pulteney*, 3 Ves. 385.

(*b*) *Kidney v. Cousmaker*, 12 Ves. p. 136; but see Lord Eldon's judgment, in *Clarke v. Lord Ormonde*, Jac. R. 115. This question may possibly still arise in the case of a charge, though by the act 1 Will. IV. c. 104, real estates are made liable for simple-contract debts.

(*c*) 2 Sugd. on Powers, 146.

(*d*) *Boughton v. Boughton*, 2 Ves. 12; 2 Ves. J. 371; as to Compensation, *v. infra*.

(*e*) *Boughton v. Boughton*, 2 Ves. 12.

(*f*) Sugd. Pow. 5th ed. p. 399; *Wilson v. Wilson*, 1 De G. & Sm. p. 154, was decided on

the particular circumstances. A question analogous to election may arise, as where a person is to have an estate, on complying with certain requisites, in the nature of a condition precedent; as to which, see *Roundell v. Currer*, 2 Bro. 73; 1 Swanst. 383. The Master of the Rolls there said, that if it had been a question of election he should have sent it to a Jury.

(*g*) As to the rules of construction, *v. sup.* vol. i. chap. viii. § 1; and see on the subject in the text, *Doe v. Oxendon*, 3 Taunt. 147.

(*h*) Lord Eldon, 6 Dow. 179; Sugd. Law of Prop. 449; *Timewell v. Perkins*, 2 Atk. 104; *Rutter v. Maclean*, 4 Ves. 537.

sary implication, then you must give up all to pass according to the will, or make compensation (a); but it rests upon those who contend for a case of election to show that there is that manifest plain demonstration, that utter improbability (b): "No man ought to be spelt or conjectured out of his property."

The question has most frequently arisen where the testator has disposed of an estate in which he had only a partial interest, or has referred to property in a particular locality in which he had only an interest of minor importance. It is difficult, said Lord Eldon, in any case to apply the doctrine of election where the testator has some present interest in the estate disposed of, though it may not be entirely his own (c). Where a deviser was entitled to a manor and a reversionary interest only in an estate in a particular parish, and his will contained a devise in terms which would have conveyed the whole estate if it had been his own, Lord Eldon said, the utmost construction that could be given to such a devise, *primâ facie*, was that he meant to dispose of such interests in the parish as were his own, that is, the manor and the reversion; but though it may appear, *primâ facie*, that the testator meant to pass only what was his own, yet if the context shows that he means to propose a case of election, and chooses to consider that which was not his own as his own for the purposes which he had in view in making his will, the expression "*my manor, lands,*" &c. will not prevent a case of election from being raised (d). Even where a donor declares that each person taking under his will shall be bound to give effect to every disposition contained in it, it must first be ascertained whether anything belonging to the person disputing the will was intended to be affected by it (e). On the princi-

(a) Lord Eldon, *Rancliffe v. Parkyns*, 6 Dow. 179; *Pole v. Lord Somers*, 6 Ves. 322.

(b) Lord Com. Eyre, *Blake v. Bunbury*, 1 Ves. J. 524.

(c) 6 Dow. 185; and see Sir E. Sugden's observations on *Dillon v. Parker*, in the House of Lords, Law of Prop. p. 455; that eminent lawyer critically examines the doctrines there laid down in reference to the facts of that case: *Forrester v. Cotton*, 1 Eden, 535-6; though the doctrine in that case, according to modern authority, seems to be too confined.

(d) Lord Eldon, *Lord Rancliffe v. Parkyns*, 6 Dow. 179. In *Lord Rancliffe v. Parkyns* the testator had confirmed the settlement under which the devisee was entitled in tail to the estate which was in terms devised to him for life, with *every thing therein contained*. In *Blake v. Bunbury*, 1 Ves. J. 514 (see 6 Dow. 185-9), the testator had only confirmed the settlement under which the devisee was entitled in tail, so far as respected certain

portions given by the settlement: this it was that occasioned different decisions being made in the two cases; see 6 Dow. 180: "Where," said Lord Eldon, in the first-cited case, "the testator expressly confirms a settlement, and every thing therein contained, you cannot, as against the *express* declaration of intention, take it by conjecture, call it 'demonstration plain,' or 'necessary implication,' or what you will, but still only conjecture, that he does not mean to confirm; and you cannot reasonably conclude that because he uses expressions which apply to some but not to others of the subjects devised, he contradicts himself, and does not intend to confirm, though he says he does confirm;" *ibid.* 182: the will did raise a case of election as to certain specific legacies; *ibid.* 182.

(e) *Trollope v. Linton*, 1 Sim. & St. 477; as to such provisions, see *Cooke v. Turner*, 17 L. J. Exch. 106; 14 Sim. 611.

ple that what is not the testator's property in the strict acceptation of the term will not pass by a devise of "his estate," it has been decided that a devise by the testator of *his* estates does not extend to lands of which the testator was tenant in tail, or to property of which he was joint owner with another, or, under the old law, to copyholds not surrendered (a).

Before the statute for making copyholds liable for debts, a more favourable construction was given to a devise of the testator's "real estate," where the testator had freehold estate as well as copyhold estate, in favour of creditors, than was applied when the devise was in favour of a stranger or even a child: in favour of creditors it was held that where it was necessary to resort to the copyholds for payment of the debts, they should be held to be intended to pass, but not so where the devise was to a younger child if provided for, or to a stranger (b); and accordingly a devise of the residue of "all my real estate whatsoever," &c. was held under such circumstances not to raise a case of election against the heir (c).

Where the testator uses such expressions as all *my* estate, or all my estate at such a place, and he has estates over which he has not the absolute power of disposition by reason of the Claims which other persons have upon them, whether the person having any such claim shall be put to his election if he take a benefit under the will, must depend on whether in point of construction it is to be taken that the testator was devising the entire corpus of the estate, or his interest in it only. It seems to be settled by authority that as a general rule the words "all my estate," *simpliciter*, must be construed to extend to the testator's interest only; but if he add a description, shewing clearly that the estate itself was the subject, the words will be applied to the entire corpus (d).

(a) Vice-Chancellor Wigram, *Allen v. Anderson*, 5 Hare, 169; his Honour there refers to the cases on this subject.

(b) *Lindopp v. Eborall*, 3 Bro. p. 188; *Drake v. Robinson*, 1 P. W. p. 443, and other cases there cited.

(c) *Judd v. Pratt*, 13 Ves. pp. 176-7. By the 55 Geo. III. c. 192, copyholders were empowered to devise without a previous surrender to the use of the will; the act 1 Vict. c. 26, affirms the testamentary power of an unadmitted heir and extends the devising power to an unadmitted devisee or surrenderee; see 1 Jarm. Wills, 52-3; and see *ib.* p. 50-51.

(d) The original decree in *Lawrence v. Lawrence*, 2 Freem. 234, 2 Vern. 365, *S. C.* at law, 1 Lord Raym. p. 438, was founded on this principle, that "a gift of all my estates"

means the whole corpus, but that decree was reversed by Lord Keeper Wright; Lord Camden refused to interfere with that reversal, and the House of Lords confirmed it; see Hoven-den's note, 2 Freem. p. 235. In *Hitchins v. Hitchins*, (2 Freem. 241; *S. C.* Prec. Ch. 133; 2 Vern. 403,) it was held that where a husband had devised to his wife a part of his estate, she should not be put to her election, for that "whatsoever is given her by the will shall be intended as a bounty, and not in satisfaction of what is her right, unless it is so expressed." In *Foster v. Cooke*, 3 Bro. 351, Lord Thurlow referred the words "all my estate," to the interest, in conformity with the above decisions; in *Chalmers v. Storil*, 2 Ves. & B. 224, (after stated,) Sir Wm. Grant, as the testator had annexed a description, referred them

As a general rule the intention to dispose of the property of another so as to put him to his election, must appear upon the will itself (*a*); mere recital, without more, does not amount to a devise or a demonstration of an intention to devise (*b*): the will now, it is to be remembered, speaks from the death as regards both real and personal estate. It seems to be settled, though there are authorities to the contrary (*c*), that where the intention to dispose is clearly expressed by the testator, and there is no ambiguity in the expressions he has used, extrinsic evidence for the purpose of showing that the words used were intended to embrace something more than they import, namely, property to which he was not entitled, is inadmissible (*d*). But in these instances, as in every other case of construction, extrinsic evidence may be admitted, not to show the intention, but what is the meaning of the words used, and thus to establish that words in themselves equivocal were used for the purpose of disposing of another person's property (*e*).

The question as to the effect of general words has been very frequently agitated in cases where it has been doubtful upon the terms of the will whether the testator has intended to devise his estate free from the claims of the wife in respect of dower (*f*): it may be well to refer to some of the decisions, inasmuch as they illustrate the general principles applicable to the subject generally, for a wife is put to her election on the same principle as a stranger (*g*).

to the corpus; but see *Holdich v. Holdich*, *inf.* p. 597, n. (*a*). In *Dowson v. Bell*, 1 Keen, p. 764, Lord Langdale says, "When a testator speaks of all his estates, he must be held to mean subject to the legal rights against them."

(*a*) See Lord Hardwicke's judgment in *Bor v. Bor*, 3 Bro. P. C. p. 179, n.; *Forrester v. Cotton*, 1 Ed. 535 (and the cases in Lord Henley's note); *Stratton v. Best*, 1 Ves. J. 285; *Blake v. Bunbury*, 4 Bro. 24; *Judd v. Pratt*, 13 Ves. 174; *Hodson v. Merest*, 9 Pri. 576 (cases as to copyholds); *Dashwood v. Peyton*, 18 Ves. p. 27; and see *Dummer v. Pitcher*, 2 My. & K. 262, 274; *Lowe v. Carter*, 1 Beav. p. 426; *sup.* vol. i. p. 572; *Cooke v. Briscoe*, 1 Dru. & Wal. 596; 2 Sugd. Pow. 149; *et v.* Sugd. Law of Prop. 448-50.

Lord Chief Justice De Grey, in *Pulteney v. Darlington*, cited 6 Ves. 400, by Lord Eldon, said, "I do not agree to the position laid down, in the general sense of it, that where a man gives all his estate he does not mean to give what is not his; what he thinks his, is, in the sense in which he uses his words, his." Lord Eldon, referring to this passage, said, "I agree to it, if it goes upon a manifestation in

the will itself, that he means to call that his own, which, in a legal sense, is not his own;" *Pole v. Lord Somers*, 6 Ves. p. 322: see Lord Eldon's observations as to evidence to explain what is meant by "my personal estate," *ibid.* p. 400; as to which, *v. infra*.

(*b*) Lord Eldon, *Dashwood v. Peyton*, 18 Ves. 41; but see the distinctions taken by the V.-C. Wigram, *Adams v. Adams*, 1 Hare, 540-1.

(*c*) *Inter alia Hinchcliffe v. Hinchcliffe*, 3 Ves. 516.

(*d*) *Stratton v. Best*, 1 Ves. J. 285; *Clementson v. Gandy*, 1 Keen, p. 309, where the previous authorities are cited in the argument; and see Jarm. on Wills, i. 392-3; *et v. supra*, p. 434, n. (*e*).

(*e*) *Shuttleworth v. Greaves*, 4 My. & Cr. 38; *Druce v. Denison*, 6 Ves. 385; and the other cases, 2 Sugd. Pow. 149; *Clementson v. Gandy*, 1 Keen, 309; *et v. sup.* vol. i. p. 556, *et seq.*; and see *Ricketts v. Turquand*, 1 H. L. Cases, 472.

(*f*) By reason of the late act as to dower, this question will not in future so frequently arise.

(*g*) *Miall v. Brain*, 4 Mad. 125.

It has been decided that where the testator gives to his wife and children all his Estates whatsoever, real and personal, to be equally divided amongst them, the wife ought to be put to her election, on the ground that her claim of dower would disturb the equality of division which is contemplated by the will (a). In the case above cited there was the additional reason for so construing "Estates," that the testator had, as appears by the judgment, described his English estate, thereby, as Sir William Grant considered, excluding the ambiguity which Lord Thurlow, in *Foster v. Cook* (b), imputed to the words "my estate" (c).

Where the testator directs that a portion of the estate shall be personally enjoyed by one of his devisees, that is an indication of an intention which puts the widow to her election as regards all the estates devised (d); indeed any expressions as to the enjoyment or management of the estate which would be interfered with by the wife's assertion of her paramount right will have the same effect (e): but where she may enjoy her dower consistently with the devise contained in the will, it will not have that effect (f). In order to put the wife to her election, said Lord Alvanley, it ought to be clear and plain and incontrovertible that the testator could not possibly give what he has given consistently with her claim of dower: it is not sufficient for her exclusion that the testator did not think of her dower: it must appear that he did know of it, and meant to bar her; or that what she demands is repugnant to the disposition (g). On this ground

(a) *Chalmers v. Storil*, 2 V. & B. p. 222; but if the wife takes her dower as *her* property, it would seem that the equality is not disturbed: see, as to this case, 1 Jarm. on Wills, 401-2; it has however been distinctly recognised and followed in two subsequent cases: *Dickson v. Robinson*, Jac. 503, and *Roberts v. Smith*, 1 Sim. & St. 513, 516, which however were perhaps more favourable in their circumstances, but to which Mr. Jarman, on authority, objects, vol. i. 404.

(b) 3 Bro. 347. "Because he gives all his property to trustees, am I to gather," said his Lordship, "from his having given all that he has, that he has given that which he has not?"

(c) See 1 Jarm. on Wills, 400.

(d) *Miall v. Brain*, 4 Mad. p. 126; and see *Taylor v. Taylor*, 1 Yo. & C. C. C. 731; and see 1 Jarm. 399, 400.

(e) *Roadley v. Dixon*, 3 Russ. 192; *Butcher v. Kemp*, 5 Mad. 61; *Hall v. Hill*, 1 Conn. & L. 132, 134, (2 Y. & C. C. C. 22); *Loues v. Loues*, 5 Hare, p. 506. These cases were fol-

lowed by the Vice-Chancellor Knight Bruce in the late case (1849) of *Grayson v. Deakin*, xiii. Jur. 145.

(f) Lord Langdale, *Brown v. Meredith*, 2 Keen, p. 532; Vice-Chancellor Knight Bruce, *Holdich v. Holdich*, 2 Y. & C. C. C. 23.

(g) *French v. Davies*, 2 Ves. J. 572, 577; *Strahan v. Sutton*, 3 Ves. 249; *Thompson v. Nelson*, 1 Cox, 447; *Birmingham v. Kirwan*, 2 Scho. & Lef. p. 444 (see 1 Jarm. p. 398, n.); *Greator v. Cary*, 6 Ves. 615; the cases are collected in Mr. Swanston's note above referred to. In *Read v. Crop* (1 Bro. 492), Lord Thurlow, according to the report of the judgment, 1 Swanst. p. 402, note from Mr. Cox's MS., thought that the testator having devised his estates in a certain locality did not of itself put his wife to her election, she having estates there, and he none; but, according to the report in Brown, p. 492, there was this additional circumstance, that the testator added, "which he had surrendered to the use of his will;" he had surrendered his own estates.

later authorities have decided that a rent-charge given to the wife, charged upon the property out of which she claims dower, does not of itself put her to her election (a).

Where a testator devised all his Canal shares, and had none but what had belonged to the father of his wife, and which stood in the name of himself and his wife; it appearing that he had always acted as the owner, it was held that there was a clear intention to bequeath these shares, and that the wife surviving was bound to elect (b). But where a testator (c) had during his life transferred two sums of £4 per Cent. and £5 per Cent. stock into the joint names of himself and his wife (d); and by his will gave the interest of, *inter alia*, all his funded property (e) to his wife for life; and after her death gave to various persons, *inter alia*, various amounts of £4 per Cent. stock (f), and the testator after the date of his will purchased some other sums of £5 per Cent. stock, which he also transferred into the joint names: the Vice-Chancellor Sir J. Leach, and after him Lord Brougham, were of opinion, though the testator had no other stock and very little other property, that, although in all probability the testator meant to give the stock standing in the joint names, there was not a sufficient indication to that effect upon the will to put the wife to her election.

If an annuity be given to a widow in lieu of dower, or other claims and demands she may have against the testator's estate, that does not prevent her taking a customary estate to which she may be entitled to succeed on the death of her husband according to the custom of the manor, the husband dying intestate as to his real estates (g); and the assets being insufficient, it was held in the same case that the widow was still entitled to be paid her annuity in priority as against

(a) *Dowson v. Bell*, 1 Keen, p. 761; the authorities are collected in 1 Jarm. on Wills, 405-6. In *Holdich v. Holdich*, 2 Yo. & Coll. C. C. p. 21, the Vice-Chancellor Knight Bruce said, "I feel bound, by the present state of the authorities, to say, that a mere gift of an annuity to the testator's widow, although charged on all the testator's property, is not sufficient to put her to her election. I consider myself equally bound, by the authorities, to say, that a mere gift to the widow of an annuity so charged, and a gift of the whole of the testator's real estate, though specified by name to some other person, are not together of themselves sufficient to put the widow to her election: and, moreover, that a gift of a portion of the real estate to the widow, whether for life or during widowhood, is not sufficient, as to the residue of the estate, to put the widow to her election in respect of dower. Whether my opinion would be so if the matter were *res*

integra, it is not necessary to say." And see *Grayson v. Deakin*, before Vice-Chancellor Knight Bruce, xiii. Jur. 146; *et v. sup.* p. 594.

(b) *Shuttleworth v. Greaves*, 4 My. & Cr. 35; *v. sup.* p. 595, n. (e).

(c) *Dummer v. Fletcher*, 2 My. & K. 262, on appeal; 5 Sim. 35, on original hearing.

(d) On the subject of such an act being an advancement to the wife, see *Rider v. Kidder*, 10 Ves. 360; and *Crabb v. Crabb*, 1 My. & K. p. 511; and the above-cited case, 272-3: the original transfer was from his own name, which made it stronger; *George v. Bank of England*, 7 Price, 646.

(e) This was considered to be a *general* not a *specific* bequest, (p. 275); the will was considered as speaking from the death: *ibid.* 277.

(f) These were considered to be pecuniary not specific legacies; p. 276.

(g) *Norcott v. Gordon*, 14 Sim. 258.

the other legatees: nor does a gift to the widow in satisfaction of all her claims preclude her from claiming her share under the Statute of Distributions in the event of the failure of the bequest of the personality (a).

In the case of a Scotchman domiciled and making his will in England, if any question of election be raised in respect of any bequest of the testator's personal estate, it must be governed by English law, that is, the law of the Domicil; but real estate is governed by the law affecting the property where it is situate. In a question of election the court will apply the law which governed cases, raising such questions as to copyholds here, to cases relating to real interests in Scotland; therefore a general devise by a testator of all his real estate, will not be considered as having the effect of a declaration of uses of lands in Scotland not previously conveyed so as to allow the will to operate upon them; it therefore will not raise a case of election against the heir taking heritable property not actually affected by the devise, though he may have a legacy given to him by the same will (b).

The Amount or the exact Nature of the property given must be ascertained before a person can be called upon to make his election; nor can a person, generally speaking, be held to have made his election until the amount of the property given has been ascertained, though he may have received gifts made to which he could only have been entitled under the will: the necessity for this as a preliminary is obvious, as election implies the exercise of judgment and choice: the party may file a bill for the purpose of having the clear amount of the fund given to him, in respect of which he is called upon to elect, ascertained (c); and if a person should have elected, supposing the fund taken to be clear, and it is afterwards diminished by the claims of creditors or the like, such person, notwithstanding his election, may resort back to his own property at least for compensation (d).

What acts of Acceptance or Acquiescence amount to an implied election is a matter of fact which must be decided upon the circumstances

(a) *Pickering v. Lord Stamford*, 2 Ves. J. 272, 581, 3 Ves. 332, 492; 1 Jarm. 407; see particularly p. 408. Of the effect of the late Act as to Dower, 3 & 4 Will. IV. c. 105, upon questions whether the Dowress is to be put to her election, see 1 Jarm. 408-9.

(b) Vice-Chancellor Wigram, *Allen v. Anderson*, 5 Hare, 170; *Brodie v. Barry*, 2 Ves. & B. 127, 131-2-3. See Sir J. Leach's nice distinction on the subject of a devise of lands to be after acquired, *Johnson v. Telford*, 1 Russ.

& M. 249; which the Vice-Chancellor Wigram (5 Hare, 169) does not appear to acquiesce in: and *Churchman v. Ireland*, 1 Russ. & M. 254.

(c) *Wake v. Wake*, 1 Ves. J. 335; *Whistler v. Webster*, 2 Ves. J. p. 371; *Butricke v. Broadhurst*, 1 Ves. J. 171; 3 Bro. 88; *Gretton v. Howard*, 1 Meriv. 448; and the other cases, 2 Sugd. on Pow. p. 154, and Mr. Swanston's note, 1 Swanst. 381; see also 2 Fonbl. 329.

(d) *Kidney v. Cousmaker*, 12 Ves. 136, 153.

of each case. In such cases it will be material to ascertain whether the party alleged to have acquiesced or to have elected was cognizant of his rights; whether he intended election; whether he can restore the individuals affected by his claim to the same situation as if the acts had never been performed; or whether, on the principle, *Interest reipublicæ ut sit finis litium*, these inquiries ought to be considered as precluded by lapse of time (a). A testator was entitled, as tenant in common, to a share of certain freehold lands; he entered into an agreement for partition, and then devised his interest in the estate to trustees, directing them to convey to his co-tenant and receive from him a conveyance of his share according to the agreement; he then devised his share, subject to an annuity to his wife for the benefit of his children. The widow after the testator's death joined in a conveyance of a moiety of the estate to the co-tenant in common; by that deed it was provided that her annuity should be charged on the testator's moiety only, and she released the other moiety from all claims. It was held that the widow was entitled to dower out of the devised moiety, but that under the circumstances she was bound to elect: the widow had received the annuity for five years, but as she was in ignorance of her right, she was allowed then to exercise her election (b).

Equivocal acts will not in general be considered as amounting to an election: where the evidence of the intention of the party to retain his own estate is at least as strong as the evidence of his intention to accept the property given to him by another, it is impossible to say that he elects to take the one and renounce the other; the utmost that can be contended is that he has no right to enjoy both,—that he might have been compelled to make an election (c). But such acts as the following will be considered as conclusive. The person entitled to take against the will entered upon the leasehold estate and the residuary estate bequeathed to him, and outlived the term and acquired a new interest in the lease; it was held that he had clearly elected (d).

It seems that acts by which the party himself would not be bound

(a) This I take from Swanston's note to *Dillon v. Parker*, 1 Swanst. p. 382, considering it to be borne out by the authorities he refers to; but, generally speaking, the representatives of the party, as well as his assignees, may elect, though the person under whom they claim has omitted to do so; see 2 Fonbl. 330.

(b) *Reynard v. Spence*, 4 Beav. 103.

(c) Sir Thos. Plumer, *Dillon v. Parker*, 1 Swanst. 380.

(d) *Giddings v. Giddings*, 3 Russ. p. 241.

The case of *Rutledge v. Rutledge*, in the House of Lords, 2 Bli. N. S. 352, where it was held that the devisee was not bound to elect, was very special in its circumstances; the principal point related to how far the purchase of the fee of renewable leaseholds by the party entitled affected the right of renewal which the owner had covenanted to settle; Sir E. Sugden, in his late work, *Law of Prop.* 542, has illustrated and explained the doctrine on which the decision was founded.

may bind his representatives, on the principle of not disturbing things long acquiesced in by families upon the foot of rights, which those in whose place the representatives stand never called in question (*a*).

If, said Lord Hardwicke, a person be entitled to an estate not well devised from him by will, but by the same will has a legacy given to him, and under a power in the will to a trustee for him during his minority it is paid to the trustee, if he loses that legacy by failure of that trustee, and receives no satisfaction for it, he will not be debarred of his original right (*b*).

"Where interests are given to a person and to his children after him, the claim of the parent in opposition to the will will not bind the children, who may elect for themselves (*c*). In one case it seems to have been thought that an election could not be raised upon an estate settled with several limitations, on account of the confusion which would ensue; the devise would sometimes be good, at other times not, as the devisee in remainder submitted to the will or not (*d*); but this objection is not now attended to" (*e*).

Under a covenant on marriage to purchase and settle lands of the value of 400*l.* a year to the use of the covenantor for life, remainder to his wife for life, remainder to the heirs of their two bodies, with a power to the wife to elect in case the husband should die before a settlement were made, to take the 400*l.* a year *or* 3000*l.* in lieu of dower and thirds; the husband having died before a settlement made, the wife elected to take the 3000*l.*; yet a settlement of lands of the value of 400*l.* a year on the wife for life, with remainder to the children *nunc pro tunc*, was decreed against creditors, and though by this means the assets were exhausted (*f*).

We are now to consider more particularly the Consequences which

(*a*) Swanston's note, 1 Swanst. 382, referring to 2 Ves. 593, 525; and see *Dillon v. Parker*, Jac. R. 513.

(*b*) Lord Hardwicke, *Moore v. Moore*, 2 Ves. 603. I have stated what I presume was Lord Hardwicke's meaning; the words of the report are obscure. Lord Hardwicke makes a distinction as regards a Mortgagee; he is entitled to say, where the trustee in possession receives the amount of a charge and becomes insolvent, that the estate has borne the burthen; *ibid.*; and see *Hutchinson v. Lord Marescaire*, 2 Ball & B. 54-5.

(*c*) 2 Sugd. on Powers, 147, referring to *Ward v. Baugh*, 4 Ves. p. 623; and *Long v. Long*, 5 Ves. p. 445; and see 2 Foulb. 330. In *Ward v. Baugh*, the Master of the Rolls had at first entertained the contrary opinion: the

provision was such that it could not be considered as a mere substitution, for the interests of the children were vested under the settlement, and the will gave them unequal provisions; and see *Long v. Long*, 5 Ves. p. 447, and the reasoning of the court in *Forrester v. Cotton*, Amb. 388, 1 Ed. 532.

(*d*) *Forrester v. Cotton*, Amb. 388.

(*e*) 2 Sugd. on Pow. *ubi sup.*

(*f*) *Hancock v. Hancock*, 2 Vern. p. 605. I presume that the wife was not allowed to take 400*l.* a year, as well as the 3000*l.*, though the report is silent as to this. Mr. Raithby (note, *ibid.*) considers that this case proceeded on the principle that the children were purchasers, referring to *Harvey v. Ashley*, 3 Atk. 607; and, as to this point, see *Lloyd v. Lloyd*, 2 My. & Cr. 192.

result from a person taking under his paramount title property devised or settled by will or by deed, thereby disappointing devisees or legatees or donees to whom such property was intended to be given; the doctrines which we shall have to consider in this investigation belong peculiarly to election.

According to the opinions of some of the eminent writers who have investigated the authorities relating to this subject, the election of the party who claims against the instrument is followed by a *forfeiture* (a) of the whole of what is given by the instrument, for the benefit of the disappointed party (b): according to others the party electing is obliged only to relinquish so much of the property given as will be sufficient to compensate the disappointed party for the loss sustained by the election which the electing party has made (c). To illustrate this by a simple case: A testator gives to A. an absolute annuity or rent-charge of 100*l.* a year, secured on substantial property of his own, and gives to B. a specific sum of stock in the funds producing 100*l.* a year, but which stock really belongs to A. If A. elects to take his own stock, on the principle of forfeiture, which may well be applied to such a case, B. will take the annuity given by the will to A.: but assume that the annuity given to A. amounts to 150*l.* a year, and that for some reason he chooses to keep his own stock; if the principle of forfeiture be applied, the disappointed legatee of the stock, assuming a perpetual annuity and stock producing annually the same amount to be of equal value, would get 50*l.* a year more than he was intended to receive; if however the principle of compensation be applied, which in such a case would appear to be the proper course, on the donee of the annuity of 150*l.* paying to the disappointed legatee as much as will purchase stock yielding 100*l.* a year, he will be entitled to keep his annuity of 150*l.* a year: this would seem to show that no general rule can be laid down as applicable to all cases, a subject which we shall presently more particularly consider.

The process by which Compensation is effected, and the principle on which it is applied, according to Mr. Swanston's (d) interpretation of the authorities, is this: In the event of election to take against the instrument, courts of equity assume jurisdiction to *Sequester* (e) the benefit intended for the refractory donee, in order to secure compen-

(a) 2 Sugd. on Powers, 144; Mr. Jacob's notes to 1 Rep. Husband and Wife, 568.

(b) See *Gretton v. Haward*, 1 Swanst. 423; and *sup.* p. 586.

(c) Mr. Swanston's note to *Gretton v. Haward*, 1 Swanst. 433; Jarman on Wills, i.

388; *et v. sup.* vol. i. pp. 639-40. This subject is discussed, Roper on Leg. pp. 1661-8, last edition, by White; see additional note, No. 2.

(d) In his very able note above referred to.

(e) See 2 Meriv. 94, dict. Lord Eldon.

sation to those whom his election disappoints, and the surplus after compensation is not permitted to devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the court controlled his legal right.

There are many dicta and some decisions which seem to favour the opinion that Forfeiture (a) is the general rule, proceeding on the principle of a tacit condition being annexed to the gift, that the donee shall take *nothing* under the instrument, unless he confirm the whole of the dispositions it contains, and that the disappointed donee shall have what was intended for the person who has by non-compliance with the condition disqualified himself from taking anything (b): but the great preponderance of authority appears to be in favour of Compensation (c). The technical doctrine of forfeiture (if such could be

(a) "Forfeiture" does not appear to be an appropriate expression, see *Gretton v. Howard*, 1 Swanst. 425.

(b) Lord Talbot, certainly an eminent judge, states the doctrine, though the question of compensation as distinguished from forfeiture, was not argued in the case before him, thus: "When a man takes upon him to devise what he has no power over, upon a supposition that his will will be acquiesced under, this court compels the devisee, if he will take advantage of the will, to take entirely and *not partially* under it, as was done in *Noys and Mordaunt's* case; there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the devisor has made." *Streetfield v. Streetfield*, Forrest. 176, 182: this mode of stating the doctrine excludes compensation, for if he is only bound to compensate, the devisee will take partially under the will; see 1 Sugd. Pow. 145. Lord Mansfield's doctrine in *Doe v. Lord G. Cavendish*, (4 T. R. p. 743,) is to the same effect, "They must renounce *all* benefit," &c. The case of *Noys v. Mordaunt*, (2 Vern. 581.) was this:—A. having two daughters, B. and C., devised fee-simple lands to B., and lands which were settled on him in tail to C.; it was held, that if B. should claim a share of the entailed lands, under the settlement, she must quit the fee-simple lands, for the testator having disposed of the whole estate amongst his children, what he gave them was on an implied condition that they should release to each other; but here also no question was raised as to compensation. In *Bor v. Bor*, (3 Bro. P. C. 178, n.), Lord Hardwicke, in the House of Lords, stated the general rule thus:—"When a father, disposing of his estate, happens to give a younger son what was settled on the elder, and at the same time gives the elder son some other provision,

if the elder will defeat the will in any part, he shall not at the same time take *any* benefit under it," referring to *Noys v. Mordaunt*, *sup.*; but Lord Hardwicke, in illustration, (p. 179,) says, in reference to the custom of London, "If the testator has said that if any of his children shall insist upon the custom, then such child shall only receive so much of his legacy, could a court of equity say he shall forfeit the whole?" *Thellusson v. Woodford*, (13 Ves. 220,) affirmed in the House of Lords, (1 Dow. p. 249,) as stated by Lord Eldon, (2 Meriv. p. 95,) also seems to proceed on the principle that the party defeating the instrument must renounce any benefit he takes under it altogether. Lord Redesdale, in *Moore v. Butler*, (2 Scho. & Lef. p. 207,) adopting a dictum of Lord Rosslyn, puts the right to call on the party to elect on the doctrine of an implied condition; and see the dictum of Sir Thos. Plumer, *Gretton v. Howard*, 1 Swanst. p. 421; of Sir J. Jekyll, *Cowper v. Scott*, 3 P. W. p. 124; of Lord Hardwicke, *Pugh v. Smith*, 2 Atk. 43, a case relating to the custom of London, and also Lord Rosslyn's dictum in *Cavan v. Pulteney*, when that case last came before him (3 Ves. p. 385). If the principle applies to the *thing*, said Lord Eldon, in *Green v. Green* (2 Meriv. p. 94), it is very difficult to say that it lies in compensation: see also *Blake v. Bunbury*, 1 Ves. J. p. 514; 4 Bro. 25, 28; *Finch v. Finch*, *ibid.* 40, 49, 51; *S. C.* 1 Ves. J. p. 534: other cases are cited, Jacob's note, 1 Rep. Husband and Wife, p. 573; and 1 Jarman on Wills, 388, n. (i): and see, on this subject, Mr. Jacob's remarks, 1 Rep. Husband and Wife, 576, note.

(c) "Lord Chief Justice De Grey," said Lord Loughborough, "would not put the doctrine of election upon an implied condition, but considered it as a *natural equity*;" *Rutler v. Maclean*, 4 Ves. p. 538; this opens the

properly applied) (a), or of implied conditions (for where there is an express condition a rule is given which must be followed), seems to be inapplicable to such cases, which are rather to be decided on principles of equity and conscience (b), or, what is equivalent, of universal or natural justice (c). If such be the true principles on which cases of this description are to be decided, it seems to preclude the laying down of any universal rule. If a testator devises to a younger son an estate, of which he is seised only for life with remainder to the elder son, yielding a clear 100*l.* a year, and to the elder son a fee-simple estate, equally eligible in all respects, yielding 150*l.* a year; the elder

doctrine of Compensation: the same noble judge, in *Lady Casan v. Pulteney*, (2 Ves. J. p. 560,) observed, that "the Lord Chief Justice De Grey distinguishes the equity of this court from an express condition, which, he says, must be performed as framed, and if it is not, that will induce a forfeiture; but the equity of this court is (as he very well expresses it), to *sequester* the devised estate *quousque*, till Satisfaction is made to the disappointed devisee;" (see 1 Meriv. p. 424). Sir Thomas Plumer, in *Gretton v. Haward*, (1 Swanst. p. 424,) uses similar expressions: here Compensation is directly pointed at. The same noble judge (Lord Rosslyn), in *Whistler v. Webster*, (2 Ves. J. 371,) expressly recognised the doctrine in these words: "If a testator disposes of the estate of A., to whom he gives some interest by his will, A. shall not take that unless he give up his estate to that amount." Indeed the majority of the dicta have treated the consequences of taking against the will as imposing an obligation to make compensation only. In an early case, where the subjects were two estates—one fee-simple, devised to the heir; the other held in fee-tail, devised to the younger son, (*Anon.* Gilbert, p. 15,) the eldest son having elected to take the entailed estate, Lord Chancellor Cowper said, "The youngest son should have an *equivalent* out of the fee-acre devised to the eldest son." In *Lewis v. King*, 2 Bro. 603, Lord Thurlow says, "The party taking as his own the property disposed of, must give up that which was given in exchange for it, to *reimburse* the devisee for his disappointment." In *Rich v. Cockell*, 9 Ves. p. 379, Lord Eldon says, "All election goes upon compensation;" but, as Mr. Jacob observes, it is not quite clear in what sense the word was there used, Lord Hardwicke, 3 Bro. P. C. p. 179, uses the word in reference to forfeiture. In *Dashwood v. Peyton*, 18 Ves. 49, Wilson's Eq. Rep. 269, Lord Eldon's expressions are explicit; so in *Ker v. Wauchope*, 1 Bli. p. 26, (1819,) Lord Eldon says, "If A. (the adverse claimant) refuses to comply with the will, B. (the devisee) shall

be compensated by taking the property or the value of the property which the testator meant for him, out of the estate devised, though he cannot have it out of the estate devised to him." His Lordship's dictum in *Lord Raneliffe v. Parkyns*, 6 Dow. p. 149, is to the same effect. Sir Wm. Grant's expressions, in his judgment in *Welby v. Welby*, 2 Ves. & B. 190-1, (see 1 Bligh, 17, note,) referring to Lord Cowper's decision, quoted above, are to the same effect; as are those of Lord Redesdale, though not so pointedly, in *Vane v. Lord Dungannon*, 2 Scho. & Lef. p. 130. Sir Thos. Plumer held that there was no distinction in this respect, whether the subject were real or personal. "I cannot," said that learned Judge, "see a principle on which the court could think itself at liberty to sequester and distribute personalty, in the event not given to the individual intended, that would not equally apply to realty; there may be greater difficulty, but the principle is not to be abandoned merely on the ground of the difficulty in reducing it to practice;" see *Gretton v. Haward*, 1 Swanst. 424. Indeed one of the earliest cases was in respect of a devise of an estate belonging to the elder son to his younger son, and of his own estate to the elder; the elder elected to take his own estate, he was allowed the benefit of the devise, making compensation out of it to his brother to the extent to which he was disappointed; *Anon.* Gilb. Eq. R. 15, *sup.*; stated 1 Jarm. 385; and see *Noys v. Mordaunt*, *sup.*; and *int. al.* the dict. *Whistler v. Webster*, 2 Ves. J. p. 372; but in that case it was a pecuniary benefit that was to be compensated, which is more readily effected.

(a) Mr. Jacob has endeavoured to reconcile the cases on the principle of the application of the doctrine of forfeiture, 1 Rep. Husband and Wife, 571: the reasoning is purely technical; and see *Gretton v. Haward*, 1 Swanst. 422-3.

(b) *V. supra*, p. 602, n. (c); *Forrester v. Cotton*, 1 Ed. 535; *et v. sup.* vol. i. 327, 413.

(c) Mitford, Plead. by Jeremy, 111.

son may well be allowed to take the settled estate, conveying to his brother a portion of the fee-simple estate in all respects equivalent: and where the subject is personal estate the application of this principle is familiar and easy (*a*). But if the settled estate closely adjoins to a mansion-house to which the younger son is entitled in his own right or by devise from the father, would an estate of equal acreage or of equal marketable value given to him "out of" the estate devised to the elder son be an adequate compensation to him? Certainly not. Would it, I would ask, be possible to calculate the value to the younger son of the land so taken away from him so as to give him compensation? The property if taken by the elder son *might* be sold for building, or even for a manufactory—are these chances to be estimated? and if that were done could it be said even then that the younger son was compensated for the disappointment to which he had been subjected? In such a case the principles of natural justice would seem to require that the younger son should take all that was devised to the elder son, however much exceeding in nominal value the estate of which he has been deprived (*b*); and to dispose of such a case in the manner above pointed out would not, as I read the cases, be acting against authority (*c*).

Where the son who disappoints the provisions of the instrument by withdrawing his own property, takes the benefit in respect of which he is put to his election under a contract entered into by the parents in a marriage settlement executed on their marriage, which contract embraced the property so withdrawn, there it would seem that compensation is out of the question, he must give up the whole of the benefits which he would derive under the settlement (*d*).

(*a*) See *Gretton v. Haward*, 1 Swanst. 424; Sir Wm. Grant there said, he saw no distinction between real and personal estate.

(*b*) It is not denied that "if a clear rule is established, no theoretical objection can be suffered to interfere with it;" but, according to the same authority, "if no rule exists, the court must on principle consider what is to be done in a new case;" Sir Thos. Plumer, *Gretton v. Haward*, 1 Swanst. 421.

(*c*) See the additional note, No. 2. In one of the last cases on this subject that came before Lord Eldon, *Tibbitts v. Tibbitts*, Jac. R. 319 (1821), his Lordship said, he had looked through all the cases with great attention, and that they contained dicta which could not easily be reconciled: it would perhaps be too much to say that that should be the rule universally, (and see Jacob's note, 1 Rep. Husb. and Wife, pp. 572-3;) but he

thought the case before him (where the testator had given an inoperative recommendation that his cousins should enjoy parts of the settled property, at the rents at which they held them at his death,) was a case for compensation only: however, he added, "I am of opinion that there may be cases where not only compensation is to be made, but the whole is to be given up:" he thought the principle of the old cases was compensation, (*sed. qu.*) but it had since been shaken.

(*d*) *Green v. Green*, 2 Meriv. 86; S. C. 19 Ves. 667. That case arose upon a settlement: the father, on his marriage, agreed to settle estates, of which he was tenant in tail, thereby, as Lord Eldon observed, becoming a purchaser of the estate of his wife for the purposes of the settlement; but as he had not effectually settled the entailed estate, on his death, the eldest son, though taking benefits

The doctrine of Satisfaction (a), which we are now about to consider; has been incidentally noticed in the preceding passages in this volume, and the doctrine, so far as relates to portions, has been fully considered (b).

Satisfaction (c), as Mr. Jarman observes (d), may be described thus: Where a man being under an obligation to do a specific act, as to pay money, does that by will which may be considered as a performance of it, the thing performed being *ejusdem generis* (e) with that which he had engaged to perform; the conclusion of law in such case, arising from the circumstances, is, that what the testator has done was intended to be in satisfaction of his obligation. But as this conclusion of law proceeds upon a presumption of intention, the circumstances may be such as to prevent its arising; thus, if the benefit given to the party be different *in specie* from that which he is entitled to, or is less beneficial either in amount or certainty or time of payment or otherwise than the thing contracted for, the presumption of its being intended as a satisfaction or substitute will not arise (f). An express declaration will of course have its natural effect.

The strict rule is established that a Legacy given by a Debtor to his Creditor, which is equal to or greater in amount than the debt, shall be presumed to be intended in satisfaction of the debt; but it must be, not only at least equal in amount, but *equally beneficial*, and of the *same nature* (g) exactly (h).

under the settlement, claimed the estates to which he was entitled in tail. Lord Eldon, after adverting to the authorities tending to establish the doctrine of compensation as regards cases of election arising on wills, said, The question is whether he (the son) shall be permitted to take without making good the contract entered into by his father on the marriage; that the Principle to be applied to *such* a case was, that "if a person will not give the price which the parties meant he should give, he shall not have the thing which was bargained for;" and his Lordship, though admitting that his opinion was not directly supported by any prior decision, held, in the case before him, that the eldest son, the heir in tail, must give up all the interests secured to him by the settlement, if he chose to insist upon his title to the entailed estate, 2 Meriv. 95; see Mr. Swanston's observations on this case, 1 Swanst. p. 434.

(a) V. *supra*, p. 204.

(b) *Supra*, pp. 204, 428, *et seq.*; and see *Plunket v. Lewis*, 3 Hare, 324, stated in the additional note, *supra*, p. 458. I need scarcely observe that the doctrines of Satisfaction and Performance, in relation to legacies, are stated

and examined, at great length, in the last edition of Mr. Roper's work on legacies, to which the practitioner will of course refer.

(c) V. *supra*, p. 436, note.

(d) 1 Powell on Devises, by Jarman, 433, n.; *et v. supra*, p. 436, n., and p. 458.

(e) V. *supra*, p. 433.

(f) See Powell on Devises, *ubi sup.*; and Mr. Cox's note to *Blandy v. Widmore*, 1 P. W. 323, where he collects the authorities, showing that an act may be considered as a *performance in part*, though giving something less will not be taken as a *part satisfaction*; as to the distinction between performance and satisfaction, see *Goldsmid v. Goldsmid*, 1 Swanst. 219; and Mr. Swanston's note to that case, *sup.* p. 452; *et v. infra*, p. 607.

(g) *Byde v. Byde*, 1 Cox, 48; and see *Nicholls v. Judson*, 2 Atk. 301; *Platt v. Platt*, 3 Sim. 503; and *Hall v. Hill*, 1 Conn. & L. 157: Mr. Cox has collected the cases, and stated the general doctrines, in his note to *Chancey's case*, 1 P. W. p. 409. A devise of real estate, though of greater value than a debt, is not a satisfaction, *Garret v. Evers*, Mos. 364.

(h) Lord Hardwicke, *Barrett v. Beckford*,

The legacy, in order to satisfy a debt, must be payable *immediately* on the testator's death (*a*). If, therefore, the debt be payable one month after the testator's death, and the legacy *six* months after, it will not be considered as a satisfaction (*b*). So to be a satisfaction there must be a certainty of payment; a legacy, therefore, on a contingency will not be a satisfaction (*c*). Where a lady, indebted to a servant for wages, gave by will ten times as much as she owed, or was likely to owe, yet because made payable one month after her death, so that the servant might not outlive the month, though a thing unlikely, the court held it not to be a satisfaction (*d*); indeed, it was said by Lord Hardwicke, that legacies to servants have never been held to be in satisfaction of debts (*e*). So where a parent, indebted to his children, gives them twenty times as much in the whole amongst them, but not payable if they do not arrive at twenty-five years of age, or do not marry, this is not a satisfaction (*f*); there is no difference between a direction to trustees to pay and a gift (*g*). If the legacy is not equally beneficial as the debt in one particular, as in the time of payment, though it may be more so in another, it will not be considered as a satisfaction (*h*).

If a legacy be *smaller* than a debt due to the legatee, it is not, even *pro tanto*, a satisfaction of the debt (*i*); nor is a bequest of specific things considered as a satisfaction (*k*), unless accepted as such; for if a man should give a matter of curiosity or art, as a fine picture, by way of satisfaction of a debt, and the legatee accept it, though the value be less than the debt, there could be no ground for equity to interpose (*l*). Although a *pecuniary* legacy is a satisfaction of a debt, provided it be equal to (*m*), or greater than the debt (*n*), any little circumstance (in which it differs from the doctrine as to the

1 Ves. Sen. 521; therefore a legacy of a moiety of a residue, whatever may be the amount, is not a satisfaction for an annuity; *ibid.*: and see *Hales v. Darrell*, 3 Beav. 324.

(*a*) *Clark v. Sewell*, 3 Atk. 98; and see *Jeacock v. Falkener*, 1 Bro. C. C. 296.

(*b*) *Haynes v. Mico*, 1 Bro. C. C. p. 129; and see, on this head, *Crompton v. Sale*, 2 P. Wms. 552; *Barrett v. Beckford*, 1 Ves. 519.

(*c*) *Nicholls v. Judson*, 2 Atk. 301; and see *Pullen v. Cresy*, 3 Anstr. 830.

(*d*) Cited by the Master of the Rolls, *Mathews v. Mathews*, 2 Ves. 636.

(*e*) *Richardson v. Greese*, 3 Atk. 69; and see the cases cited, *Wallace v. Pomfret*, 11 Ves. 547-9; *Chancey's* case, 1 P. W. p. 408, was the case of a servant, but no distinction was taken: see as to this dict. 2 Rep. on Leg. 1053.

(*f*) *Mathews v. Mathews*, 2 Ves. 636.

(*g*) *Per* Master of the Rolls, *Nicholls v. Judson*, 2 Atk. 301.

(*h*) *Nicholls v. Judson*, 2 Atk. 300; and other cases cited 1 P. W. 409, n.

(*i*) *Eastwood v. Vinke*, 2 P. Wms. p. 616; Mos. 295.

(*k*) *Slaney v. Styles*, M. 1733, MS., Mad. P. and P. ii. 54.

(*l*) *Byde v. Byde*, 1 Cox, 49.

(*m*) *Brown v. Dawson*, 2 Vern. 498; *sic* dict. Mos. 8.

(*n*) *Wallace v. Pomfret*, 11 Ves. 544; and see *Jeffs v. Wood*, 2 P. Wms. 132. In *Crompton v. Sale*, 2 P. Wms. 555, Lord King held that legacies given by the wife to the husband's nieces could not be taken as in satisfaction of legacies given by the husband to the same nieces, for which the wife was liable, unless so declared.

satisfaction of *Portions*) is laid hold of by the court to take it out of the rule (*a*), it having been considered by some distinguished judges, as not founded on sound principle (*b*) and even by some judges as absurd (*c*).

Wherever there are circumstances on the face of the will affording a presumption that the testator's intention was not that the legacy should be an ademption of a debt, as where it is given for a particular purpose, *diverso intuitu* (*d*), it will not be held to be a satisfaction (*e*); so where the testator creates a fund for the payment of his debts, and, subject to the same, charges his legacies thereon (*f*): the intention, express or presumed, is the rule, so that if the intention clearly is to *give*, it cannot be contradicted by saying that the donor is paying a debt (*g*).

If the debt due to the legatee be upon an *open or running* account, so that it might not be known to the testator whether he owed any money to the legatee, the legacy will not be considered as a satisfaction of the debt; nor is a legacy a satisfaction of a debt contracted after the making of a will; for in such cases the legacy could not, as it has been considered, be intended as a satisfaction (*h*).

Lord Talbot would not allow of parol evidence to show that the testator designed to give the legacy exclusive of the debt (*i*): indeed on general principles it would seem that such evidence ought not to be admitted, though Lord Eldon in one case, as before noticed, upon the authorities, admitted parol evidence to repel the presumption of satisfaction of a debt by a legacy, notwithstanding that the general presumption was fortified by other provisions in the will (*k*).

(*a*) *Hinchliffe v. Hinchliffe*, 3 Ves. p. 529; but see *Wallace v. Pomfret*, 11 Ves. p. 547, where Lord Eldon says, "If this rule of presumption was once established, and understood to be the rule, it would have been infinitely better that it should not be destroyed by small observations upon small circumstances; the court trying to find out a distinction. It would have been better either to have abided by the rule, or to have said boldly, it should exist no longer."

(*b*) See Lord King's judgment in *Chancey's* case, 1 P. Wms. 410.

(*c*) *Mathews v. Mathews*, 2 Ves. p. 636; *Gaynon v. Wood*, 1 Dick. p. 331; *Barclay v. Wainwright*, 3 Ves. 466; and see *Eastwood v. Vinke*, 2 P. Wms. 616; *Richardson v. Greese*, 3 Atk. 66; *Fowler v. Fowler*, 3 P. Wms. 354; and *Barrett v. Beckford*, 1 Ves. 521.

(*d*) *Mathews v. Mathews*, 2 Ves. p. 635; *Nicholls v. Judson*, 2 Atk. 301; 3 Atk. 68.

(*e*) *Mathews v. Mathews*, 2 Ves. p. 635; but there the condition originally annexed to the greater legacy being afterwards released, it was held to be a satisfaction.

(*f*) *Chancey's* case, 1 P. Wms. 408; *Richardson v. Greese*, 3 Atk. 66, 68; *Hinchliffe v. Hinchliffe*, 3 Ves. 529, cited 2 Fonbl. Tr. Eq. 325, n. (*l*); *Field v. Mostin*, 2 Dick. 543; but a covenant to pay six months after the testator's death, will not be considered as a debt in this sense, *Wathen v. Smith*, 4 Mad. Rep. 325; and see *Gaynon v. Wood*, *ubi sup.*, and in note (1) to 1 P. Wms. 409.

(*g*) See Treatise on Equity, vol. ii. 330-1; and Mr. Fonblanque's references.

(*h*) *Rawlins v. Powell*, 1 P. Wms. p. 299; *Thomas v. Bennet*, 2 P. Wms. 342; *Cranmer's* case, Salk. p. 508; *Mascal v. Mascal*, 1 Ves. 324; *Cole v. Ashborne*, 1 March, 1744, MS.; *Mad. P. and P. ii.* p. 56; and see *Chancey's* case, 1 P. Wms. p. 409, and the references in the margin.

(*i*) *Fowler v. Fowler*, 3 P. Wms. p. 354; and see *Hales v. Darrell*, 3 Beav. p. 329; and *Hall v. Hill*, *sup.* p. 452.

(*k*) *Wallace v. Pomfret*, 11 Ves. 542-48; *sup.* vol. i. p. 570; but see as to this case, *ibid.* p. 575; and see *Weall v. Rice*, 2 Russ. & M. 268; *et v. supra*, pp. 444, 452.

A legacy is not an extinguishment of a negotiable security (a). And though a legacy to an executor excluded him from the undisposed surplus of the testator's estate, it was not allowed to operate for two purposes, and so as also to be a satisfaction for a debt due from the testator (b). Though a gift of a legacy may, as in the civil law (c), be so framed as to release a demand; yet where the demand was in respect of a bond debt, uncanceled in the testator's possession, the bond was held not to be released by a legacy, no intention to release appearing upon the will (d).

A legacy given by the will of a parent to his child (e), or by a husband to his wife (f), is not considered upon any different footing from that of a legacy by any other person, as to the satisfaction of a debt.

Where a fund settled in trust for the father for life, remainder to his son and daughter, was sold out by the father, who on the marriage of the daughter settled funds of much larger amount than the daughter's interest in the trust fund on the daughter, and to which settlement the daughter being of age was a party, it was held that this was to be considered as a presumed satisfaction of her interest, and that such presumption would not be affected by the ignorance or knowledge of the husband as to the rights of his wife in respect of the trust fund, or by the consideration of natural affection being introduced into the deed; but the Vice-Chancellor seemed to consider that evidence might have been adduced to rebut or support the presumption (g).

The distinction between Satisfaction and Performance has already been adverted to (h).

A case has lately occurred before the Vice-Chancellor Wigram (i) which seems to remove all doubt, if any such existed, as to the actual state of the law in reference to Performance, as regards a distributive share in personal estate taken by a person having a claim upon the intestate for a fixed sum, or for an annuity. That learned judge considers that it is settled by authority (k), though upon a principle which is purely arbitrary, that in the case of a covenant by the hus-

(a) *Carr v. Eastabrooke*, 3 Ves. 564.

(b) *Mathews v. Mathews*, 2 Ves. 637.

(c) Just. Inst. ii. 20, 13.

(d) *Wilmot v. Woodhouse*, 4 Bro. C. C. 227; see on this subject, *Aston v. Pye*, in note to *Smyth v. Eden*, 5 Ves. 350.

(e) *Tolson v. Collins*, 4 Ves. 490-2; *Chave v. Farrant*, 18 Ves. 8.

(f) *Fowler v. Fowler*, 3 P. Wms. 353.

(g) *Plunkett v. Lewis*, 3 Hare, 316, 324-5, there is a full examination of the cases in the Vice-Chancellor's judgment; the student will

do well to read this case, and the cases there referred to, with attention.

(h) *V. supra*, p. 436, n. (b); *et v.* 10 Ves. 4.

(i) *Salisbury v. Salisbury*, xii. Jur. 671, Vice-Chancellor Wigram; *v. supra*, 436, n. (b), where "and" in the last line but five should be substituted for "but."

(k) *Blandy v. Widmore*, 1 P. W. p. 324; *S. C.* 2 Vern. p. 709; *Garthshore v. Chalié*, 10 Ves. 1; *Goldsmid v. Goldsmid*, 1 Swanst. 217; (*v. sup.* p. 434, n., 436, n.); that was a case of virtual not intentional intestacy; Lord Eldon,

band that on his death his wife shall receive a gross sum, the distributive share of the widow in the case of absolute intestacy, if equal to the sum covenanted to be paid, is to be considered as a Performance of the covenant; so that the widow cannot first insist upon her rights as a creditor and then claim her distributive share, treating the two claims as distinct and as depending on distinct titles; if her distributive share is equal to or greater than the debt, the debt is extinguished, if less she must take her distributive share in part: but the shares of the next of kin are liable to make good the deficiency if any: this principle is applicable to every other person who is entitled to a distributive share in the covenantor's estate on his intestacy (a). In the same case the Vice-Chancellor Wigram considered it as equally settled, though not satisfied that there is any solid reason for the distinction, that where the covenant is that an annuity shall be paid or secured to such person after the testator's death, the distributive share which such person may take on the intestacy of the covenantor is not a performance (b); it is not treated as a satisfaction, because satisfaction, as before observed, implies that something is done from which an intention to satisfy the covenant may be presumed, and even a gift of a sum of money, not being *ejusdem generis* with a fixed sum, is not a satisfaction. The gift of an annuity to a married woman, even though the amount and days of payment are precisely the same, will not be held to be a satisfaction of an annuity to a like amount charged on the donor's estate, if the annuity so given is charged upon property of a different nature, and if the annuity given be made payable to the donee generally, the annuity to which the donee was previously entitled being payable to her separate use (c).

Where the debt arises in the husband's lifetime, as where he covenants within two years after marriage to pay a certain sum and he outlives the two years, a distributive share will not be a performance or a satisfaction of the covenant (d), nor is an orphanage part, for it is not in the father's power (e).

A distributive share on intestacy, it will be remembered, is not an advancement to a child during life (f).

in *Cartshore v. Chalié*, said, this court had infused an intention into the husband's contract which a court of law could not; *v. sup. et infra*.

(a) See *Cartshore v. Chalié*, 10 Ves. 16; Lord Hardwicke, 2 Ves. Sen. 411, treats it as a strict performance.

(b) *Couch v. Stratton*, 4 Ves. p. 391, Lord Rosslyn; *Salisbury v. Salisbury*, *sup.* p. 608.

(c) *Bartlett v. Gillard*, 3 Russ. 154-5.

(d) *Oliver v. Brighthouse*, cited by Lord Hardwicke, 1 Ves. Sen. 1; and see *Lang v. Lang*, 8 Sim. 465.

(e) Case on Mrs. Parson's will, cited 1 Ves. Sen. 2.

(f) *Twisden v. Twisden*, 9 Ves. 427; *sup.* p. 430.

There is a sort of mixed case, as Lord Eldon observed, between performance and satisfaction; for instance, said his Lordship, if there be a covenant to purchase and settle lands upon the first and other sons in tail male, and the party purchases lands, not being copyhold (a), of less, equal, or greater value than the sum he covenanted to lay out, taking a conveyance to him and his heirs, and dies leaving a son who would be tenant in tail under the settlement, and a granddaughter by an elder son upon whom no settlement being made the lands descend, that will bar the demand against the assets of the grandfather in the whole or in part according to the amount: the granddaughter must give up the estate (b). Other cases have decided that a subsequent purchase by the covenantor, of lands of a smaller value (which are at his death left undisposed of) shall be intended to be a part performance of such covenant, as it may be presumed he meant to purchase more lands afterwards and to settle the whole according to the covenant (c). Evidence however may be given to rebut the presumption (d): a sale of the lands is sufficient evidence to rebut the presumption (e), a devise is not. Where there is a covenant on marriage to settle specific lands, generally it will not be satisfied by suffering other lands of equal value to descend (f); but where a man covenants to settle lands on the eldest son of the marriage, and suffers lands to descend to him in fee, that is a performance so far: so where lands descend to an heir-at-law who claims in place of his ancestor a sum of money to be laid out in land (g).

Where a husband covenants that lands to be settled are of a certain annual value, it amounts to a covenant on his part to settle and make good to that extent in case of deficiency, for the covenantee might have damages; but the value is to be calculated at the date of the settlement, not of the death of the covenantor, if the covenant be in general words (h). If a person under such an obligation devise to the cove-

(a) *Attorney-General v. Whorwood*, 1 Ves. 541.

(b) *Garthshore v. Chalié*, 10 Ves. 8; Lord Eldon is there reported to have said, "any demand," without exception or qualification; see on this subject *Wilcocks v. Wilcocks*, 2 Vern. 558 (2 Atk. p. 634); *Deacon v. Smith*, 3 Atk. 323; *Sowden v. Sowden*, 1 Bro. 582 (10 Ves. 8, 9, 10); *v. sup.* pp. 204, 205; and see *Wilson v. Foreman*, imperfectly reported, 2 Dick. 593, stated from Reg. Lib. 10 Ves. pp. 519, 520; *Lechmere v. Lechmere*, For. rest. 80.

(c) *Lechmere v. Lord Carlisle*, 3 P. Wms. 211; Cox's note to *Blandy v. Williams*, 1 P.

Wms. 324.

(d) Lord Eldon, *Garthshore v. Chalié*, 10 Ves. 10.

(e) *Deacon v. Smith*, 3 Atk. p. 327; *Tooke v. Hastings*, 2 Vern. p. 97; and see *Speake v. Speake*, 1 Vern. 217, n.; and the other cases cited, 2 Vern. 97.

(f) *Trevor v. Trevor*, Dom. Proc. 5 Feb. 1719, Harc. MS., 1 Mad. P. and P. 501.

(g) Dict. Lord Hardwicke, *Prime v. Stebbing*, 2 Ves. Sen. 411; this and similar cases appear to proceed also upon the leaning against double provisions; Lord Hardwicke, 3 Atk. 421, referring to *Wilcox v. Wilcox*, *supra*.

(h) *Speake v. Speake*, 1 Vern. 217.

nantee lands which are not of that value, as he could not intend that they should be a satisfaction or performance, it will be taken as an accumulated bounty and not even as a part performance, unless so declared in the will (a).

The period of time specified in the covenant has been in cases of satisfaction considered as material; in cases of performance little regard has been paid to it by the court; and the court will not look upon the slight difference between "leaving" and "paying" (b).

(a) Lord Hardwicke, *Prime v. Stebbing*, 2 Ves. 411.

(b) Lord Eldon, *Garthshore v. Chalié*, 10 Ves. 7, 13.

ADDITIONAL NOTE, No. I.

Judgment of Vice-Chancellor K. Bruce, in Savill v. Savill.—Election.—Sup. p. 586.

Upon the marriage of a man with an infant ward of the court, who was entitled jointly with her sister to real and personal estate held by trustees in undivided moieties, he, with the sanction of the court, covenanted that upon the wife coming of age her real property should be settled upon himself and herself, and the children of the marriage, with an ultimate limitation in default of issue of the marriage to the heirs of the wife; he also covenanted to settle the personal property in the same manner, except that there was an ultimate limitation in default of issue to the next of kin of the wife. The marriage took effect, the wife attained twenty-one, and about a month after the marriage died, without issue, and without executing a settlement of the real estate, leaving her sister, who was also an infant ward of court, her sole heiress and next of kin. The Vice-Chancellor, in giving judgment, said, "Among the causes before me on this occasion is the cause in which the proposals and articles for a settlement, in contemplation of the marriage of Mrs. Parker, then a ward of this court, were approved by the court, a circumstance, perhaps, not immaterial. She never had any issue, and has been survived by her husband, who is her administrator. The persons who were her next of kin at her death were her heiress-at-law and others. Mr. Parker, who, subject to any contract that may have been made concerning his wife's personal estate, has the sole title to his wife's personal estate, is willing to abide by the proposals and articles, provided that all their terms and provisions be carried into effect as they would have been if he and Mrs. Parker, in her lifetime, after her majority, had joined in making a settlement conformably to the proposals and articles. The heiress-at-law and her husband insist on withdrawing the real estate from the proposals and articles, and are entitled to do so. For this the other next of kin are not answerable and are not to blame. But one question is, whether the rights of the issue of the marriage being out of the case (for there was not any issue of the marriage), the next of kin, who are 'volunteers' or in a sense 'volunteers,' can be allowed in these suits to claim the benefit of part of the contract against the husband, who is not permitted to have the benefit of the whole of it. And my opinion is, that, there having been no issue of the marriage, the next of kin have not a better equity to take from him the personal estate, for the purposes of the proposals and articles, when the

real estate is withdrawn from the proposals and articles, than he has to keep out of their influence so much at least of the personal estate as may be sufficient to compensate him for that interest in the real estate which the proposals and articles purport to give him, but which he is not allowed to have," *Savill v. Savill*, 2 Coll. 721, 726-7.

ADDITIONAL NOTE.—No. II.

Compensation.—Extract from Mr. Swanston's Note to Gretton v. Haward.
Supra, p. 604.

"The intention," says Mr. Swanston, speaking of a devise, "having become impracticable in the prescribed form, is executed by approximation, or, in the technical phrase, cypres. The devise to the stranger, rendered void as a gift of the specific subject, is effectuated as a gift of value and effectuated at the expense of the heir by whose interference its strict purpose has been defeated. By this management the intention of the testator in favour of the stranger, though defeated in form, is in substance accomplished; his intention in favour of the heir, equally express, remains to be considered. If the value of the estate retained by the heir exceeds the value of the estate designed for him his own act is his indemnity: the benefit which he enjoys transcends the intention of the testator: but if the value of the estate of which the court deprives him exceeds the value of the estate of which he deprives the devisee, what disposition is to be made of the surplus? Considered as a gift of value (and on that principle the equitable arrangement is founded) the devise to the stranger entitles him to an equal amount, but is no authority for bestowing on him more," which would be the effect if the principle of forfeiture to the disappointed devisee were adopted; therefore, what is not transferred to the devisee must remain with the heir. The condition not expressed in the will is supplied by the construction of the court for the single purpose of executing the presumed intention. "The case of specific gifts," adds Mr. Swanston, "may involve some difficulty of appreciation, by the rejection of local attachments which admit neither accurate estimation nor adequate compensation. But it is on the principle of appreciation that the court interferes to transfer to one party that which is expressly, and at law effectually, given to another, and the difficulty has been repeatedly encountered. Should any case present impediments of this nature, practically insurmountable, the doctrine of compensation might become in that instance inapplicable, but would not for that reason cease to be the general rule of the court." In conclusion Mr. Swanston states that by the doctrine of Compensation the intention, so far as is practicable, is effected; by Forfeiture that intention will be defeated. *Note to Gretton v. Haward*, 1 Swanst. 443.

CHAPTER VIII.

OF MORTGAGES AND LIENS.

SECTION I.—*Of the Creation of Mortgages—Sale with Condition to secure Repurchase—Conditional Sale—Loan on Grant of Annuity—How Attempts on the Part of the Mortgagor to introduce Special Terms are viewed—Mortgage for Costs—Mortgage with Power of Sale—Defective Conveyances by way of Mortgage, and other incidental Topics.*

Property capable of being Mortgaged.

Mortgage at Common Law.

Mortgage by Creation of Terms.

Welsh Mortgages.

What constitutes a Mortgage.

Sale with Right of Repurchase.

Loans upon Annuity.

Sales of Rent-Charges with Right of Repurchase.

General Rules.

Mortgagee not entitled to any Benefit beyond his Principal, Interest, and Costs.

Right to Redeem cannot be clogged with any By-Agreement.

Mortgage of Advowson.

Mortgage of West India Estate.

Stipulation for Consignments—Commission.

Mortgage to Solicitor for Costs.

Leases from Mortgagor to Mortgagee.

Mortgage with Power of Sale.

Mortgage of Stock.

Mortgage of Leaseholds—Fixtures, &c.

Mortgages under Power to raise Money by Sale or Mortgage.

Grant of an Annuity under such a Power.

Mortgage prevails over Voluntary Settlement.

Mortgagee taking with Notice of Fraud.

Defective Securities—Equitable Relief.

WE are now to enter upon the consideration of a kind of equitable estate or interest called an Equity of Redemption, which, as will appear on reference to the thirteenth chapter of the Third Book of the

Second Part of this work (*a*), originated in Chancery legislation, but which may now be considered as founded on an implied contract; and of the subject of mortgages and securities generally.

Lands by whatever tenure they may be held (*b*), advowsons, tithes, rents, tolls, reversions, and possibilities coupled with an interest (*c*), may be mortgaged. So may personal chattels, ships (*d*) and freight, stock in the funds, debts, policies and other choses in action, and with some exceptions (*e*) salaries and pensions. Indeed generally every kind of interest in property, real or personal, which is capable of absolute sale may be the subject of a legal mortgage or its equivalent in equity (*f*). Where the mortgage is by assignment of a leasehold interest, the mortgagee, unless there be a special provision to the contrary, as between the mortgagor and mortgagee, takes the interest subject to the covenants and obligations contained in the original lease (*g*): but the mortgagee, though he may not have entered, is liable to all the covenants which run with the land, though the landlord will have no assistance in equity in such case; taking an under lease for a shorter term will protect the mortgagee (*h*).

A mortgage of freehold land at common law was by feoffment in fee, upon condition to be void if the feoffor or his heirs should on a fixed day

(*a*) V. *supra*, vol. i. p. 601.

(*b*) See Jarman on Conv. by Sweet, vol. v. pp. 234, 510. This volume, together with Mr. Coote's learned work on the same subject, contains such a mass of authority and fund of information on the subject of mortgages, incumbrances and liens, as almost to supersede the necessity for any further reference. Mr. Sweet spontaneously gave me permission to make use of this, indeed of all his works, at pleasure; and it will be seen that I have largely availed myself of his kind and liberal offer.

(*c*) Lord Eldon held, in *Carleton v. Leighton*, (3 Mer. 670,) that an expectancy of an heir presumptive or apparent (the fee simple being in the ancestor) was not an interest, or a possibility, nor was it capable of being the subject of an assignment or a contract; that is, that such an interest could not presently be affected by any conveyance or contract; and see *Meek v. Kettlewell*, stated *infra*, though that was not a mere expectancy: but a man may make a binding contract, as in *Beckley v. Newland*, 2 P. W. 182; *Hobson v. Trevor*, 2 P. W. 191, that if he should become possessed of a particular estate, he will execute a security upon it; the interest which passes by the covenant in such case is not an interest in the land till it comes in possession, but a right under the contract; *Duckle*

v. Baines, 8 Sim. 525.

(*d*) *Thompson v. Smith*, 1 Mad. 395; and see *Stringer v. Murray*, 2 Barn. & Ald. 248: mortgages of chattels will be treated of in a separate section.

(*e*) As half-pay and the like; *Stone v. Lidderdale*, 2 Anst. 533; *Lidderdale v. Duke of Montrose*, 4 T. R. p. 248; *Priddy v. Rose*, 3 Meriv. 102; and see *Wells v. Forster*, 8 Mees. & W. 149; *Hill v. Paul*, 8 Cl. & Fin. 307; *Palmer v. Bate*, 2 Brod. & B. 673; *Davis v. Duke of Marlborough*, 1 Swanst. p. 79; and *Tunstall v. Boothby*, 10 Sim. 549.

(*f*) Jarman's Convey. by Sweet, v. 508-9, 510, 657 (which will be quoted in future, Jarm. Mortgage, by Sweet); *ibid.* 235, *et seq.*; *ibid.* 312, *et seq.*; *ibid.* 298; *ibid.* 294, 302, 458, *et seq.*; *ibid.* 225; *ibid.* 441. The references in this note will direct the reader to the peculiarities affecting mortgages of these several subjects; practical directions are there given for the guidance of those who may be engaged in such transactions.

(*g*) See *Haig v. Homan*, 4 Bli. N. S. 380, 423, 426, 429.

(*h*) *Sparkes v. Smith*, 2 Vern. 275; *Pilkington v. Shaller*, *ib.* 374; and see *Jenkins v. Portman*, 1 Keen, 454 (8 Sim. 524); *Powell on Mortgages*, 178-9; *Jarman, Mortgage*, by Sweet, 429, 431.

—and if no day was fixed, then any time within the feoffor's life was understood (a)—pay the debt and interest agreed upon to the feoffee or his representatives. Non-payment at the day (b) gave to the mortgagee an absolute estate in fee for ever discharged from the condition (c). In later times it became usual to insert a proviso in the mortgage deed, that on payment of the debt at the appointed time the mortgagee should reconvey the estate: the condition for making the conveyance void, or the proviso for reconveyance, was sometimes contained in a separate instrument; but whatever form the transaction assumed, the terms of redemption were strictly abided by at law, and if they were not complied with to the very letter the estate of the mortgagee became indefeasible (d). If the mortgagor tendered the money on the day, at such convenient time that it might be counted, it was sufficient, and he might tender it in bags, and if the mortgagee miscounted it, or there were any counterfeit coin, still if the mortgagee accepted the money tendered, the condition was considered as fulfilled (e).

The creating of Terms for years (f), for the purpose of securing money lent, was introduced with a view to obviate the inconveniences which were found to arise from the ancient mode of making mortgages by charter of feoffment with a condition of defeasance; for by such mode, if the condition were not performed, the estate becoming absolute was thenceforth subject at law to all the real charges and incumbrances of the feoffee, and, as some thought, to the dower of his wife (g). If an estate be demised for a term of years with a proviso, making the term void on payment of a sum of money with interest, before or upon a certain day, the condition is not considered at law as complied with unless the money be paid on the day; the subsequent payment, though it gives the mortgagor the equitable right to the estate, does not at law affect the legal con-

(a) Co. Litt. 208, b.

(b) The stat. 6 Geo. IV. c. 16, § 70, gives to the assignees of a mortgagor the power of paying *before* the day, which the mortgagor has not (in the passage, vol. i. p. 603, "before" must therefore be altered to "on"); but the statute does not give them power to revest the estate, by payment *after* the day; *Dunn v. Massey*, 6 Ad. & Ell. 481. The mortgagee may enter at law before default of payment; *Rogers v. Grazebrook*, 8 Q. B. 895.

(c) The nature of a common-law mortgage, and the rigour with which at common law the condition was enforced, and the general feeling which called for some modification of the

common-law doctrines, have been adverted to in the former volume, pp. 154, 600-3.

(d) *Supra*, vol. i. pp. 601-2; Jarman, Mortgage, by Sweet, pp. 79, 80.

(e) *Wade's* case, 5 Co. 115; and see Shepard's Touchstone, 143. A tender in bank notes is now good under the stat. 3 & 4 Will. IV. c. 98, § 6: as to what, on the general law, amounts to a good tender, see Jarman, Mortgage, by Sweet, p. 380, *et seq.*

(f) As we have seen in the preceding chapters, the creation of terms for raising portions, and the like, is a common practice.

(g) 2 Fonbl. 104; 2 Bla. Com. 158; 1 Powell on Mortgages, by Coventry, p. 7.

tinuance of the term (*a*); though by the late act, 8 & 9 Vict. c. 112, terms of this kind as well as all other satisfied terms have been extinguished (*b*). Mortgages for long terms for years are attended with this particular advantage, that on the death of the mortgagee the term and the right in equity to receive the mortgage debt vest in the same person; whereas where the mortgage is in fee, the estate on the death of the mortgagee goes to his heir or devisee, and the money is payable to his executor or administrator; this produces a separation of rights which is often attended with great inconvenience both to mortgagor and mortgagee (*c*): but there being also inconveniences in mortgages for terms, and the stat. 1 & 2 Vict. c. 69, and Will. IV. c. 60, having afforded a remedy for the inconveniences attending the mortgaged estate descending to an infant heir or other persons from whom formerly a re-conveyance could not have been obtained, mortgages in fee have again become the more usual form of security (*d*).

The history of the jurisdiction of the Court of Chancery over mortgages has been traced, and the general character of a mortgage in the view of the court has been stated in the former volume (*e*); we are now to enter into a practical consideration of the doctrines of the Court of Chancery, principally in reference to what is called the Equity of Redemption.

It may be proper to state in the outset that, in the view of the Court of Chancery, whatever be the nature of the mortgage, it is only a personal contract, and the mortgagee, generally speaking, is considered as having no interest beyond the obtaining his money (*f*).

There is a kind of mortgage called a Welsh Mortgage, which however has now fallen into disuse, in which there is no condition or proviso for repayment at any time; the agreement is that the mortgagor to whom the estates is conveyed shall receive the rents till his debt is paid: in such case the mortgagor and his representatives are at liberty to redeem at any time (*g*). A conveyance of the inheritance for securing a sum of money in trust that the party to whom the estate is conveyed shall continue in possession till, by perception

(*a*) See Butler's note (1), Co. Litt. 290, b. § 13.

(*b*) *Supra*, vol. i. 292-3, 516.

(*c*) Butler's note, Co. Litt. (961), Co. Litt. 205, a.; 2 Foulb. 256: one way of obviating this inconvenience, which has been resorted to, is by making the mortgagor covenant, in default of payment, to convey the fee, discharged of all equity of redemption, to the

mortgagee, or as he shall appoint; Butler's note.

(*d*) Powell on Mortgages, by Coventry, p. 8.

(*e*) V. *supra*, vol. i. pp. 603-4.

(*f*) *Brown v. Gibbs*, Prec. Ch. 99.

(*g*) *Yates v. Hambly*, 2 Atk. 363; *Longuet v. Scaven*, 1 Ves. 406.

of rents and profits, he shall be satisfied the principal and interest upon such sums as he has already lent or shall thereafter lend, and subject thereto for the mortgagor for life, with remainders over, is in the nature of a Welsh Mortgage, and subject to the rules which are applicable to a mortgage of that description (a): In such mortgages there is usually no covenant for the payment of the money (b); but in this, as in ordinary cases of mortgage, that is no obstacle against redemption (c), the loan creates a debt whether there be a covenant or not (d).

Though there is in such cases, generally speaking, a perpetual right to have back the estate when the debt is satisfied, the mortgagee cannot compel the mortgagor to redeem, nor can he foreclose (e). The mortgagor may apply to the Court of Chancery for an account of the profits received, as on an *elegit* the conuzor has a right to come here to see if the conuzee upon the extended value has received satisfaction for his whole debt, and if there be a surplus to have it paid to him; and where the debt has been extinguished he will have possession decreed to him without being driven to an ejectment at law, though the transaction be such as that possession might be recovered at law (f). If the value be excessive the court will decree an account notwithstanding it be part of the agreement that the mortgagee shall retain the profits in satisfaction of the interest (g): indeed where the relation of mortgagor and mortgagee subsists it is hardly possible that an agreement under which the mortgagee is to hold the land at a rent as an equivalent for interest can be supported; it being considered, independently of the question as to usury, to be against public policy that such agreements should be permitted to take place between parties one of whom has an obvious advantage over the other (h).

(a) *Yates v. Hambly*, *sup.*

(b) *Lawley v. Hooper*, 3 Atk. 280; as to the effect of the absence of such a covenant, as between the real and personal representatives, see *Howell v. Price*, Prec. Ch. 423; and 1 P. W. 294, n.; and *S. C.* Prec. Ch. p. 477; where it was ultimately decided that the heir was entitled to have the estate exonerated out of the personal estate; for the general rule is (see the exceptions, note to *Galton v. Hancock*, 2 Atk. p. 435, and *infra*.) that every mortgage implies a debt, for which the mortgagor's personal estate is liable; *King v. King*, 3 P. W. 361; and Cox's note.

(c) *Mellor v. Lees*, 2 Atk. p. 495; *King v. King*, 3 P. W. 360: but it may be a material circumstance, as explanatory of the intention of the parties, in a doubtful case, as to whether the transaction is a sale or a security; 2 Atk. 495.

(d) *Lex Præc.* 310-11; *supra*, n. (22).

(e) Lord Hardwicke, *Longuet v. Scawen*, 1 Ves. 406; *Teulon v. Curtis*, 1 Yo. 610: that transaction was held to be in the nature of a Welsh mortgage; no time was fixed by the proviso for the payment of the money, and there was a covenant that the mortgagee might enter and receive the profits till paid; he had filed a bill for foreclosure, which was dismissed: the case of *Hartpole v. Walsh*, 5 Bro. P. C. 267, there cited, was one of peculiar circumstances: both cases are stated, Jarman, Mortgage, by Sweet, p. 101.

(f) Lord Hardwicke, *Yates v. Hambly*, 2 Atk. 362-363.

(g) *Fulthorpe v. Foster*, 1 Vern. 476; and see *Talbot v. Braddill*, 1 Vern. 183, 395; see the observations on that case, Jarman, Mortgage, by Sweet, 93; and *ibid.* 96.

(h) See *Webb v. Rorke*, 2 Scho. & L. 668; *Morony v. O'Dea*, 1 Ball & B. p. 117, *infra*; and see *Belcher v. Vardon*, 2 Coll. 162, 172.

In these cases where the mortgagee is in possession, generally speaking, time is no bar; there is nothing for the Statute of Limitations to operate upon, for there is no forfeiture (a): though if it should appear after the account taken that the mortgage had been satisfied by perception of profits more than twenty years before, and that the mortgagee had continued in possession ever since, it would seem that the Statute of Limitations, or the equitable bar from length of time adopted by analogy to it, if pleaded (b), would operate as a bar to the recovery of the estate (c).

As regards mortgages in general, it may be considered almost as an universal rule, that wherever a conveyance or assignment of an estate is originally intended as a security for money, whether this intention appears upon the deed itself, or by any other instrument, or even by parol evidence, it will ever after be considered in equity as a mortgage, and therefore redeemable on the usual terms, though at the time of the loan or as part of the same transaction there may have been an express agreement between the parties that it shall not be redeemable, or that the right of redemption shall be confined to a particular time or to a particular person or description of persons (d). If a man make a mortgage and by the same deed covenants that it shall not be redeemed but during his life, yet it is a mortgage and shall always be redeemable as well after his death as before; if the agreement be that A. or his *heirs male* may redeem, the heir general or assignee may redeem (e). In short, according to the doctrine of the Court of Chan-

(a) Lord Hardwicke, *Yates v. Hambly*, 2 Atk. 363; *Fenwick v. Reed*, 1 Meriv. 120; *Orde v. Heming*, 1 Vern. 418.

(b) Where the Statute of Limitations is not set up by plea, demurrer, or answer, it cannot be insisted upon at the hearing; *Roch v. Callen*, xii. Jur. 112; xiii. Law Jour. Chanc. 144. Vice-Chancellor Wigram (Mitf. on Pl. 273), "though the courts will, in cases which allow of the exercise of discretion, use the statute as a rule to guide that discretion;" *ibid.*

(c) Lord Hardwicke, *Yates v. Hambly*, *ubi sup.* The application of the Statute of Limitations to ordinary mortgages will be the subject of distinct consideration: on the subject of presuming a conveyance, see *Fenwick v. Reed*, 1 Meriv. 125; *S. C.* 5 Barn. & Ald. 233.

(d) See 5 Bacon's Abr. p. 5, *et seq.*, where the cases are brought together. One of the earliest cases is *Clench v. Witherly*, Ca. temp. Finch, p. 376 (1678); it was a case of an absolute surrender; a judgment was given as a further security, and there was a

previous memorandum signed, showing that a mortgage was intended; and see *Bonham v. Newcomb*, 1 Vern. 7, 215; *Howard v. Harris*, 1 Vern. p. 33; on rehearing, 190; *Talbot v. Braddill*, 1 Vern. 183, 394. In the last-cited case the day of payment on redemption was limited to the year 1688; but the estate having, by the dropping-in of lives, become much more valuable, the mortgagor was permitted to redeem several years before the day limited, though the mortgagee could not have foreclosed before that day, and though the general rule is, that the right of foreclosure and redemption ought to be reciprocal (see 2 Freem. 150; *Price v. Perrie*, 2 Freem. 258; *Francklyn v. Fern*, Barn. p. 30; and see 2 Fonbl. 263; *Goodman v. Grierson*, 2 Ball & B. 279); but it is now settled as a general rule that the mortgagor cannot redeem before the day; *v. infra.*

(e) Com. Dig. Mortgage, 4 A. 1 and 4 A. 2; *Howard v. Harris*, 2 Ch. Ca. 61, 148; *S. C.* 1 Vern. 33, 190; *Price v. Perrie*, 2 Freem. 258.

cery, the parties cannot by special agreement alter what the court says are the special terms of the contract: the equity of the mortgagor is part of the law of England, so that it cannot be in any way provided by agreement that the Court of Chancery shall not give its usual relief (*a*). Provisoes for redemption by separate deeds are discouraged, being liable to suspicion that an unfair or improper use of the principal deed is intended to be made (*b*).

From what has been above observed it will be seen that in many cases the court will have first to determine the fact whether the conveyance was intended to be an absolute transfer or only a security for money (*c*). Any circumstance which tends to show that the transaction was by way of security, or indeed which is inconsistent with the notion of the grantee having been intended to take as owner, and particularly where such circumstances are apparent from the grantee's own acts, will be sufficient (*d*); but any after arrangement or promise is to be carefully distinguished from what passes at the time of the original transaction (*e*). So early as the time of Lord Nottingham there was a known distinction between a mortgage and an absolute conveyance with a collateral agreement to reconvey upon payment of the purchase money (*f*), and that distinction is still recognised (*g*): in such case no account of back rents will be decreed: but the transaction must be clearly a sale with a distinct stipulation for a liberty to repurchase; if there be any circumstances showing that the transaction was in any way intended as a security for money, it will, as above mentioned, be treated as a redeemable interest and as a security only (*h*). Mere parol evidence is admissible to show or explain the real intention and purpose of the parties at the time, though the conveyance be in form absolute, more especially if it is suggested that the defeazance was omitted by fraud (*i*). The principle on which evidence is admitted

(*a*) Lord Thuriow and Lord Eldon, 7 Ves. 273; *Seton v. Slade*, Com. Dig. *ubi supra*, et vide 9 Ves. 271. So it is a maxim of law "that the law will not suffer its rules to be contradicted, but will supersede the intent and reduce the gift to its own operation, such as it will allow;" 1 Ves. 146.

(*b*) See *Baker v. Wind*, 1 Ves. 161. Lord Hardwicke made the mortgagee who had disputed the mortgagor's title to redeem pay the costs.

(*c*) See the late case of *Williams v. Owen*, 5 My. & Cr. 303.

(*d*) *V. int. al. Goodman v. Grierson*, 2 Ball & B. 278, and the criteria there stated; *England v. Codrington*, 1 Eden, 169.

(*e*) See *Copleston v. Boxwill*, 1 Ch. Ca. 1; 2 Freem. 150; *Barrell v. Sabine*, 1 Vern. 269;

Esneworth v. Griffiths, 5 Bro. P. C. 184; and see 1 P. W. 269.

(*f*) Lord Nottingham, *Thornboro' v. Baker*, 1 Ch. Ca. 286. See, on this subject, Sugd. V. and P. p. 221, §§ 24, 25, 26. In *Orby v. Trigg*, 2 Eq. Ca. Abr. 599, § 24; *S. C.* 9 Mod. 2, a right of *preemption* on the part of the mortgagee, under a covenant to that effect, appears to be recognised as one that may be enforced, but how is the *price* to be fixed, must the mortgagee take it at the price asked?

(*g*) 1 Powell on Mortgages, by Coventry, p. 138, n.: there is a form of such a conveyance in the third volume of the same work.

(*h*) *Vernon v. Bethell*, 2 Eden, 113; *Goodman v. Grierson*, 2 Ball & B. 278.

(*i*) For instance, to show that although the conveyance was absolute, the party, in-

in these cases against the import of the deed, appears to be, that from the relative helplessness of the borrower it is likely that the lender may have omitted to cause the deed to be so prepared as to represent the real nature of the transaction. Evidence may also be let in of other circumstances indicating fraud or mistake (*a*). If it shall appear upon evidence that the money paid by the grantee was clearly not a fair price for the absolute purchase of the estate conveyed to him; if he was not let into the immediate possession of the estate; if instead of receiving the rents for his own benefit he accounted for them to the grantor and only retained an amount equivalent to interest; or if the expence of preparing the deed of conveyance was borne by the grantor; each of these circumstances has been considered by the court as evidence showing with more or less cogency that the conveyance was intended merely by way of security (*b*). If, having a due regard to the nature of the instrument and the extraneous facts, it shall appear that the parties intended a mortgage, the party from whom the estate has passed and those claiming under him will be allowed to redeem notwithstanding the conveyance may be in the form of a sale (*c*), and notwithstanding that the mortgagor may have bound himself that on some future event, as failure in payment on a particular day, it should operate as a purchase (*d*); but a *bonâ fide* sale with a stipulation for *re-purchase*

stead of entering into possession, demanded interest; *Sir G. Maxwell v. Lady Montacute*, Prec. Ch. 526; fraud, *Lord Hardwicke, Walker v. Walker*, 2 Atk. p. 99; mistake, *Joynes v. Statham*, 3 Atk. 389; *Baker v. Wind*, 1 Ves. p. 160; *England v. Codrington*, *Spurgeon v. Collier*, *ubi infra*; *Vernon v. Bethell*, 2 Eden, 110; it may also be received to show undue influence on the part of the mortgagee, *ibid.* p. 113; see other cases, 2 Fonbl. 263.

(*a*) In *Irnham v. Child*, 1 Bro. 92, the parties purposely omitted a clause making the annuity purchased redeemable; Lord Thurlow would not on such evidence vary the deed; and see *Lord Portmore v. Morris*, 2 Bro. 219, and *Phillips v. Eastwood*, 1 Lloyd & G. temp. Sugd. p. 288; and Lord Eldon's observations in *Marquis Townshend v. Stangroom*, 6 Ves. 332. The rules as to the admission of extrinsic evidence without reference to fraud, are stated *sup.* vol. i. p. 555, *et seq.* A mistake may be such as to avoid a transaction altogether; thus in *Carpmael v. Powis*, 10 Beav. 36, evidence was let in to show a mutual mistake in computation, and that having been proved, the transaction, a sale of an annuity, was set aside altogether.

(*b*) See the authorities cited *infra*. The early authorities are collected in Mr. Butler's

note, No. 96, Co. Lit. 205 a, § 2; some, however, of the cases cited in that note have but a remote bearing on the text.

(*c*) *Sevier v. Greenway*, 19 Ves. p. 414; *Fulthrope v. Foster*, 1 Vern. 476.

(*d*) *Bowen v. Edwards*, 1 Ch. Rep. 222; *Jennings v. Ward*, 2 Vern. 520; *Manlove v. Bale*, 2 Vern. 84, nearly 20 years had elapsed since the first conveyance: the stipulation was that the grantee was to be redeemed, if at all, within one year, the leases under which the property mortgaged was held had been twice renewed by the party who claimed as vendee; *Exton v. Greaves*, 1 Vern. 138; *Francklyn v. Fern*, Barnardist. 30; *Willett v. Winnell*, 1 Vern. 488; *Price v. Perrie*, 2 Freem. 258; *Fulthrope v. Foster*, 1 Vern. 476; *Spurgeon v. Collier*, 1 Eden, 59; and see the cases collected in the note, *ibid.* p. 60; *Vernon v. Bethell*, 2 Eden, 113. "There is great reason and justice in this rule, for necessitous men are not truly speaking free men, but to answer a present exigency will submit to any terms that the crafty may impose upon them," Lord Northington (2 Ball & Beat. 278): and see *Williams v. Owen*, 10 Sim. 386, though under the circumstances that decision was reversed (*ibid.* p. 668; 5 My. & Cr. 303), the transaction being considered as a sale. How-

on fixed terms, introduced into an agreement for sale at the time or at a subsequent period, will have its natural construction (a). Where the transaction appears on the face of it to be an absolute conveyance, it will not be easily presumed that the transaction was by way of mortgage, especially if the possession and enjoyment have gone along with the conveyance (b). It has been said, that where the person charged to be mortgagee has no remedy to recover his money, the person alleging himself to be mortgagor shall not enforce a redemption, for the remedy ought to be reciprocal; but this is liable to some qualification, as we have seen as regards Welsh mortgages (c). In a late case it was held that where the grantee of lands, subject to a limited power of redemption, has not the remedies of a mortgagee by which he might enforce repayment of his principal and interest, the conveyance will not be treated as a mortgage but as a conditional sale. Thus where some lands were conveyed in lieu and satisfaction of a portion charged on them, with a clause of redemption if the portion were paid in ten years, and there was no covenant for payment of the portion, or any collateral security; a redemption was refused after one year had elapsed from the end of the ten years, on the ground that if the produce of the sale of the lands were insufficient to discharge the portion, the grantee could have no remedy against the grantor in covenant, *assumpsit*, or otherwise, to recover the deficiency (d). If the putting upon the transaction the semblance of a sale appears to have been

ever, in *Tasburgh v. Echlin*, which was a clear case of a mortgage, though without a covenant for payment, (which is a circumstance which may be material as regards the intention, see *Mellor v. Lees*, 2 Atk. 496; *Floyer v. Lavington*, 1 P. W. 272; and *Goodman v. Grierson*, 2 Ball & B. 278,) the proviso was that if the mortgagor did not pay within five years, he should be absolutely barred at law and in equity; after the lapse of many years the heir of the mortgagor sought to redeem, and it was refused (2 Bro. P. C. p. 265); but independently of the great lapse of time, there were other special circumstances (v. *ibid.* 267, 268) operating against the claim; and see *Coote*, p. 31.

(a) *Supra*, 619; *Tasburgh v. Echlin*, *sup.*; *Perry v. Meddowcroft*, 4 Beav. 202; but such an agreement, if contemporaneous, will usually be treated as meaning redemption; 1 Phill. p. 434.

(b) *Cotterell v. Purchase*, decree of Master of the Rolls, affirmed Forrest. 61, the defendant had been in possession, recovered by ejectment, for 16 years; there was evidence distinct from the deed that it was a purchase, p. 63; *England v. Codrington*, 1 Eden, 169;

and *Williams v. Owen*, 5 My. & Cr. p. 308; on appeal, and the cases cited by Lord Cottenham, 306-7. *Baker v. Wind*, 1 Ves. Sen. 160; and *Spurgeon v. Collier*, 1 Eden, 55, to the contrary, were decided upon clear evidence of intention, and partly on the ground of fraud.

(c) Dict. *Copleston v. Borwill*, 1 Ch. Ca. 1; 3 Salk. 241. In Comyn's Digest, Mortgage, 4 A. 3, *Bonham v. Newcomb* is cited, as supporting the proposition that a deed shall not be deemed a mortgage if there be not a mutual remedy for the mortgagor to have a redemption, and for the mortgagee to enforce payment of his money; but there are many cases, as will be hereafter mentioned, to show that this dictum, though it has often been relied upon in argument, (v. *int. alia*, *Copleston v. Borwill*, 1 Ch. Ca. 1, 2; *Talbot v. Braddill*, 1 Vern. p. 394,) is not universally applicable; v. *int. al.* *Talbot v. Braddill*, 1 Vern. pp. 183, 395, where it is stated that though the mortgagee could not foreclose before the expiration of a certain time, the mortgagor might redeem within that time; *sed v. infra*.

(d) *Goodman v. Grierson*, 2 Ball & B. 274, 277-9; the leading authorities are there referred to: and see 5 My. & Cr. 307-8.

with a view to deceive the creditors of the mortgagor or others, that of course will have its effect on the decision (a). If the transaction be subsequently recognised by the pretended purchaser as having originally been as a security only, that will, generally speaking, be sufficient to give the conveying party a title to redeem (b).

An absolute assignment with common deed-stamps was made by a woman to a creditor of her son-in-law in consideration of 10*l.*; it was held, on parol evidence and leases granted by both parties, that the deed was to be considered as intended to be a security for 1500*l.* due at the time from the son-in-law to the creditor, that on the one hand the grantor could not claim by way of resulting trust, and on the other, that the donee was entitled to the assignment as a security only for the 1500*l.* (c).

If there be an incongruous covenant in a deed, as that the vendor would not agree to any partition of the estate, that alone, as it has been held, will not turn a purchase into a mortgage (d); and it seems to be settled that a *bonâ fide* purchase of an estate or interest will not be considered as a mortgage on account of a right of Repurchase being given to the vendor, though at an advanced price (e).

An absolute conveyance will not be deemed to be a mortgage or held to be a security only, though it be for an Undervalue (f), (if it be not so gross as to show that necessity, or pressure amounting to fraud (g), could alone have induced the person to enter into such a con-

(a) *Baker v. Wind*, *supra*; 5 My. & Cr. 308.

(b) *Sevier v. Greenway*, 19 Ves. p. 413 (5 My. & Cr. 307). As to recognitions by will and otherwise, as affecting the right to redeem, *v. infra*. The old rule is stated by Lord Thurlow, *Perry v. Marston*, 2 Bro. 399.

(c) *Gordon v. Selby*, 11 Bli. N. S. p. 351; and see, as to this case, Sugd. Law of Prop. p. 578.

(d) *Cotterell v. Purchase*, Forrester. 61.

(e) Butler's note, Co. Litt. p. 205, a, § 2: dict. Lord Redesdale, *Verner v. Winstanley*, 2 Sch. & Lef. p. 394: this case arose upon a purchase of an annuity; and see *ibid.* p. 395 (note), a similar case; *et v.* Sugd. V. and P. 221, § 24. Lord Redesdale refers to Lord Hardwicke's decision in *Lawley v. Hooper*, *supra*, (3 Atk. p. 278,) as having proceeded partly on the additional sum to be given on the repurchase; and in *McGhee v. Morgan*, *ibid.* 395, note, he said that that case had not been followed. In the case itself (*Verner v. Winstanley*), Lord Redesdale, on the circumstances, held the transaction to be a loan: it was not a creation but an assignment of an existing charge, in consideration of 300*l.*, with a clause

for repurchase on a certain day, contemporaneous (within two days) with a loan of 200*l.* on bond: the plaintiff, as surety, had also executed a bond for payment of the 350*l.* (the money fixed for repurchase) on the day fixed, and for the payment of the rent-charge. Lord Redesdale said, "What vitiated the transaction was, the purchaser not taking upon himself the risk of the annuity, but securing himself by the bond for 700*l.*; and that he should, on the hearing, as then advised, direct an account of what was due on the 500*l.* and interest, and the receipts on the footing of the annuity to be set off."

(f) See *McGhee v. Morgan*, 2 Scho. & Lef. 395-6, a case of an annuity purchased at an under-value: Lord Redesdale treated the decision to the contrary in *Heathcote v. Paignton*, 2 Bro. p. 167, as of no authority; and see the note, p. 179.

(g) *Drought v. Eustace*, 1 Molloy, p. 337, 342, 343; dict. of Sir Anth. Hart, Chancellor: mere inadequacy of price is not even a sufficient ground for refusing specific performance to a purchaser; Sugd. V. and P. 311; but see *ibid.* 326; and 2 Bro. 176.

tract) (a), unless it shall appear to have been so intended at the time of the making, by condition in the same or by other writing, or by other sufficient evidence (b); and though the purchaser afterwards declare that he will take the money given as the consideration of the conveyance at any time with damages for it, or the like; for if it be not a mortgage *in principio* it shall not be so by parol agreement *afterwards* (c). But where a man made a conditional surrender of a copyhold to be void on payment of 200*l.* at such a day, and at the same time gave a bond that, if he should not pay it then, on payment of 78*l.* additional in 10 days the mortgagee should have the estate as a purchaser, and the surrenderor died before the day of payment, and the 200*l.* not being paid, the surrenderee paid the other sum to his administrator; nevertheless it was held, that the transaction continued to be a mortgage, and that the heir of the surrenderor should be permitted to redeem on payment of the whole principal and interest (d). It seems to have been admitted from the earliest times that if the transaction is to be considered in the light of a mortgage as to one party it must as regards the other (e).

Where the transaction is clearly one of purchase with a right of repurchase, the time limited ought precisely to be observed, and there is no principle on which the court can relieve if it is not (f). Where a person had released his equity of redemption to the mortgagee for a valuable consideration, and it was agreed that if the mortgagor should by a certain day repay the mortgage money and the additional sum paid for the equity of redemption; it was held that this agreement did not open the release, and that the mortgagor not having paid the money at the day, was not entitled to any relief (g).

In one case, where the conveyance was absolute on the face of it, and there was no agreement for redemption, but the defendant who had advanced the money stated in his answer, that there was a parol agreement that on payment of the money secured the estate should be settled on the grantor's wife and children; the plaintiff insisted

(a) See *Astley v. Reynolds*, 2 Strange, 915; dict. Lord Thurlow, *Heathcote v. Paignon*, 2 Bro. p. 175; but see the last preceding note; *Stithwell v. Wilkins*, Jac. R. 282 (see 1 Molloy, 338). The doctrine of the Roman law (*supra*, vol. i. 323, n. (e)), appears to have had some influence; see the argument in *Heathcote v. Paignon*, 2 Bro. C. C. 174.

(b) Dict. Com. Dig. Mortgages, 4 A. 3.

(c) Com. Dig. *ubi sup.*; *Barrell v. Sabine*, 1 Vern. 268.

(d) Com. Dig. Mortgage, 4 A. 2; *Willett v. Winnell*, 1 Vern. 486.

(e) See *Howard v. Harris*, 2 Ch. Ca. p. 148.

(f) *Barrell v. Sabine*, 1 Vern. p. 268; *et v. sup.* p. 621.

(g) *Ensforth v. Griffiths*, 2 Eq. Ab. 595; 15 Vin. Ab. 468, § 8; 5 Bac. Ab. 595; affirmed, 5 Bro. Par. Ca. 184; the payment had been delayed for 16 years: and see *Copleston v. Boxwill*, 3 Salk. 241; 1 Ch. Ca. 1; and Jarman, Mortgage, by Sweet, p. 84, where the leading cases are collected; and Coote, p. 28; see also *Sabine v. Barrell*, *ubi supra*. In *Tasburgh v. Echlin*, in Dom. Proc. 2 Bro.

that this was sufficient to show that the defendant, the grantee, was not entitled to retain the estate as purchaser, and so the court held; but it was decreed that upon the defendant being satisfied the consideration money, the estate should be in trust for the grantor's children (a).

This important consequence results in the event of the transaction being one of repurchase and not of redemption, that if the purchaser die seised and then the right of repurchase be exercised the money will go to the real representative, not to the personal representatives, as it would in the case of a mortgage (b).

As the subject of procuring money on the grant of Annuities is intimately connected with the doctrines last adverted to, it may be well here to introduce some of the leading authorities applicable to that subject.

It appears that in the time of Lord Harcourt purchases of Annuities began to be very commonly resorted to instead of mortgages, and, as it would appear, with a view to avoid the Statutes against Usury (c). The mode of borrowing money upon annuity is now of common occurrence: the effect of the transaction is, that the money borrowed is to be repaid by instalments consisting partly of interest, partly of principal: whether the annuity be for a term of years or for a life or lives, the transaction is in substance the same; the value of the life in respect of its probable duration is a matter of calculation, and as the principal is put in hazard, the amount of the interest is not regulated by the Statute of Usury, which is the only material distinction (d). A purchase of an annuity will never be treated as usurious if the principal and interest are both put in hazard (e). It was formerly held that a proviso for repurchase actually vitiated the annuity by

Par. Ca. 265, it was held that where the right of redemption was limited to a certain specified time, and no application had been made for a considerable time afterwards, the mortgagee had an absolute estate: as to this case, see Coote, 31; and Powell on Mortgages, 4th ed. vol. i. p. 183. Lord Harcourt said, "He did not see why a contingent right of redemption, leaving it at the election of the mortgagor whether he would redeem within a certain time, might not be purchased upon fair and reasonable terms," *Floyer v. Lavington*, 1 P.W. 272; that was a grant of a rent-charge, with the right of re-purchase during the grantor's life; it had taken place sixty years before.

(a) *Hampton v. Spencer*, 2 Vern. 289: the court held against the grantor, that he was not entitled by way of resulting trust, he having

—as was taken to be a fact, on the defendant's statement in his answer, from which alone the plaintiff could make out any case—declared the trust at the time; see the decree in *Raithby's* note: the plaintiff was a pauper.

(b) See *Thornborough v. Baker*, 1 Ch. Ca. 286; 2 Freem. 143; *S. C.* 3 Swanst. pp. 628, 631, append.; *St. John v. Wareham*, cited 2 Freem. 126.

(c) *Arguendo, Heathcote v. Paignon*, 2 Bro. 176. Lord Hardwicke said (3 Atk. 279) "he thought that ninety-nine cases out of one hundred of grants of annuities were only colourable to evade the Statutes of Usury."

(d) Lord Cottenham, *Bulwer v. Astley*, 1 Phill. 433.

(e) *Murray v. Harding*, 2 Bl. Rep. 856; 3 Wils. 395-6; *Drought v. Eustace*, 1 Mol. 337.

converting the sum advanced into a loan at usurious interest, but it is now established that such a proviso is *not illegal* (a); an annuity will not be set aside for mere inadequacy of price, if not such as to be evidence of fraud, no actual fraud being proved (b). But if the purchaser do not pay the consideration money at the time and manner as stated in the deed, the sale will be set aside; evidence cannot be received of an agreement to pay it in any other manner: purchases of annuities and of reversions are not cases for giving interest by way of compensation for delay in payment (c).

The distinction between an absolute sale of an annuity or rent-charge for a life or lives, and the grant of an annuity or rent-charge as a security only for the money advanced, leads to important consequences, it is therefore necessary in every case to ascertain to which class it belongs. Although the deed may be in form a grant of an annuity, or of a rent-charge on an estate, where it appears that the transaction was really a loan, and that the form of annuity or rent-charge was adopted for the purpose of securing a larger rate of interest or remuneration for the loan; for instance, if there be a stipulation that the grantor shall pay the expences, or there be a personal covenant to pay the annuity; or if the proviso for repurchase or redemption be accompanied with a stipulation for six months' notice so as to allow time for the lender "to find out another hand to take the money;" each of these circumstances has been considered as evidence that the transaction was in effect a security for a loan; and a warrant of attorney given at the time to confess judgment for double the amount of the money advanced, is a circumstance tending to the same conclusion (d): the grantor and the grantee in such case will stand in the relative situations of debtor and creditor; the annuity, if clearly a security, will be treated as redeemable, like a Welsh mortgage (e). The court will not admit evidence of an agreement that an annuity should be redeemable, though such was the agreement, if the parties knowingly prevented its being inserted in the deed, though evidence may be admitted where the clause giving the right of redemption was omitted by fraud (f).

(a) *Murray v. Harding*, *supra*, where the doctrine as to what is and what is not usurious, is stated; *Irnham v. Child*, 1 Bro. 92; and see *Fox v. Mackreth*, 2 Bro. 411; and as to what is usury, see *Belcher v. Vardon*, 2 Coll. 172.

(b) *Low v. Barchard*, 8 Ves. 133: there five years had elapsed; the bill was dismissed *with costs*; and see *Coles v. Trecothick*, 9 Ves. 248; and *Floyer v. Sherrard*, Amb. 18.

(c) *Drought v. Eustace*, 1 Molloy, 342-3; *Sugd. V. and P.* 325; and see *Darley v. Sin-*

gleton, Wightw. R. p. 29; *et v. supra*, p. 622, note (g).

(d) See *Lawley v. Hooper*, 3 Atk. 278, v. *sup.* p. 622, n. (e); *Mellor v. Lees*, 2 Atk. p. 496; *Bulwer v. Astley*, 1 Phillips, 435.

(e) *Longuet v. Scaven*, 1 Ves. 402: the annuities had been granted in discharge of a debt; the grantor was not to be personally liable, but liberty to redeem the annuities was reserved to him; *et v. infra*, p. 626, n. (b).

(f) See *Irnham v. Child*, and *Lord Portmore v. Morris*, *supra*.

In some early cases it was considered that there was less inconvenience in decreeing a redemption after a great lapse of time, where the security was in the form of an annuity, than where it was by way of conveyance of an estate with possession; for the yearly payments being fixed, the account could be easily taken (*a*).

When the transaction, though in form a grant of an annuity, is really meant only to secure the repayment of the loan with interest, whether usurious or not, it will be treated as a loan throughout, and will therefore be redeemable on payment of principal, interest, and costs (*b*). In *Searle v. Lord Carpenter*, the plaintiff, being necessitous, in May 1732, in consideration of 800*l.*, demised to the then late Lord Carpenter his estate for 99 years, if the plaintiff should so long live, and Lord Carpenter redemised for 98 years three-quarters at a rent of 120*l.* afterwards reduced to 100*l.* a year, payable quarterly, redeemable at the end of one year. Another annuity which had been granted in like manner to one Fellowes, but redeemable at the end of three years and a half at the soonest, was assigned by him to Lord Carpenter. In 1750 the plaintiff confessed judgment to the defendant, son of the grantee, to secure the arrears, and now, being sued for arrears, brought his bill against the defendant to be relieved from the annuity on payment of principal, interest, and costs. There was no suggestion of fraud, except what might arise from the act itself. The court, said Lord Hardwicke, leans against these sort of annuities as much as possible, being the means of avoiding the Statute of Usury, and of ill consequences, and his Lordship granted an injunction on payment into court of the principal, interest, and costs (*c*).

On the administration of the assets of the grantor, if there be an annuity charged on the real estate, only as a security for a loan, the tenant for life is entitled to have the annuity valued, and the amount will be a debt, which the personal estate will be the first fund to pay; and the tenant for life is only bound to keep down the interest of so much as is raisable out of the estate (*d*).

(*a*) Lord Hardwicke, *Mellor v. Lees*, 3 Atk. 496 (*et v.* 1 P. W. 270); but in that case, as in *Floyer v. Lavington*, 1 P. W. p. 268, on appeal, the annuity was, under the circumstances, held not to be redeemable; a great length of time had elapsed, in the latter case sixty years, and the reporter considered that that was the main ground; *v. infra*, p. 628. The 18th section, 3 & 4 Will. IV. c. 27, extends to mortgages of rents.

(*b*) See *Floyer v. Sherard*, Amb. 18. Lord Hardwicke, in one case, said: "When the annuity is redeemable, the court looks upon it as an evasion of the statutes of usury, and only

a loan of money," *Lawley v. Hooper*, 3 Atk. 278, 279, 280, 281; but Lord Redesdale disputed the authority of this dictum, *supra*, p. 622: Lord Hardwicke added, Whenever there is the least tincture of fraud in these oppressive bargains, the court will relieve; *ibid.* 279, and see p. 281; *Searle v. Lord Carpenter*, Amb. 243; *Longuet v. Scawin*, *supra*, Lord Hardwicke; *Phillips v. Eastwood*, Lloyd & G. temp. Sugd. p. 288; *Bulwer v. Astley*, 1 Phillips, 433-4-5; and see Saunders on Uses and Trusts, note *H.* vol. ii. p. 312.

(*c*) Amb. p. 248, *et v.* 2 Coll. 172-4.

(*d*) Lord Cottenham, *Bulwer v. Astley*, 1

"A clause of repurchase in the grant of an annuity," says Mr. Saunders in his work on Uses and Trusts (*a*), "is introduced upon the same principle that a vendor of an estate in fee simple stipulates with his vendee that he may be at liberty within a given time, and for a certain sum to repurchase the estate. An annuity granted subject to a clause of repurchase, differs from a mortgage or security for money in these points: in a mortgage the principal debt still continues until the equity of redemption be foreclosed; but upon the purchase of an annuity the principal is gone for ever, and consequently, if the repurchase be made, the money paid on that occasion is not in discharge of a debt, but as the consideration for a new purchase."

As regards contracts for the Grant of a Rent-charge; if the transaction be really and *bonâ fide* a sale of a rent-charge issuing out of land with the usual powers of distress and entry, the land will be the fund from which the annuity is to be paid; the arrears due at the death of the grantor only may be recovered as a debt against the general estate of the grantor, under the covenant or other obligation to pay: there may be a valid contract even contemporaneous that the grantor shall be at liberty to *repurchase* the rent-charge at a certain period on certain terms, as there may be for the repurchase of an estate, as has already been mentioned; but if the clause, though in form for a repurchase, is really to be construed as a clause for redemption, it has always been considered a very strong if not a decisive circumstance to show that the transaction was in reality a loan, and that the conveyance was intended only as a security (*b*): however if the transaction be really a contract for repurchase not one for redemption, then the grantor must comply with the conditions on which he is to entitle himself to repurchase, just as the vendor of an estate with a power of repurchase; and the Court of Chancery in such a simple case can give no relief unless the conditions are complied with (*c*).

A mortgage was made by the plaintiff's grandfather Thomas Miller, in 1689, to John and James Whitehead; afterwards in the same year they mortgaged the premises to J. Cartwright and Heywood, Thomas and John Miller his son joining in the deed, to secure 200*l.* charity

Phill. 435. There were various circumstances in that case to show that the annuity was intended as a security only; but the question did not arise directly on the right of redemption, the question was whether the annuities were to be valued, and the amount of the valuation paid as a *debt* under the charge for

payment of debts in the grantor's will.

(*a*) Vol. ii. p. 312; p. 139, last edit.

(*b*) Lord Cottenham, *Bulwer v. Astley*, 1 Phill. 433.

(*c*) See *Barrell v. Sabine*, 1 Vern. p. 269; Sugd. V. and P. p. 221, § 26; and no account will be given of back rents, *v. supra*.

money lent which was held in trust to be laid out in the purchase of lands in fee; Cartwright and Haywood, in order to secure themselves the interest, leased the premises to the plaintiff's father in June 1689, for 5000 years, at a rent of 12*l.* a year for the first three years, and 10*l.* a year for the remainder of the time, and it was provided that if at the end of three years the 200*l.* were repaid, the premises should be reconveyed; the 10*l.* a year was paid down to 1730, receipts were given sometimes for rent and sometimes for interest; in 1738 the plaintiff gave notice to pay off the principal, and so get rid of the rent-charge. At this time the value of the premises had increased from 500*l.* to 900*l.* The Master of the Rolls first, and then Lord Hardwicke refused to let the plaintiff redeem the rent; Lord Hardwicke said there was a difference between such an agreement as this, which related to a rent-charge issuing out of land, and an agreement which relates to the land itself; so likewise the case of *creating* a rent-charge out of lands, and mortgaging a rent-charge is of a different consideration; here the land itself was not parted with, but it was merely selling a rent-charge, strictly adequate to the consideration given, and instead of having a chance for the whole estate the lender of the money is contented to buy the interest for ever by way of rent-charge; it was plain that the intention of the parties was that after the end of the three years, the interest should be changed into a rent-charge and be irredeemable (a).

The Right to Redeem a mortgage cannot be clogged with any by-agreement, since this, as it has been considered, would let in all manner of extortion and usury, for necessitous men may be induced to agree to almost any terms (b). As a trustee cannot be permitted to make any benefit out of the trust fund, so neither shall a mortgagee be allowed to obtain any advantage out of the security beyond his principal and interest (c). Nor can the mortgagee at the time of the mortgage stipulate for a collateral advantage, as that if the interest be not paid at the time it shall be converted into principal (d): a doubt has been entertained whether a subsequent agreement to that effect, even after

(a) *Mellor v. Lees*, 2 Atk. 494-5; but length of time had great influence on this decision, and some weight was given to the special trust to which the 200*l.* was liable (p. 496): there was *no covenant* to pay; and see *Floyer v. Lavington*, 1 P. W. p. 268, *supra*, p. 626, note, cited in the above case.

(b) *Bowen v. Edwards*, 1 Ch. Rep. p. 222; *Croft v. Powell*, Comyn's R. p. 603; *Jennings v. Ward*, 2 Vern. 520; and *Exton v. Greaves*,

1 Vern. 138; and see *Spurgeon v. Collier*, *ubi supra*; and the cases collected in the note, 1 Eden, 60.

(c) Lord Redesdale, *Gubbins v. Creed*, 2 Scho. & Lef. 217.

(d) *Bosanquet v. Dashwood*, Forrest. p. 40; *Broadway v. Morecraft*, Mosely, 247; *Chambers v. Goldwin*, 9 Ves. p. 271; and see *Ex parte Champion*, 3 Bro. p. 440; and *Brown v. Barkham*, 1 P. W. 652.

the interest is due, is not usurious (a). But where a mortgage is given to secure a banker's balance and the accounts are rendered according to the usual course, striking balances at the end of every year, or even every half-year, such being the custom of the bankers in their dealings, (at the end of three months would be usurious,) and computing interest on the balances so constituted, and those accounts are not objected to, the ultimate balance thus brought out will be payable under the security (b).

On the principle that the mortgagee only holds the estate as a pledge for the payment of money, where an Advowson is mortgaged, in case the living should become vacant prior to foreclosure, the mortgagee will be compelled in equity to present the nominee of the mortgagor, so far therefore till foreclosure the mortgagee is a trustee for the mortgagor (c), and that although nothing but the advowson be mortgaged to him, and the deed contain a covenant that on any avoidance the mortgagee should present (d). The reason is that it is not to be presumed that any advantage is to be made of the presentation which the mortgagee cannot bring to account, and if he were allowed to present he would gain an advantage beyond the securing his principal money and lawful interest (e): a mortgage of an advowson is therefore, as Lord Hardwicke observed, an indifferent security; but it is so far aided by the court that the mortgagee may pray a sale of the advowson (f). If, however, the mortgagee should present, the court will not after the statutable period disturb the presentation, and will nevertheless give the mortgagee the whole of his principal, interest, and costs (g).

A mortgagee of a West India estate may stipulate that the consignments shall be made to him: the principle on which this is allowed,

(a) In *Sackett v. Bassett*, 4 Mad. 58, Sir J. Leach sent the question to a court of law: but see *Blackburn v. Warwick*, 2 Yo. & Coll. 92. A written charge is necessary to convert interest into principal, so that the estate in the land may be charged therewith; *Brown v. Barkham*, 1 P. W. p. 652.

(b) *Lord Clancarty v. Latouche*, 1 Ball & B. 420; *Ex parte Bevan*, 9 Ves. 223; *Ruford v. Bishop*, 5 Russ. 346; see Sir J. Leach's observations on the case of *Ex parte Bevan*, *ibid.*

(c) *Jory v. Cox*, Prec. Ch. 71, Finch's ed.; but there a bill to redeem had been filed: *Amhurst v. Dawling*, 2 Vern. p. 401; *Attorney-General v. Heskeith*, *ibid.* 550; and see *Boteler v. Allington*, 3 Atk. p. 456; *Hobart v. Selby*, 1 Stra. p. 403; *S. C.* 2 Freem. p. 273; *Gubbins v. Creed*, 2 Scho. & Lef. 218.

(d) *Mackenzie v. Robinson*, 3 Atk. p. 559,

overruling the doctrine in *Gardiner v. Griffith*, cited *ibid.* p. 559; and *S. C.* 2 P. W. p. 404; Mosely, 16; this case is stated by Mr. Maddock, P. and P. ii. p. 646, to have been affirmed under the name of *Gardner v. Cooke*, in the House of Lords, A. D. 1728; but the decree was not to the effect stated by Mr. Maddock; that was only a dictum; the decree proceeded upon this, that it was too late to disturb the presentation, (not affirming the right of the mortgagee to present,) and therefore the mortgagee was entitled to his principal, interest, and costs.

(e) *Mackenzie v. Robinson*, *ubi sup.*

(f) *Ibid.*; but not pending an avoidance; see *Fonbl. ii.* 528; and see *Theuton v. Betts*, 2 Freem. 87.

(g) *Gardner v. Griffith*, 2 P. W. 404; recognized, on this point, in *Mutter v. Chauvel*, 1 Meriv. 493.

as stated by Lord Eldon, is, first, because it furnishes him with a security for his debt; and next, because the commission which he receives is supposed to be only a fair compensation for his trouble (*a*). A mortgage creditor out of possession may take a certain reward for the Management of the estate, provided he do not make that employment a condition; but when the mortgagee takes possession, he assumes a different character; all that he does is for himself, and independent of the point of usury or tendency to usury, he is not at liberty to charge the mortgagor whom he has ousted with the trouble which he takes on his own account; such a proceeding would be like making a charge against himself, it would open a door to imposition and even oppression (*b*), he cannot therefore charge or stipulate for commission on consignments, insurance, and the like, and he stands precisely in the same situation as a mortgagee in possession of an English estate (*c*).

A Solicitor may take a mortgage security from his client for Costs already due (*d*); but a security for the costs of such actions and suits as the solicitor may afterwards prosecute and defend is not supportable (*e*). Whether such a security, where it is given generally to secure subsequent costs, is good to the extent of moneys actually paid in conducting subsequent actions and suits is at least doubtful (*f*). In the case of *Daly v. Kelly*, an attorney agreed to advance moneys to his client who had no funds of his own to carry on the necessary proceedings for prosecuting his claims, and to maintain him and his family in the mean time; a mortgage was given by the client to the attorney to secure his present debt, amounting to 6000*l.* and upwards, and such other sums as should be advanced by the attorney or become

(*a*) *Bunbury v. Winter*, 1 Jac. & W. 261.

(*b*) Lord Brougham, *Leith v. Irvine*, 1 My. & K. 288; and see, on this subject, *Cox v. Champneys*, Jac. R. 576.

(*c*) *Leith v. Irvine*, *ubi supra*; the Vice-Chancellor Wigram held, in *Faulkner v. Daniel*, (3 Hare, 218,) that the decision in this case was binding on the court, notwithstanding *Sayers v. Whitfield*, 1 Knapp, p. 133. An executor or trustee may be appointed consignee, with the usual profits; *Morison v. Morison*, 4 My. & Cr. 224. As to the remedies of a consignee, see *Farquharson v. Balfour*, 8 Sim. 210; *Brown v. Anderson*, 2 Moore, Pr. C. R. 249.

(*d*) *Williams v. Piggott*, Jac. p. 600; see 2 Dru. & W. 189.

(*e*) *Jones v. Tripp*, Jac. p. 323, on appeal; the Vice-Chancellor had sent the question of fact whether the deed was fraudulently ob-

tained to a jury; Lord Eldon held that it was a case in which an issue ought not to be directed, the deed being for future costs on the face of it was not supportable, *Pitcher v. Rigby*, 9 Price, 83.

(*f*) The dictum of the Lord Chancellor Eldon, and the reference made by him in *Pitcher v. Rigby*, 9 Price, 84, and the dicta, 84 and 86, by the Lord Chief Baron Richards, and Baron Graham, seem to be in favour of the validity of the security to that extent. But Sir E. Sugden, in *Uppington v. Bullen*, (2 Dru. & W. 188,) seems to have entertained very strong doubts of, if his opinion was not in fact against, the validity of the mortgage even to that extent; though he seems to consider that the holding that a solicitor cannot, pending the suit, take a security for future costs, was originally a great stretch of jurisdiction, Law of Prop. 576.

due to him for costs. Lord Manners, in a suit by the attorney alleging that the client was fraudulently endeavouring to deprive him of the benefit of his security altogether, declared that the attorney was entitled to the benefit of the mortgage for the payment of his costs and advances. On an appeal to the House of Lords this part of the decree was not disturbed, though Lord Eldon observed that it was a transaction to be viewed with great jealousy (*a*). Sir Edward Sugden justly observes that this decree went beyond what had been done in any former case, so that it must depend upon its own particular circumstances (*b*). Where the deed does not fairly state the nature of the transaction, that is when it purports to be a sale, whereas it ought to have been a mortgage, it will not of course be supported (*c*); such a deed will not even be allowed the effect of showing what is the amount due to the attorney; indeed it would seem that the consideration must be proved in every case where the solicitor seeks to enforce a security against his client (*d*). If the attorney, being also the general manager for his client, takes a security from his client, the accounts being unsettled, the client will clearly be entitled to a general account without regard to the security (*e*).

An agreement to limit to the mortgagee a further interest in the mortgaged property, by way of additional security in default of payment, is not liable to objection, as the additional interest so derived will be subject to the same equity of redemption as that created by the original mortgage (*f*); and the mortgagee is at liberty to stipulate for the option of preemption in case the mortgagor should determine to sell (*g*).

A verbal agreement for the reduction of the interest on a mortgage may be binding (*h*). A stipulation that the mortgagee shall receive interest at 4 per cent. if regularly paid, but 5 per cent. if default be made, is good and may be enforced, if 5 per cent. be reserved by the deed (*i*). But if 4 per cent. only is reserved, a stipulation that 5 per cent. shall be paid if the interest be not regularly paid, is in the nature of a *penalty*, and the court will relieve against this as other like penalties, placing the mortgagee (as it is considered) in the same situation as regards the amount of interest reserved as if it had been actually paid, by giving him interest on the interest unpaid at 4 per cent. (*k*).

(*a*) *Daly v. Kelly*, 4 Dow. p. 417; see pp. 420, 421, 431, 440.

(*b*) Sugd. Law of Prop. 575.

(*c*) *Uppington v. Bullen*, 2 Dru. & W. p. 184; *Dunstan v. Patterson*, xi. Jur. 96.

(*d*) *Lewes v. Morgan*, in Dom. Proc. 5 Price, 143; *Lawless v. Mansfield*, 1 Dru. & W. 557; see Sugd. Law of Prop. 576.

(*e*) *Defillin v. Gale*, 7 Ves. 584.

(*f*) Jarman, Mortgage, by Sweet, p. 83.

(*g*) *Ibid.*; *Orby v. Trigg*, 9 Mod. p. 2; 2 Eq. Ab. 599, pl. 24.

(*h*) *Milton v. Edgeworth*, 5 Bro. P. C. 313.

(*i*) See Jarm. Mortgage, by Sweet, p. 644.

(*k*) *Jory v. Cox*, Prec. Ch. p. 161; *Seton v. Slade*, 7 Ves. 273; and the other cases, Jarm.,

Although, as above stated, in common mortgages stipulations against the power to redeem are not permitted, yet the reasoning on which this doctrine is founded does not apply to a case where the person entitled to the estate has in view *bonâ fide* to settle the estate on some relation or connection who may have advanced the money, and has therefore reserved a limited right of redemption so as to enable him to defeat such settlement only during his life or the like. As where a conveyance was made in consideration of 100*l.* advanced to the grantor by a person who had married the grantor's kinswoman, upon condition that if he did not repay the money with interest during his life, his heirs should have no power to redeem; it having been proved that it was the design of the mortgagor by this deed, in the event of his not redeeming during his life, to secure a benefit to the grantee, it was held that although the settlor might have redeemed at any time during his life, yet not having done so the right of redemption was gone (a).

Leases made by the mortgagor to the mortgagee at a rent, are looked upon with great suspicion as liable to have originated in, and to have been influenced in regard to the terms by the mortgagee having taken advantage of the necessities of the mortgagor. In the simple case of a mortgagor granting a lease to the mortgagee there would not perhaps, said Lord Redesdale, be sufficient to impeach the lease, but if there be anything more the court will look into the transaction with every possible jealousy, and if it prove to be a contract for a beneficial lease in consideration of forbearance, it is a contract for more than the law allows for forbearance and is then usurious (b).

It was indeed held in one case that where an agreement was entered into between the mortgagor and mortgagee, that in order to secure the regular payment of the principal money and interest, a lease should be executed to the mortgagee for 21 years at a certain rent,

Mortgage, by Sweet, 396-7: *Hallifax v. Higgins*, 2 Vern. p. 134, is over-ruled by the later cases. See the distinction as to what is penalty and what liquidated damages at law, *Astley v. Weldon*, 2 Bos. & Pull. 346, 350.

(a) *Bonham v. Newcomb*, 2 Vent. p. 364; S. C. 1 Vern. 232, Lord Keeper North, reversing the decree of Lord Nottingham; it happened that the transaction had turned out to be a good bargain: *Wolstan v. Aston*, Hard. 511; 2 Fonbl. 262; and the dictum of the Lord Keeper, *Howard v. Harris*, 1 Vern. pp. 193-4; and see *Jason v. Eyres*, Coote, p. 36.

(b) *Gubbins v. Creed*, 2 Scho. & Lef. 214,

218; the lease in that case was set aside, on the ground of advantage taken, and of misconception on the part of the mortgagor: *Webb v. Rorke*, *ibid.* 661, there the lease was made at a fair value, but it was set aside; Lord Redesdale had, in the first instance, directed issues, which he stated was wrong and done by inadvertence (*ibid.* pp. 666-7), saying such a transaction must be considered *prima facie* as an advantage taken of the mortgagee and against policy; *ibid.* 668: *Morony v. O'Dea*, 1 Ball & B. 109. In *Hickes v. Cooke*, 4 Dow. 26, the principle was admitted, but the mortgagor was excluded from relief by his laches: *Jarm. Mort.* by Sweet, 398; *et v.* 2 Coll. 172.

and the mortgagee acquiesced for 19 years, and settled accounts on that footing, the mortgagor was precluded by his acquiescence from proving that the rent was at an undervalue (a): it was, however, agreed by Lord Manners, as Lord Redesdale had decided, that transactions of this nature in general ought not to be supported, it being most likely that they were entered into under pressure, though nothing may have been said, and as tending to usury. In the case before Lord Manners one lease had expired, but there was a renewed lease still subsisting; in the case before Lord Redesdale the lease was subsisting—in each case the subsisting lease was set aside (b). Lord Manners's decision in the particular case as regards the rent under the first lease proceeded on the ground that it was almost impossible, after an interval of 20 years, to ascertain what was the actual value, and therefore if it had been gone into the mortgagee might have been materially prejudiced: *laches*, his Lordship observed, may in itself be unjust and contrary to equity and good conscience (c), as it may prevent a man from keeping himself armed with evidence to rebut a *prima facie* claim (d): though generally speaking whilst the relation of mortgagor and mortgagee is subsisting *laches* on the part of the mortgagor in not endeavouring to disturb a transaction between them which is void in the view of the Court of Chancery cannot be set up against him (e). Lord Redesdale, in the case before him, though he set aside the lease, yet he directed the account to be taken on the footing of the rent down to the filing of the bill (f).

A mortgage in fee was executed in January to secure 800*l.*; in May following, the mortgagee conveyed the estate to a third person who was really a trustee for the mortgagee at a fee-farm rent of 80*l.*; the rent, which was a fair rent, appears to have been paid for nearly 50 years: on the ground of acquiescence for such a length of time, the Court of Chancery in Ireland refused to set aside the fee-farm deeds, and the House of Lords confirmed the decree (g).

A practice has been introduced, or rather perhaps revived (h),

(a) *Morony v. O'Dea*, 1 Ball & B. pp. 109, 113.

(b) *Webb v. Rorke*, 2 Scho. & Lef. 668-9-70; and *Watt v. Grove*, 2 Scho. & Lef. 492, there cited; also 671, where there are some very important objections stated to such an arrangement; this case, though referred to, had not been reported when *Morony v. O'Dea*, *sup.*, was decided.

(c) See 2 Scho. & Lef. 672.

(d) *Morony v. O'Dea*, 1 Ball & B. p. 118; and see *Molloy v. Irwin*, 1 Scho. & Lef. 310.

(e) *Webb v. Rorke*, 2 Scho. & Lef. 672.

(f) *Ibid.* 674.

(g) *Hickes v. Cooke*, 4 Dow, pp. 16, 24. Lord Eldon observed, that such transactions were looked upon with great jealousy; but "if they should appear to be perfectly clear, the court would not set them aside merely because they were foolish;" Lord Redesdale said, he thought such transactions, on general principles, could not be allowed to stand; and Sir E. Sugden seems rather to incline to the latter doctrine: see Sugd. Law of Property, pp. 574-5.

(h) Cowell, who wrote about two hundred

of conveying lands by way of mortgage to a third person, agreed upon by the mortgagor and mortgagee, in trust, upon nonpayment of the mortgage money at the time agreed upon for its repayment, and usually on giving a certain number of days' notice, to sell the mortgaged estate, with a view to satisfying the mortgage out of the proceeds, with the usual covenants where a power of sale, &c., is given to trustees, and a covenant from the mortgagor to join in such sale, &c. (a). This enables a mortgagee easily and expeditiously to obtain the money lent, without the delay, expense, and difficulties attending a bill of foreclosure (b). It is not necessary, that a trustee should be interposed, for the same power of sale may be given to the mortgagee (c). Though the mortgagor has expressly covenanted to join, yet the purchaser cannot require that he should join in the conveyance (d). It may be observed, that a power of sale given to the trustee and his heir cannot be exercised by his assign (e): and generally a trust for sale to be exercised "during the continuance of the trust" cannot be exercised when the trust is at an end (f).

The mortgagee himself cannot be prevented from using all the remedies belonging to his character of mortgagee, and exercising all the powers that are given to him, as and when he pleases; a power of sale may have been harshly exercised, and at a time when, having a regard to the interests of the mortgagor, he would not have been advised to sell; but if the sale has been made in the ordinary way in which sales are conducted—and the price obtained as compared with the estimated value may be an important feature in this respect—the sale cannot be impeached. In the late case of *Jones v. Matthie* (1847) (g),

years ago, has, in his Institutes, the following passage:—"It sometimes happens that he who is not owner may alienate; for a creditor by contract may alienate a pawn or mortgage, although the thing be not his: as if it be agreed in the beginning that it shall be lawful for the creditor to sell the pawn if the money be not paid."—Cowell's Inst. pp. 115-16.

(a) See *Clay v. Sharpe*, 18 Ves. 346, n.; *S. C.* Sugd. V. and P. App.; *Corder v. Morgan*, 18 Ves. 344.

(b) "Mighty profit," says Sir Robert Atkyns, "arises to that court (the Court of Chancery) by redemption of mortgages, wherein relief being given long after the time limited by the parties, great inconveniences happen to the mortgagee, by expecting the event of a tedious suit, and what his estate or interest will at last fall out to be, whether real or only personal, or of what value, and how to dispose of it in the mean time, as it is probable he would, if he knew it would be a real estate (as the common law doth judge it), or whether

only personal, and then to be left to an executor to perform his will, or make a provision for a younger child, or how to dispose of it in case it prove the one or the other, he is a long time held in suspense, till after some years, the Court of Equity come to a resolution about it."—Inquiry into the Jurisdiction of the Chancery, pp. 38, 39.

(c) *Corder v. Morgan*, 18 Ves. 344; see, on the subject of Powers of Sale, Coventry's note to Powell on Mortgages, ii. 1002, 1016; i. p. 96.

(d) *Corder v. Morgan*, 18 Ves. 344; *Clay v. Sharpe*, there cited, p. 346.

(e) *Bradford v. Belfield*, 2 Sim. 264.

(f) *Wood v. White*, 2 Keen, 664; on the appeal, 4 My. & Cr. 479. Lord Cottenham thought the trusts as to one of the shares were subsisting, but did not object to the principle, indeed affirmed it; p. 480: the case arose on a will.

(g) Jur. xi. 504, 761; reported under the name of *Matthie v. Edwards*, before the Vice-

in which case the power of sale was given to the mortgagee himself, the opinion of the Lord Chancellor, who reversed the decision of the Vice-Chancellor, as well as of the Vice-Chancellor, was that an harsh exercise of the power had been made use of against the mortgagor; but the Lord Chancellor said, This court is not to interfere because a legal right might have been exercised with more attention to the interests and wishes of others. There was nothing to show that the estate was sold at an undervalue. It had been urged that the whole transaction was a manœuvre of the solicitors either for the benefit of the purchaser or to injure the mortgagor's property, but as regards that part of the case, the bill had been dismissed on the original hearing (a), and the Lord Chancellor considered that the property having been sold at or nearly to the full estimated value, displaced this part of the case. The Vice-Chancellor had considered that the estate was improperly sold, and to show this, two facts were relied upon—one, that the age of the tenant for life (the property sold was reversionary) had not been stated; and the imprudence of selling whilst possibly the wife (who was the representative of the mortgagor) might be pregnant and without any guarantee on that subject (b). As to the first, the Lord Chancellor considered that the description was sufficient to enable the value to be calculated by the purchaser; as to the other fact, viz. the uncertainty whether the wife was pregnant, that was an incident attaching to the nature of the property: his Lordship held that the mortgagee, in selling, exercised his undoubted right—whether he acted with kindness and charity or not this court had nothing to do—and finding that the full value was given, and looking at the other circumstances of the case, the Lord Chancellor said he saw nothing to support that part of the decree which set aside the sale (c).

The sale may be made without notice to the mortgagor and without his concurrence, unless that be made a condition (d); where it is

Chancellor Knight Bruce, 2 Coll. 465. The Vice-Chancellor stated in his judgment, that he considered that a mortgagee, having a power of sale, is bound to exercise some discretion, not to throw away the property, but to act in a business-like manner, with a view to obtain as large a price as may fairly and reasonably, with due diligence and attention, be, under the circumstances, attainable; the reversal, as will be seen, does not impugn this doctrine.

(a) The bill had been dismissed, but without costs, as against the solicitors.

(b) See 2 Coll. p. 480.

(c) *Earl of Aldborough v. Trye*, 7 Cl. & F.

436; *Waters v. Groom*, 11 Cl. & F. 684; and Lord Brougham's remarks, *ibid.* p. 699, were referred to.

(d) *Clay v. Sharpe*, 1802; Sugd. on Pow. Appendix, No. xiii., cited, Butler's note, Co. Litt. 205, a.; *Hawkins v. Rambottom*, 1 Pri. 138; Sugd. V. and P. p. 61; and see Jarm. Convey. by Sweet, pp. 101-2-3-4, where the cases establishing that the purchaser cannot insist on the mortgagor joining in the conveyance, are stated and examined; though there be an express covenant by the mortgagor to join, that makes no difference; *ibid.* In the same work, p. 105, the doctrine as to when the

made a condition, of course it must be complied with (a). Where an equitable mortgagee took from the administratrix of the mortgagor a legal mortgage with a power of sale, and then sold under such power, the Vice-Chancellor Knight Bruce would not compel the purchaser to complete his purchase without the administratrix and the parties claiming beneficially under the mortgagor being brought before the court (b).

Where the power of sale is given to a trustee (c), it is his duty to attend equally to the interest of both parties, and though in one case Sir John Leach refused to interfere by injunction as against the mortgagor to prevent a sale taking place, which was applied for on the ground amongst others that notice had not been given, yet when it was afterwards represented that it was a trustee who was effecting the sale, his Honour granted an injunction (d). A power of sale is only an additional remedy, and therefore does not interfere with the right of the mortgagee to foreclose when by the terms of the deed the estate is forfeited at law (e).

Where the surplus produce on the execution of a power of sale in a mortgage in fee is directed to be paid to the mortgagor, his executors, &c. this is not of itself a conversion of the equity of redemption into personal estate; if the sale take place in the lifetime of the mortgagor the surplus is personal estate, but if he die before the sale is made the equity of redemption descends to the heir, and he is entitled to the surplus (f).

It has already been stated, and the subject will be again brought under consideration in the succeeding volume, that a trustee for sale cannot become the purchaser (g); but this does not preclude a new contract with those who have entrusted him, it does not prevent him from bargaining that he will no longer be trustee: but such a

power can be exercised by the survivors and by the assigns of the trustee is considered; *et v. sup.* p. 38, *Bradford v. Belfield*.

(a) See, on this subject, *Jarm. Mortgage*, by Sweet, 411.

(b) *Sanders v. Richards*, 2 Coll. 568.

(c) Of the duties of trustees for sale generally, see *Sugd. Vend.* and *Pur.* § vi. p. 55, *et seq.*

(d) *Anon.* 6 Mad. p. 10; *Sugd. V. and P.* p. 57, §§ 12, 15, 58.

(e) *Re Hailey*, 3 Dea. & C. 502; *Ex parte Hodgson*, 1 Gly. & J. 12: see the distinctions on this subject, *Jarm. Convey.* by Sweet, 108, and *Kerrick v. Saffery*, 7 Sim. 317, as to the course to be adopted where the mortgage is of a term, with a trust for the sale of the fee; it is

stated (*Jarm. Mortgage*, 108), that as doubts may arise on securities of this description, as to the doctrine of Tacking, (as to which hereafter,) they do not present the most eligible form of security.

(f) *Wright v. Rose*, 2 Sim. & St. p. 324; and see *Polley v. Seymour*, 2 Yo. & Coll. 721, 722; and *Brown v. Bigg*, 7 Ves. 279, there cited; *Bourne v. Bourne*, 2 Hare, p. 39; and *Matson v. Swift*, 8 Beav. 374-5-6.

(g) *Downes v. Grazebrook*, 3 Meriv. 200; *sup.* 1 *Sugd. Pow.* 142-3: as to the trustee buying in the property where he is not expressly authorized so to do, see *Jarm. Mortgage* by Sweet, p. 412; *Ex parte Lewis*, 1 Gl. & Jam. p. 69.

transaction is viewed with great jealousy (*a*) although there may be other acting trustees (*b*); and the onus is on the trustee distinctly and clearly to prove the circumstances which are relied upon as taking the case out of the ordinary rule (*c*); it is at the option of the *cestuis que trust* in all cases to hold the trustee to his purchase if they please (*d*).

In the case of a mortgage, or, as it may more properly be called, a pledge of Stock, there is no occasion for an express power of sale. After the time for redemption is passed the mortgagee may sell; "the convenience of these securities is that after the day of payment passed they are taken to be ready money," and it would be productive of much trouble and delay if there could be no sale of such annuities so pledged without a decree of foreclosure; and the same rule holds as regards any other personal chattels which may be pledged (*e*): the principle of the civil law is applied to such mortgages. But the mortgagor may redeem the stock if not sold; if sold the mortgagee will be bound to account for the amount received beyond what was due to him on his security (*f*); if no time is fixed the mortgagor has his whole life to redeem, if the stock remain *in specie* (*g*). If the mortgagee has transferred the stock by way of loan, he will be charged with the value at the time of such transfer (*h*).

A mortgage, whether legal or equitable, of Leasehold premises includes the goodwill of a trade carried on on the premises, which is nothing more than an advantage attached to the possession of the house; the mortgagee, therefore, in the event of a sale, is entitled to have the whole of the proceeds applied in discharge of his debt (*i*): it also includes the fixtures (*k*); but mortgages and pledges of personal chattels will be more particularly considered hereafter.

Where trustees have a power to raise money by sale or mortgage, to pay off a mortgage debt, if they have mortgaged the estate, it is at

(*a*) Lord Eldon, *Ex parte Lacey*, 6 Ves. 626-7; *Coles v. Trecothick*, 9 Ves. p. 234; *Morse v. Royal*, 12 Ves. 375.

(*b*) *Whelpdale v. Cookson*, 1 Ves. Sen. 9; *S. C.* Belt's Sup. p. 9, where Mr. Belt has collected the early cases.

(*c*) *V. int. alia*, *Randall v. Errington*, 10 Ves. 428-9.

(*d*) *Ex parte Lacey*, 6 Ves. 625-30; *Sidny v. Ranger*, 12 Sim. pp. 118, 120. Lord Eldon doubted the authority of *Whelpdale v. Cookson*, so far as it sanctioned the sale, if approved by a majority of the creditors only, as

they could not bind the rest; 6 Ves. 628.

(*e*) *Tucker v. Wilson*, 1 P. W. 261; 1 Bro. P. C. 494; *Lockwood v. Ewer*, 2 Atk. p. 303; *Kemp v. Westbrook*, 1 Ves. 278.

(*f*) *Harrison v. Hart*, Com. 393; *Ex parte Denison*, 3 Ves. p. 352.

(*g*) *Kemp v. Westbrook*, 1 Ves. 278.

(*h*) *Ex parte Denison*, 3 Ves. p. 352; see *Jarm. Mortgage*, by Sweet, pp. 300, 301.

(*i*) *Chissum v. Dewes*, 5 Russ. 29, 30.

(*k*) *Ex parte Cowell*, xii. Jur. p. 411; xvii. Law J. Bank. 16; *Ex parte Tagart*, 1 De G. p. 531.

least doubtful whether they can afterwards sell; the mortgagee cannot compel them to proceed to a sale to try the question (*a*).

A power to appoint land authorizes the charging of money on land; the party might direct a portion of the land to be sold and the money to be paid to the object of the power; a devise to trustees to sell is good under such a power (*b*). A grant of an annuity to endure till a gross sum is paid off, is, it is to be observed, a good execution of a power to raise a sum of money to that amount (*c*).

A mortgage will prevail over a prior voluntary settlement, a mortgagee being a purchaser *pro tanto*. A person being tenant in tail under his father's will, with remainder to his brothers in tail, on his marriage agreed by articles to settle the estate on himself for life, with remainder to the sons of the marriage in tail; after the marriage he suffered a recovery and executed a settlement according to the articles, adding limitations to each of his brothers successively for life, remainder to their sons in tail; he then mortgaged the premises: it was held that the limitations to the brothers were void under the statute of Elizabeth, as against the mortgagee (*d*). Lord Eldon held that in such cases it makes no difference whether the settlor was tenant in tail only or tenant in fee, the brothers under the settlement clearly took new estates (*e*); but the voluntary settlement is only avoided to the extent required to give effect to the provisions of the instrument subsequently executed for value (*f*).

Where the mortgagee takes from a person who has acquired the capacity to mortgage by a fraud, as where the father has appointed under a power to a child, with a view to enable him for the father's own purposes to make the mortgage; if the mortgagee have notice of the circumstances the mortgage will be void in equity (*g*): so where the party takes a mortgage or charge under a power, and the circumstances under which the party creating the mortgage or charge was authorized to make it are not attended to, the security so taken will be liable to be set aside (*h*).

(*a*) *Palk v. Clinton*, 12 Ves. 56.

(*b*) *Keworth v. Bate*, 6 Ves. 793; *Roberts v. Dixall*, 2 Eq. Ab. p. 668, pl. 19, and the other cases cited.

(*c*) *Marnell v. Blake*, 4 Dow. p. 248; 2 Ball & B. p. 35; Sir E. Sugden approves of this case, in *Muskerrey v. Chinnery*, Lloyd & G. temp. Sugd. p. 227. As to sales, &c., under charges to raise debts and portions, v. *supra*, p. 316, *et seq.*, p. 406, *et seq.*; and as to the power of trustees for sale to mortgage, v. *sup.* p. 369.

(*d*) *Cormick v. Trapaud*, 6 Dow. p. 60; Sugd. Law of Prop. 147-8, 577.

(*e*) 6 Dow. 83, 85, Lord Eldon; and see *Johnson v. Legard*, *supra*, pp. 291-2.

(*f*) V. Sugd. Law of Prop. 148, and *Croker v. Martin*, 1 Bli. N. S. 573, there stated.

(*g*) *Palmer v. Wheeler*, 2 Ball & B. 18, 29.

(*h*) The case of *Edgeworth v. Edgeworth*, 1 Beatty, 333, determines what will be a due execution of a power to charge "reasonable" portions; the amount, the time, and occasion on which they are to be made payable must

We may here shortly advert to the doctrines of the court in respect of Defective Securities given by the mortgagor. When fines were in operation, it was held, that where the tenant for life with remainder over mortgaged the estate and then levied a fine, thereby forfeiting his estate to the remainderman, yet that the mortgagee if he had no notice of the will and had considered the mortgagor to be dealing as heir, should hold for the life of the mortgagor (*a*); but in two subsequent cases it was stated that the court could not relieve in such case against the legal title, and that the mortgagee must lose his money (*b*).

The statute 3 & 4 Will. IV. c. 74, § 21, regulates the effect of a disposition by way of mortgage by a tenant in tail (*c*); before that act if the tenant in tail had made a mortgage, and a bill was filed to compel him to suffer a recovery, the course was to direct a good title to be made by the mortgagor to the mortgagee, and the principal and interest to be paid within six months or the mortgagor to stand foreclosed (*d*).

Where a person affects to make a mortgage but the deed is defective for want of enrolment or the like, though by the *laches* of the mortgagee, as the instrument is at least evidence of an agreement to convey, the conscience is bound to make further assurance, and it will be enforced in equity (*e*). If a man mortgages by defective conveyance, and afterwards mortgages to a person who lends his money upon the security of the land by an assurance that is effectual, without notice, the second shall prevail because he has the legal title. But a distinction has been taken as to bond or other creditors who did not originally lend their money on the security of the land, but who, without notice, after the death of the mortgagor, have obtained judgments against the heir; Lord Nottingham held that the defect in the original mortgage ought to be supplied against such judgment creditors, they being in the nature of volunteers (so far as regards their lien on the land)

be looked to, if not, the mortgagee's security may be in jeopardy: see, as to fraud in respect of appointments, *sup.* p. 417.

(*a*) *Willis v. Fineux*, Prec. Ch. 108; and see *Putland v. Burrows*, 5 Bro. P. C. 263, to same effect.

(*b*) *Peachy v. Duke of Somerset*, Pr. Ch. 572, 2 P. W. 147; *Lady Whetstone v. Sainsbury*, *ibid.* 591, 2 P. W. 146; and see *Osborn v. Lea*, 9 Mod. 96.

(*c*) As to the effect of this section, see Coote, 241; *et v. ibid.* 242, as to the application of the 38th section.

(*d*) *Sutton v. Stone*, 2 Atk. p. 101: the covenant for further assurance might be taken hold of as a plank, Lord Thurlow, *Tourle v. Rand*, 2 Bro. 652: as to the effect of a covenant for further assurance, as against assignees of tenant in tail and others, see *Pye v. Daubuz*, 3 Bro. p. 595; *S. C.* 2 Dick. p. 759, erroneously reported; and *Ex parte Wills*, 2 Cox, 233.

(*e*) Lord Eldon, *Mestaer v. Gillespie*, 11 Ves. 625; Lord Cowper, *Taylor v. Wheeler*, 2 Salk. 449; 1 Eq. Abr. 122, pl. 3.

claiming under a person who was bound to make the security good (a), and not purchasers (b). If the subsequent purchaser or mortgagee have notice of the prior defective conveyance, he will be bound just as he would if he had notice of an agreement (c). A covenant by tenant in tail to convey is binding on his assignees in bankruptcy (d).

If the debt be paid off, in equity the mortgage is extinguished, and the mortgagee is trustee by operation of law for the mortgagor, and if it be established by sufficient evidence that the debt was freely forgiven or released, even by parol only, the same result will follow (e).

(a) Bacon's Abr. 4 Eden, p. 40; *Burgh v. Francis*, before Lord Keeper Finch, there cited; 1 Eq. Ab. p. 320. Mr. Coote doubts whether this case can be taken as establishing the general doctrine, On Mortgages, 254, n.; the governing principle is, that the person who did not lend his money with reference to the land, has not equal equity with one who did, as to which *v. infra*.

(b) "A purchaser without notice of the trust may be free, but an incumbrance is not like a sale," Lord Nottingham, *Burgh v. Francis*, 3 Swanst. p. 537, n.; and see *Oxwick v. Plumer*, 5 Bac. Abr. p. 43, where Lord Cowper held the same doctrine as to judgment creditors; and see the other cases cited in *Whitworth v. Gaugain*, 3 Hare, 420. In *Averall v. Wade*, Lord-Chancellor Sugden, (Llo. & G. temp. Sugd. 262,) citing *Finch v. Winchelsea*, (1

P. W. 277,) and *Burgh v. Francis*, (3 Swanst. 536, note,) held, that where there is a defective conveyance by way of mortgage, the estate being specifically bound, as a judgment creditor has no specific lien, it must be made good against him: what (if any) may be the effect in this respect of the stat. 1 Vict. c. 110, was not adverted to by the Lord Chancellor; and see on this subject, *Bothomly v. Fairfax*, 1 P. W. 340; *Fothergill v. Kendrick*, 2 Vern. 234; and Raithby's note, *ibid.* 751.

(c) *Jennings v. Moore*, 2 Vern. p. 609, (stated to have been affirmed in the House of Lords,) founded on *Taylor v. Wheeler*, 2 Vern. 564.

(d) *Edwards v. Applebee*, 2 Bro. 653, n.; *Pye v. Daubuz*, 3 Bro. 595.

(e) *Richards v. Syms*, Barnardist. 90, 92, 93.

ADDITIONAL NOTE.

Statutes relating to Usury.

By the statute 3 & 4 Will. IV. c. 98, § 7, bills of exchange, having not more than three months to run, were exempted from the operation of the Statute of Usury, 12 Anne, stat. 2, c. 16.; and by the stat. 1 Vict. c. 80, no bill of exchange or promissory note made payable at or within 12 months after the date, or not having more than 12 months to run, shall be void by reason of any interest taken thereon, or secured thereby, or any agreement to pay, or receive or allow interest on discounting, negotiating, or transferring the same. By the stat. 58 Geo. III. c. 93, no bill or note given for usurious consideration shall be void in the hands of the indorsee for value without notice. Mr. Sweet has collected the cases at law upon these statutes, On Mortgages, p. 394-5. By the stat. 14 Geo. III. c. 79, interest not exceeding 6 per cent. may be charged in West India securities under certain regulations; and see 3 Geo. IV. c. 47.

**SECTION II.—Of the Mortgagor and Mortgagee, general View of their
Respective Rights — Nature of Equity of Redemption — Of Mort-
gagor in Possession and Mortgagee in Possession—Of Tender of the
Mortgage Money—Of an Assignment of the Mortgage.**

Nature of Equity of Redemption.

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How far Mortgagee is a Trustee of the Mortgaged Estate.

*Right of Redemption may be devised, granted, &c. in the same manner as might the
Estate if not under Mortgage.*

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Mortgagee in Possession—Liability to subsequent Mortgagees.

Mortgagor in Possession—Waste.

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Mortgagee in Possession—Leases—Waste.

To whom the Redemption Money is to be paid.

*Mortgagee only bound to accept Payment from those who are entitled to the Equity
of Redemption.*

Where the Mortgagee holds two Mortgages from the same Mortgagor.

As to the Notice which the Mortgagee may require prior to his being paid off.

Effect of Tender.

*Mortgagor or those who represent him must pay all Expenses which the Mortgagee has
properly incurred in maintaining the Title and the like.*

*Four per Cent. only allowed from Confirmation of Report where the Estate is sold in a
Suit by Mortgagee to administer the Estate.*

*Who is to pay Commission on Remittances where the Debt is contracted out of this
Country.*

Mortgagee cannot dispute his Mortgagor's Title.

Mortgagor may extinguish his Equity of Redemption.

Mortgagee may purchase the Equity of Redemption.

*Mortgagee not bound to produce the Deeds till paid off—but must produce them for the
purposes of Sale, if such Sale has been made with his Consent.*

Mortgage by Tenant in Common.

Effect of Assignment of Mortgage.

Devise of Mortgaged Premises.

Assignment of Mortgage—Conversion of Interest into Principal.

Purchaser of Mortgage.

Donatio Mortis Causâ of a Mortgage.

THE mortgage being constituted, the Court of Chancery holding that the time for redeeming is not of the essence of the contract, permits the mortgagor, or those claiming under him, as will be more particularly mentioned hereafter, or other persons who according to the contract might have redeemed within the time limited (*a*), to redeem or get back the estate on payment to the mortgagee, or those claiming under him, the principal money and interest due, together with the costs and charges properly incurred by them in relation to the mortgage; it being considered that the mortgagee or his representatives thereby obtains all that natural justice demands (*b*). A mortgage, said Lord Northington, is an assignment on condition; the condition being performed, the conveyance is void *ab initio*; equity dispenses with the time, and when the money is paid the conveyance is void in equity and conscience (*c*).

This equity of redemption is not a mere right, it is an Estate in the land (*d*).

Sir M. Hale, for the purpose of showing that where an estate escheats at law by the death of the mortgagee without heirs the mortgagor may redeem, took a distinction between a trust estate, and the estate which a mortgagor is entitled to under his equity of redemption, which does not appear to have been impugned (*e*); namely, that as regards a trust, as it is created by contract, (an expression which is liable to some observation,) those only are bound by it who come in in privity of estate or with notice, as a tenant in dower is bound by it, because she is in in the *per*; but not a tenant by the curtesy, who is in in the *post*; "But a power of redemption (*f*) is an equitable right inherent in the land, and binds all persons, in the *post* or otherwise;" because, said that learned judge, "it is an ancient right, which the party is entitled to in equity; and although," said the learned judge, "by escheat the tenure is extinguished, that will be nothing to the

(*a*) See *Skeffington v. Whitehurst*, 3 Yo. & Coll. 46. If an administrator mortgage a term belonging to the intestate, his executor, not the administrator *de bonis non* of the intestate, is the person to redeem; *Butler v. Bernard*, or *Vincent*, 2 Freem. p. 139; Lord Nottingham, MS., 3 Yo. & Coll. p. 447: Mr. Baron Alderson considered that the authority of this case was unshaken; *ibid.* pp. 44, 46.

(*b*) *Radcliffe v. Warrington*, 12 Ves. 332, 334; *Davy v. Barker*, 2 Atk. 2. The same principle, as we shall see, applies in granting relief against other forfeitures where compensation can be given in money; and see Com. Dig. *Mortgage*, 4 A. 11; and *supra*, vol. i.

p. 599. Lord Redesdale, (On Pleading, p. 153, Smith's ed.) founds the jurisdiction to grant relief after the time for redemption is passed, on the ground of Accident; *et v. supra*, vol. i. pp. 599, 603.

(*c*) Lord Northington, *Burgess v. Wheate*, 1 Eden, 256.

(*d*) Lord Hardwicke, *Casborne v. Scarfe*, 1 Atk. 605 (1 Eden, R. 225); *et v. infra*, S. C. from Lord Hardwicke's MS.

(*e*) The Vice-Chancellor Wigram lately cited it with approbation, *Lord Downe v. Morris*, 3 Hare, 404-5; and see 1 Eden, 206; *Tucker v. Thurstan*, 17 Ves. 133-4.

(*f*) As to redemption, *v. infra*, Sect. iii.

purpose, because the party may be recompensed by the court for that (a);” Lord Nottingham also said, “An equity of redemption charges the land not a trust (b):” however, the words “or otherwise” must be understood with some limitation, for if a person should be so imprudent as to execute an absolute conveyance intended by way of mortgage with a defeazance by a separate deed, a purchaser for valuable consideration from the donee in possession, without notice that the vendor held as mortgagee, would take the estate discharged of the equity of redemption (c): and on the death of a mortgagor being tenant of the equity of redemption in fee simple, the equity of redemption is not so far an estate as that it will escheat (d); though where an estate escheats to the lord for want of heirs of the tenant, the lord is entitled to redeem a mortgagee holding a security on the land by way of term for years (e).

A trust estate as contrasted with an equity of redemption is in other respects materially different (f); a trust estate of inheritance is legal assets by virtue of the Statute of Frauds (g); though the trust of a term is not (h): an equity of redemption of a fee-simple estate or of a term is equitable assets, and as it is now settled even when devised to executors for payment of debts (i): but a judgment creditor, as he has a right to redeem (k), is entitled to be paid in priority (l) out of an equity of redemption.

As regards a mortgage of the wife's estate, the rule is that where the husband is seised of the legal estate *jure uxoris*, and husband and

(a) *Paullett v. Attorney-General*, Hardr. 465; Treat. of Eq. by Fonbl. ii. 259; cited, Butler's note, Co. Litt. 205, a.; also Com. Dig. *Mortgage*, 4 A. 4; and 3 Hare, p. 404. Historically a trust estate is clearly the most ancient estate; indeed an equity of redemption, as Sir M. Hale himself has observed, is comparatively modern; v. *sup.* vol. i. 603, 466; *et v. infra*, p. 645, n. (c).

(b) 1 Eden, 206; 3 Hare, 405.

(c) Lord Talbot discouraged defeazances by a separate deed, as savouring of fraud, probably having in view, amongst others, a fraud of this description; *Cotterell v. Purchase*, Forrest. 64.

(d) *Burgess v. Wheate*, *sup.* vol. i. p. 504; and 3 Hare, 406.

(e) *Lord Downe v. Morris*, 3 Hare, 394, 400.

(f) See *Tucker v. Thurstan*, where it was held that an equity of redemption was within the exception of the Annuity Act, 17 Geo. III. c. 26 (now repealed by 53 Geo. III. c. 141); 17 Ves. 133; and *Lord Downe v. Morris*, 3 Hare, 404-5.

(g) 29 Car. II. c. 3, § 10.

(h) *King v. Ballett*, 2 Vern. p. 248; Williams on Executors, 1320-21; Coote, 60, 61; *Scott v. Scholey*, 8 East, p. 485; of the doctrine of execution against trust estates at law, see Jarm. Mortgage, by Sweet, p. 39.

(i) *Plunket v. Penson*, 2 Atk. 290; Coote, 60; *Lyster v. Dolland*, 3 Bro. 480, 1 Ves. J. 431. Mr. Ram, on Assets, ch. xxvii. p. 401, *et seq.*, has carefully collected the cases.

(k) The right of a judgment-creditor to redeem, though he may not have issued execution, is recognized, in, *inter al.* *Barrett v. Blake*, (2 Ball & B. 357,) and *Neate v. Duke of Marlborough*, (3 My. & Cr. p. 407,) except in the case of leaseholds, which are not affected by the judgment until execution; *Duck v. Dixon*, Vice-Chancellor, 17 July, 1819, 1 Mad. P. and P. 656; and see *Barnewall v. Barnewall*, 3 Ridgw. P. C. p. 24; and *Tunstall v. Trappes*, 3 Sim. 293-9; *et v. infra*, Sect. iii. As to the effect of stat. 1 Vict. c. 110, see *Haris v. Davison*, 15 Sim. 120; *et v. infra*.

(l) *Sharpe v. Lord Scarborough*, 4 Ves. 542; 1 Beatty, 196.

wife join in a mortgage of the estate, reserving the equity of redemption to the husband and his heirs, the husband has the equity of redemption as he before had the legal estate, that is, *jure uxoris* (a). If the estate he before had *jure uxoris* was equitable, so the equity of redemption remains equitable, but still *jure uxoris*; and equity throws this protection round the wife that the deed shall operate no further than its particular purpose, unless there be some recital of intention that the husband shall take the benefit (b), or it is evident that the transaction was more than a mere mortgage transaction, or where the form of the equity of redemption has nothing to do with the limitation of the estate—where the limitation of the estate is perfectly distinct (c).

It is frequently stated that the mortgagee is a Trustee of the estate for the mortgagor (d). But it was observed by Sir Thomas Plumer, that it is only in a secondary point of view and under certain circumstances, and for a particular purpose, that the character of trustee constructively belongs to the mortgagee; no trust is expressed in the contract, it is only raised by implication in subordination to the main purpose of it and after that is fully satisfied; its primary character is not fiduciary. It is a contract of a peculiar nature, by which, under certain conditions, the mortgagee becomes the purchaser of a security and pledge to hold for his own use and benefit; he acquires a distinct beneficial interest in the estate: he has always a qualified and limited right (e), and may eventually acquire an absolute and permanent one, to take possession, and he is entitled to enforce his right by an adverse suit *in invitum* against the mortgagor; all which can never take place between trustee and *cestui que trust*; they have always an identity and unity of interest, and are never opposed in contest with each other. A trustee is not allowed to deprive his *cestui que trust* of possession; but a court of equity never interferes to prevent the mortgagee from assuming possession, for it is in conformity with his contract, which would be directly violated by any impediment being thrown in the way of the exercise of this right; this presents a character directly

(a) Lord Eldon, Chancellor, *Ruscombe* appellant, *Hare* respondent, 6 Dow. 20; Sir E. Sugden (Law of Prop. p. 172) has stated and examined this case; see also 2 *Hare*, 414; *Robinson v. Gee*, 1 Ves. 252.

(b) Lord Eldon, 6 Dow. 20.

(c) Lord Redesdale, *Jackson v. Innes*, 1 Bligh, 128-9; Sir E. Sugden has stated and examined this case, Law of Prop. 174-6; *et*

v. supra, p. 306-7; *et v. infra*, Sect. iii.

(d) *V. int. alia*, *Casburne v. Inglis*, 2 Jac. & W. 196, Append. In the case of a mortgage of an advowson, a mortgagee in possession is a trustee in respect of the presentations; see 1 Eq. Ab. 328, pl. 2; *et v. supra*, p. 629; *et v. infra*, p. 656, note (f).

(e) And see *Cholmondeley v. Clinton*, 2 Meriv. 339, Sir W. Grant.

opposite to that of trustee. It is in this opposite character, continued the learned judge, that he accounts for the rents when in possession, and when he is not, receives the interest of his mortgage debt. He does not at any time possess like a trustee a title to the legal estate, distinct and separate from the beneficial and equitable title; whenever he is entitled at all to either, he is fully entitled to both, and to the legal and equitable remedies incident to both: but in equity his title is confined to a particular purpose: he has no right to either, nor can make use of any remedy belonging to either, further than as may be necessary to secure the repayment of the money due to him; when that is paid his duty is to reconvey the estate to the person entitled to it, it never remains in his hands clothed with any fiduciary trust; he is not intrusted with the care of it, nor under any obligation to hold it for any one but himself, nor is he allowed to use it for any other purpose. The estate is not committed to his care nor has he the means of preventing or being acquainted with the changes which the title to the equity of redemption may undergo, either by the act of the mortgagor without his privity, or by operation of law, by descent, forfeiture or otherwise, and consequently by the operation of the analogy of the Statute of Limitations (a): however, all the cases treat the mortgagee, as soon as he is paid, as becoming a mere naked trustee, holding the legal estate for the benefit of the mortgagor (b).

This right of redemption being, as before stated, an actual Estate in the land, may be devised, granted and entailed in the same manner as might have been done with the estate before the mortgage was made; the entail of it may be barred, formerly by fine and recovery, now by disentailing deed; so there may be a *possessio fratris* and tenancy by the curtesy of an equity of redemption (c); and by the late act as to dower it is subject to the Dower of a widow who has married since the 1st of January, 1834.

Still this estate exists, generally speaking, in the view of the Court

(a) Sir T. Plumer, *Cholmondeley v. Clinton*, 2 Jac. & W. 182, *et seq.* The court, as has before been observed, is bound by the Statute of Limitations now in force.

(b) *Ibid.* *Quarrel v. Beckford*, 1 Mad. p. 278; *et v. supra*, p. 629, as to a mortgage of an Advowson; and *infra*, p. 657.

(c) Butler's note, Co. Litt. 205, a, No. 96, § 3; and see *Wilmott v. Pike*, 5 Hare, *infra*. In this light the legislature has viewed the different estates of mortgagor and mortgagee

in the statute 4 & 5 Will. & M. c. 16, and 7 Anne, c. 19; and see *Casburne v. Inglis*, before Lord Hardwicke, from his own MS., 2 Jac. & W. 195-6. Lord Hardwicke there held that an equity of redemption was an estate, and of which there might be seisin, equivalent to a seisin of the freehold at law; his Lordship, however, added, that a mere trust in land was, as it was admitted, always to be considered as a real estate; *ibid.* 196.

of Chancery only, the legal estate continuing in the mortgagee. Where the mortgagor is left in possession of the mortgaged premises, he only holds them by the will or permission of the mortgagee, who may by ejectment, and without notice, recover the possession against him, or against his tenant under a tenancy created subsequently to the mortgage; and he is not even entitled to reap the crop, in which respect the mortgagor is in a worse condition as regards his possession than a tenant at will; though of course the mortgagee in the final account must give credit for such emblements, as he must account for the rents he receives and for an occupation-rent for such part as he may keep in his own possession (a).

As a general rule, as has already been observed, the court will not interfere to prevent the mortgagee from putting all his securities in force, and that concurrently, for the party borrowing must abide by the fair terms of his contract with the mortgagee (b). The mortgagee may therefore bring an action on a collateral bond concurrently with filing a bill for foreclosure; but, said Lord Redesdale, the mortgagor has a right not to be obliged to pay the money on his bond if he is in danger of not getting back his title deeds; the mortgagee can have nothing but on condition of reconveying and giving up the title deeds which he has received: where therefore the mortgagee had deposited the title deeds with an attorney, who claimed a lien upon them, he (the mortgagee) was restrained from proceeding against the mortgagor on his collateral security (c). The mortgagee may also bring ejectment and obtain possession; but the old doctrine (d) that the mortgagor after forfeiture is bailiff or receiver of the mortgagee is exploded; so that the mortgagee who suffers the mortgagor to remain in possession is not entitled to call on the mortgagor to account for

(a) *Keech v. Hall*, Doug. p. 21; *Moss v. Gallimore*, Doug. p. 266; *Doe dem. Fisher v. Giles*, 5 Bing. p. 421; *Doe v. Maisey*, 3 Man. & R. p. 110; Sir W. Grant, *Cholmondeley v. Clinton*, 2 Meriv. p. 339; Butler's note, Co. Litt. 204, b.; 2 Fonbl. p. 258; and see additional note to this section. Those who may desire to become acquainted with the position of a mortgagor in possession at law, will do well to refer to Jarm. on Mortgages, by Sweet, 352-5; and to a Treatise in the Jurist on this subject, Ap. 22, and Ap. 29, 1843; see add. note.

(b) See *Lockart v. Hardy*, 9 Beav.; *sup.* p. 347, add. note; *Schoole v. Sall*, 1 Scho. & Lef. p. 176; *Booth v. Booth*, 2 Atk. p. 343.

Purely vexatious conduct, or a refusal to receive the mortgage money, interest and costs due, may be visited, in respect of costs, when the matter comes into the Court of Chancery see (*int. alia*) *Morley v. Bridges*, 2 Coll. 628; *Smith v. Green*, 1 Coll. 563-4; *Cliff v. Wadsworth*, 2 Y. & Coll. C. C. 598; *et v. supra*, pp. 634-5. and *infra*, p. 652.

(c) *Schoole v. Sall*, 1 Scho. & Lef. 176; the amount due for principal, interest, and costs, was ordered to be paid into court, there to remain till the title-deeds were secured and a reconveyance could be had. Of the course to be pursued on redemption, where the deeds have been lost or destroyed, *v. infra*, Sect. iv.

(d) *Moss v. Gallimore*, Doug. 266.

the rents he has received (a), though the mortgaged property may have become an insufficient security; not even, as it seems, for rents which have been received by the mortgagee, after notice to the tenants to pay their rents to the mortgagee; unless the mortgagor has dispossessed the mortgagee, or the mortgagor has by collusion obtained the rents which the mortgagee would otherwise have received (b).

It was held by Lord Eldon, that the mortgagee of a term for raising portions which had expired, was not entitled to have the surplus rents which had accrued before the expiration of the term, and which were in the hands of a receiver, applied to the discharge of the mortgage debt, he having done nothing to assert his title to such rents; the order appointing a Receiver is for the benefit of incumbrancers only so far as it is expressed to be for their benefit, and only so far as they choose to avail themselves of it; "I apprehend," said Lord Eldon, "that when the court interfered to receive the rents beyond what was required for keeping down the interest on incumbrances, all the surplus rent after payment of interest was received for the benefit of the heir (c);" the mortgagee whose interests were not provided for by the order might have come in to be examined *pro interesse suo* (d), or with leave of the court have enforced his legal title. If a receiver has been appointed in a suit to which the mortgagee is not a party, the mortgagor will not acquire a title to the rents by giving notice to the receiver, his course is to move to discharge the receiver (e). If a man has a legal mortgage, he cannot have a receiver appointed, he may take possession; but if he have only a mortgage of the equity of redemption, if the prior mortgagee is not in possession he may have a receiver. It seems indeed to have been considered by Sir Wm. Grant, that where it appears in a suit to administer an estate that the pro-

(a) *Turkington v. Kearnan*, Llo. & G. temp. Sugd. 43.

(b) *Higgins v. York Buildings Company*, 2 Atk. p. 107; *Mead v. Lord Orrery*, 3 Atk. 244; *Ex parte Wilson*, 2 Ves. & B. p. 252; *Colman v. Duke of St. Albans*, 3 Ves. p. 25; *Drummond v. Duke of St. Albans*, 5 Ves. 438; *Codrington v. Johnstone*, 1 Beav. 524; *Lord Clarendon v. Barham*, 1 Yo. & Coll. C. C. 704.

(c) *Gresley v. Adderley*, 1 Swanst. 573, 579.

(d) *Ibid.*; and *Hunt v. Priest*, 2 Dick. 540.

(e) *Turkington v. Kearnan*, Llo. & G. temp. Sugd. 42; and the other cases cited in Jarm. Conv. by Sweet, 359. As to the application of the rule above stated, in particular cases,

for instance, where a receiver has been appointed for the benefit of other persons, see *Thomas v. Brigstocke*, 4 Russ. 64; *Salt v. Donegall*, Llo. & G. temp. Sugd. pp. 96-7; also *Earl of Clarendon v. Barham*, 1 Yo. & Coll. C. C. 703, 704. Under a bill to put a term out of the way, that being in the nature of an equitable ejectment, past rents, from the time of the bill filed, may be obtained; *ibid.*; and see *Codrington v. Johnstone*, 1 Beav. 524. A receiver, on his appointment, is entitled to receive all the rents then in arrear; 1 Beav. 524. As to the doctrine at law, as regards the tenants, see Jarm. Mortgage, by Sweet, pp. 358, 363; and *Rogers v. Humphreys*, 5 New. & Mann.; 4 Ad. & Ell. 313, the last case there cited.

perty is subject to a mortgage, a receiver ought not to be appointed in the absence of the mortgagor, though the object may be to prevent trustees who have acted improperly in the trust from getting the rents into their hands (a); but Lord Eldon stated it to be the practice on motions for receivers not to look to mortgagees further than to take care that they are not prejudiced (b).

Where a mortgagee is in possession without notice of a second mortgage he may pay the rents over to the mortgagor, and the second mortgagee if he is so imprudent as not to give that notice, as he cannot have an account of bygone rents from the mortgagor, so he cannot have it from the other mortgagee; but after notice of the second incumbrance, however obtained, the first mortgagee is answerable to the second for what he has received or might have received (c).

Whether the mortgagor be in possession or not, he is considered until foreclosure for most purposes, excepting where the interests of the mortgagee may be affected, as *substantially*, as according to the Roman law he was *actually* (d), the owner of the estate (e): however he will not be permitted to do any acts injurious to, or which may diminish the value of the estate, so as to put in jeopardy the security of the mortgagee: if he commit or attempt to commit acts of waste, he will be restrained from so doing by injunction (f). A mortgagor in possession may be restrained from cutting down timber if the land without it is a scanty security, but not, as it is now settled, if it is sufficient without the timber; and from cutting down underwood contrary to the usual course of husbandry, but not from cutting underwood in the ordinary course, though the mortgagor be insolvent (g).

(a) Sir Wm. Grant, *Price v. Williams*, Sir Geo. Coop. R. 31.

(b) *Norway v. Rowe*, 19 Ves. p. 153; see the cases in the note to *Berney v. Sewell*, 1 Jac. & W. 650. Mr. Coventry, in his note to Powell on Mortgages, 297, *et seq.*, from § iii. to § viii., has collected the cases on this subject, and in the prior and subsequent pages there, relating to the doctrine as to the appointment of receivers generally: see more on this subject, *infra*, Sect. iv.

(c) *Berney v. Sewell*, 1 Jac. & W. p. 650; *Archdeacon v. Bowes*, 13 Price, 368; and see *Parker v. Calcraft*, 6 Mad. 11; *Bentham v. Haincourt*, Prec. Ch. 30; *Coppring v. Cooke*, 1 Vern. p. 270; *Maddocks v. Wren*, 2 Ch. R. 209; Powell on Mortgages, by Coventry, 951.

(d) V. *sup.* vol. i. p. 599

(e) A mortgagor in possession has the

right of voting under 2 & 3 Will. IV. c. 45, § 23: a mortgagee who has been in possession for seven years has then a right to vote; *ibid.*

(f) Dict. *Robinson v. Litton*, 3 Atk. 210; *Usborne v. Usborne*, 1 Dick. 75, and other cases cited in the note: *Goodman v. Kine*, 8 Beav. 379: it was at one time contended that it was the mortgagor's own fault that he did not enter into possession, and therefore he ought not to be permitted to interfere.

(g) *Farrant v. Lovel*, 3 Atk. p. 723; *Usborne v. Usborne*, 1 Dick. 75; *Cox v. Goodfellow*, Oct. 1820, 8 Ves. 105, n. (a); *Hippesley v. Spencer*, 5 Mad. p. 422; *Turkington v. Kearnan*, Llo. & G. temp. Sugd. 45; *King v. Smith*, 2 Hare, 242-3. Sir J. Wigram, Vice-Chancellor, there says, "sufficient" means "that the security is worth so much more than the money advanced." In *Robinson v. Litton*,

If the mortgagee exercises his option of taking possession, which of course he may do at pleasure if he has the legal estate, he may retain possession of the estate until he is paid off by some person entitled (a); though whether he enter or not, unless barred by lapse of time, he is entitled, until actually paid off, to retain the character of mortgagee and to exercise all the rights which are incident to it (b). The mortgagee in possession may grant leases of the premises, but such leases are subject to the mortgagor's right of redemption, and he may avoid any leases which may have been made by the mortgagee subsequently to his mortgage, and may eject the tenant without notice (c). A mortgagee in fee in possession may at law commit waste, but in equity he will be restrained from cutting timber unless his security be deficient (d).

It has been considered that where a person obtains a judgment in ejectment, he shall be treated as being in actual possession (e): and though the general rule is that the court will not compel the mortgagee to take possession (f), yet where a prior mortgagee had obtained leases of the mortgaged premises after a subsequent mortgage had been granted, and had entered into possession as he alleged as lessee; it was held at the instance of the second mortgagee who was also owner of the equity of redemption, that the first mortgagee must be held to be a mortgagee in possession (g).

The mortgagee in possession has a right to add to the principal of his mortgage debt any sums of money he may be compelled to pay for arrears of rent, or for rebuilding the premises or putting them in repair, especially when this is necessary to prevent a forfeiture (h); but it seems he ought first to apprise the mortgagor as to what he is about to do (i): but he cannot by contract or otherwise entitle himself to make any charge for management (k); even though the circum-

(3 Atk. p. 210,) Lord Hardwicke puts it upon this ground, "because the whole estate is a security;" and in *Hampton v. Hodges*, *ubi supra*, Lord Eldon said, "As regards a bankrupt mortgagor, there is a good deal in this, that you have a right to have the estate in the plight in which it was at the date of the bankruptcy, and to prove the rest of the debt:" and see *Humphreys v. Harrison*, 1 Jac. & W. 581; *Hampton v. Hodges*, 8 Ves. 105.

(a) *V. int. al. Dary v. Baker*, 2 Atk. p. 2; and *James v. Biou*, 3 Swanst. p. 237; *infra*, p. 651.

(b) See *Grugeon v. Gerrard*, 4 Y. & C. p. 128; as to Time, *v. infra*, Sect. vi.

(c) 2 Fonbl. p. 258; Jarm.

Sweet, 355.

(d) *Withrington v. Banks*, Sel. Ca. Ch. 31.

(e) *Duke of Buckingham v. Gayer*, 1 Vern. 258; but there were special circumstances in the case.

(f) *Penrhyn v. Hughes*, 5 Ves. p. 106; of the mode of taking the account against a mortgagee in possession, *v. infra*.

(g) *Gregg v. Arrott*, 1 Llo. & G. 246.

(h) *Hardy v. Reeves*, 4 Ves. 466, 480, 482; *Quarrel v. Beckford*, 1 Mad. 281-2; *v. sup.* p. 304; *et v. infra*, p. 653; and Sects. ix. and x.

(i) *Lord Trimleston v. Hamill*, 1 Ball & B. 385.

(k) *Leith v. Irvine*, and *Chambers v. Goldwin*, *supra*; and see *Lord Trimleston v. Ha-*

stances of the estate would have warranted the appointment of a receiver, and charging his poundage to the mortgagor, that will not justify the mortgagee in taking it (a).

If the mortgagee in possession opens quarries or mines he does it at his own hazard (b). If the mortgage be of mines opened, the mortgagee is bound at the utmost to make such expenditure as a prudent owner would do, he cannot be removed from possession for refusing to do more; if he can be removed for mismanagement it must be on a special and very clear case being made out against him (c): it seems that he is liable to the mortgagor if by his gross negligence the estate becomes deteriorated whilst in his possession (d).

A mortgagee of renewable leaseholds is not bound to renew unless it be part of his contract that he should do so; but he may renew at his own expence and reimburse himself by adding what he pays to the principal of the mortgage debt; the renewed lease becomes part of the pledge (e): if a renewable lease be assigned by way of mortgage, an agreement between the landlord and the mortgagee, without the concurrence of the mortgagor, will not bind the mortgagor (f).

As to the Payment of the Redemption money: when upon a mortgage the money is made payable to the heir or executor, in such case, on the day appointed for payment, the mortgagor has the election to pay to which he pleases (g): but if in the mortgage neither heir nor executor be mentioned, then after the death of the mortgagee the law determines that the mortgage money is to be paid to the executor (h). It has long been settled in equity, by analogy to this rule of the common law in cases of payment before forfeiture (i), that the mortgage money after forfeiture is to be paid, not to the heir but to the personal representative; and this holds though the mortgage be in fee,

mill, 1 Ball & B. p. 377; *Langstaffe v. Fenwick*, 10 Ves. p. 405; there Sir W. Grant opened an account on this ground, after a considerable lapse of time, the mortgagee being the attorney of the mortgagor; *Carew v. Johnston*, 2 Scho. & Lef. 301; *et v. supra*, pp. 299, 304.

(a) *Ibid.* As to the proper order to be made when a trust term has been created, and under an authority for that purpose the trustees have entered and appointed a receiver, and the mortgagor has then paid up the arrears, and seeks to discharge the receiver; see *Jenkins v. Milford*, 1 Jac. & W. 629; and see *Allen v. Lord Blessington*, 2 Molloy, 492.

(b) *Hughes v. Williams*, 12 Ves. 496; *et v. Thornercroft v. Crockett*, *infra*, sect. x.

(c) *Rowe v. Wood*, 2 Jac. & W. 556.

(d) *Wragg v. Denham*, 2 Yo. & Coll. 122; but see the note on this case, 4 Yo. & Coll. 570.

(e) *Lacon v. Mertins*, 3 Atk. 1, 4; *Woolley v. Draye*, 2 Anst. 551.

(f) *O'Reilly v. Featherstone*, 4 Bli. N. S. p. 161.

(g) *Co. Litt.* 200, a.; *Rightson v. Overton*, *Freem.* p. 20; *Canning v. Hicks*, 1 Vern. 412; *S. C.* 2 Ch. Ca. 187; and see 1 Ch. R. 283; 2 Ch. R. 220.

(h) *Anon.* 2 *Freem.* 12; *Rightson v. Overton*, *ibid.* p. 20; 1 *Inst.* 209, b.

(i) *Lord Nottingham*, *Thornborough v. Baker*, 1 *Freem.* p. 142; 3 *Swanst.* Append. 628; *Tabor v. Tabor*, *ibid.* 636.

and though the mortgagee may have been in possession, and that possession may have been continued to his heirs (a): and the rule prevails, though the condition be for payment to the mortgagee, his heirs or his executors; and though there be no want of assets; and though there be no bond given or covenant entered into by the mortgagor for the payment of the money; and whether the mortgage be forfeited or not at the death of the mortgagee: for the Court of Chancery considers a mortgage as part of the mortgagee's personalty; the money came from that source, and is to be returned to it (b): and if the mortgagor shall have exercised his option, whilst he had it, to pay to the heir the heir is trustee of the money for the personal representatives (c): for this reason a mortgage of an inheritance to a citizen of London is held to be part of his personal estate, and to be distributed according to the custom (d).

The mortgagee, or those who represent him in interest, are not bound to accept the money, except from the party who is entitled to, or who claims under the party entitled to the equity of redemption, as to which more will be said in treating of redemption; against all other persons the estate is the property of the mortgagee (e). If the mortgagee holds two estates in mortgage from one mortgagor, though by different mortgages, he has a right to insist that all that is due to him shall be paid (f); but where the mortgagee takes proceedings to foreclose this doctrine does not apply; if such a bill be filed against the mortgagor to foreclose both mortgages, he may redeem the one, and allow himself to be foreclosed as to the other: so in bankruptcy the surplus arising from the sale of one estate will not be applied to make good the deficiency in the proceeds of the other (g); but this will be more particularly adverted to in the section on Tacking.

In the case of *Browne v. Lockhart* (1840), the Vice-Chancellor of England incidentally said, "I admit that it is the usual practice for

(a) *Noy v. Ellis*, 2 Ch. Ca. 221; *Tabor v. Grove*, 2 Vern. 367; *S. C.* 2 Freem. 227; *Thornborough v. Baker*, *supra*; a leading case and well reported, decided by Lord Nottingham, see 2 Foul. 280.

(b) *Ibid.*; and see Butler's note, No. 106, to Co. Litt. 208 a, 205 a, § 3; 2 Foul. 283-5, and the cases there cited; and see 1 Inst. p. 209 b, *supra*; and the case cited in next note.

(c) *Kendall v. Micfeild*, Barnardist. 50.

(d) Lord Nottingham's judgment, *Thornborough v. Baker*, *ubi supra*; and 1 Ch. Ca. p. 285.

(e) Lord Eldon, *James v. Biou*, 3 Swanst. p. 237; *v. infra*, p. 635, n. (a).

(f) *Titely v. Davis*, 2 Eq. Abr. 604, pl. 35,

and the margin; and see *Bugden v. Bignold*, 2 Yo. & Coll. C. C. p. 383. This case, and *Barnes v. Racster*, 1 Y. & Coll. C. C. p. 401, though not directly in point on this question, are important cases as to how the rights of subsequent mortgagees, who claim under mortgages of distinct portions of the same property, are to be adjusted.

(g) *Ex parte Bignold*, 2 Deac. 66; and see *Ex parte Hartley*, 1 Deac. p. 288; Jarman, Mortgage, by Sweet, pp. 377, 438; and see the other exceptions in the same page. This is an instance of the interests of the parties being affected by their situation on the record, or the condition in which they may stand at the time; but *v. sup.* p. 477, n., *et infra*, Sect. iii.

a mortgagor when he intends paying off the mortgage to give a proper notice of his intention so to do; but I apprehend that there is no law of this or any other court which requires that to be done: it rests entirely on custom, and the custom is founded on this, namely, that it is but fair that the party who has lent his money upon the security, should have a reasonable opportunity before the transaction is put an end to of finding some other security on which he may lay out his money" (a). But this custom, as affecting the mortgagee's claim for interest, has the force of law; for it is a well established rule that a mortgagee whose money is not paid at the day appointed by the proviso is entitled to six months' notice previously to its being paid, unless it be paid in pursuance of a demand made by the mortgagee (b), or there has been an agreement entered into that it should be paid on a particular day (c): if the money be not tendered on the day of the expiration of the notice, the mortgagee is entitled to another six months' notice (d); so that a tender before the end of the six months in either case will not stop the running on of interest during such six months. If the mortgagee refuse to receive his money after due notice, interest will cease to run from the time of the tender (e), that is, if the mortgagor keep the money continually ready and make no profit by it (f); whether the mortgagee can properly accept present payment of interest in lieu of notice is doubtful as respects the usury laws. When the mortgage money really due is actually and properly tendered by a person having a right to make the tender, the mortgagee must accept it: if there be a refusal to receive the money due on the mortgage upon the terms the debtor has a right to enforce, and he is prevented from paying the money, he having the money and tendering it, by the act of the mortgagee, interest from that day will cease; and, in the event of a suit being instituted, the mortgagor, in the absence of all blame on his part, will receive his costs, or at least the mortgagee will not be entitled to his costs (g); the circumstances will determine in each case which of the courses ought to be adopted (h). The first mortgagee is bound to accept payment of

(a) 10 Sim. 424.

(b) *Sharpnell v. Blake*, 2 Eq. Ab. p. 603, pl. 34; bank notes are now a legal tender.

(c) *Austin v. Executors of Dodwell*, 1 Eq. Ab. 318, pl. 9; Jarm. Mortgage, by Sweet, 379, 382.

(d) *Hix v. Ling*, 2 Powell on Mortgages, 5th ed. 934; Jarm. Mortgage, by Sweet, 379.

(e) *Lutton v. Rodd*, 2 Ch. Ca. 206; *Manning v. Burges*, 1 Ch. Ca. 29; *et v. Middleton v. Eliot*, 15 Sim. 534. See *Meade v. Earl of*

Bandon, 2 Dow, p. 268, as to tender by an agent.

(f) *Gyles v. Hall*, 2 P. W. 378; *Lutton v. Rodd*, 2 Ch. Ca. 206.

(g) See Sects. iii. and iv. and ix. *infra*.

(h) *Cliff v. Wadsworth*, vii. Jur. 1009; 2 Y. & Coll. C. C. 604-5: there one of three joint mortgagees had to pay costs; another was refused his costs; the third had his costs; and see *Roberts v. Williams*, 4 Hare, 129.

his principal, interest, and costs, when tendered by a second mortgagee, and thereupon to convey to him the estate, whether the tender be made with or without the privity of the mortgagor (a); and generally speaking he is justified in accepting payment and transferring the legal estate, to any person who tenders the principal interest and costs due to him, that person being interested in the equity of redemption (b).

The mortgagor and those who represent him in interest, besides principal and interest and costs (c), must also pay, or to stop the running of interest tender, the expenses which the mortgagee has properly incurred in his character of mortgagee, and, as before observed, the sums he may have properly laid out in respect of the estate; for instance, in maintaining the title to the estate (d), in renewing renewable leaseholds (e), and sums laid out in necessary repairs and lasting improvements (f), with interest from the time the sums were advanced (g): but this subject will be again considered in treating of the mode in which the account is to be taken. Where a mortgage carries five per cent. interest, if the mortgagee choses together with bond creditors to file a bill for a sale of the estate, only four per cent. interest will be allowed from the confirmation of the report (h). The mortgagee cannot be compelled to reconvey until the money is in his pocket, payment into court is not sufficient (i); nor then till he has had an opportunity of perusing the draft of the deed, at least if there are any covenants on his part in the deed (k).

If money be lent in London on mortgage, the mortgagor may give notice for payment of the same in London, though the mortgagee live at Oxford; but the mortgagor must be ready to pay at the time, and he must from that time keep his money ready, in order to prevent interest running on (l).

Where a debt is contracted in Jamaica and is therefore *primâ facie* to be paid there, it is obviously reasonable, said Lord Eldon, if the creditor lives in London and his agent makes a demand upon the debtor where he resides and he there pays the whole, that it shall be taken that he has paid the creditor, and in such case the expense of the transmission of the debt is between the creditor and his agent; but upon a security made payable in London, in point of law, the creditor

(a) *Smith v. Green*, 1 Coll. 555, 563.

(b) *V. infra*, Section vii. on Tacking.

(c) See *Dunstan v. Patterson*, 2 Phill. 344.

(d) *Godfrey v. Watson*, 3 Atk. 518.

(e) *Lacon v. Mertins*, *ubi sup.*; *Manlove v. Bale*, 2 Vern. 84; see 2 Eq. Ab. 602.

(f) *Hardy v. Reeves*, 4 Ves. 480; *Godfrey v. Watson*, 3 Atk. 518.

(g) *Godfrey v. Watson*, *supra*, and the cases cited *supra*, p. 304, 649; and Coote, p. 472.

(h) *Harris v. Harris*, 3 Atk. 722.

(i) *Postlethwaite v. Blythe*, on appeal, 3 Mad. 244.

(k) *Wiltshire v. Smith*, 3 Atk. 90.

(l) *Gyles v. Hall*, 2 P. Wms. p. 378; and see *Bishop v. Church*, 2 Ves. 372.

is to receive in London so much money without any deduction; and there is no difference between West India and Irish remittances: "I cannot bring myself to doubt," added his Lordship, "that where a man agrees to pay £100 in London, upon the 1st of January, he ought to have that sum there at that day; if he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been performed" (a).

When the mortgagor, or those claiming under him, come to pay off the mortgage, the mortgagee cannot dispute the title of the mortgagor; the mortgagor is entitled to have back that which he gave in pledge, and the pledgee has no right to take upon himself to set up any title in another; for if such title be just, yet the mortgagee will not be trustee for the person entitled, nor will he be in any way liable to him, if he accounts to the mortgagor who is his principal (b).

A mortgagor may by a subsequent deliberate act extinguish his equity of redemption. A person surrendered a copyhold estate by way of mortgage, the reconveyance to be to such uses as he should appoint, or to himself in fee; and then by a subsequent surrender the mortgagor settled the estate on himself for life; remainder to his wife (the mortgagee's sister) for life, remainder to the mortgagee in fee, subject to the trusts of the former conveyance: the mortgagor enjoyed the premises for many years without paying any interest, and then his wife; on her death the mortgagee entered and held for several years: Lord Thurlow, even against strong evidence of admissions on the part of the mortgagee, which had induced Lord Kenyon to hold that it was a continuing mortgage, held, that the mortgagee had an absolute title to the estate under the second surrender (c).

A mortgagee may purchase the equity of redemption of the mortgagor, but the court views such transactions with considerable jealousy, and will set aside a sale of the equity of redemption, where by the influence afforded by his incumbrance the mortgagee has purchased for less than others would have given, especially if there are other circumstances evidencing misconduct in his obtaining the purchase (d).

A mortgagee is not bound to produce his mortgage deed or indeed any of the deeds in his possession to the mortgagor or any person

(a) *Cash v. Kennion*, 11 Ves. 315-16; the case turned upon who was to pay the commission on remittances to pay the debts: and see *Cockerell v. Barber*, 16 Ves. p. 465; as to the principles to be applied to this subject, see Voet ad Pandect. lib. xii. tit. i. 15.

(b) See *Smith v. Valence*, 1 Rep. Ch. 170; *Goodtitle v. Bailey*, Cowp. R. 601; *Tasker v. Small*, 3 My. & Cr. 70.

(c) *Perry v. Marston*, 2 Bro. 399.

(d) *Lord Redesdale, Webb v. Rorke*, 2 Scho. & Lef. 673.

claiming under him, until payment of the principal and interest due, and his costs, though the application may be made *bonâ fide* only with a view to ascertain the amount secured, the rate of interest, and other particulars with a view to paying off the mortgage (a); but where a mortgagee, who is a party to a suit, consents to a sale of the mortgaged property; he must produce and leave in the Master's office the title deeds which are necessary in order to complete such sale (b).

If the mortgage is made by a tenant in common, and he files a bill against the other tenants in common for a partition, the mortgagee is not a necessary party to such a bill if the mortgage embraces the entirety, as he would be if his mortgage only embraced a part of the estate (c).

An assignment of a mortgage is an assignment of the debt; the right to receive the debt is incident to the mortgaged estate, and necessarily passes by the assignment of it, and it is not necessary that notice should be given to the mortgagor (d). Where a mortgagee devises the money it may on the context carry his interest in the land (e); but it is not to be taken as an universal rule that a devise of the money will carry the land (f). A gift of a mortgage security for money, is a gift of all the testator's interest in the money and the security, and will therefore pass the fee (g). The general rule appears to be that where the testator devises all his real estates, whatsoever and wheresoever, the legal estate in the mortgaged premises will pass by the will unless a different intention is to be collected from the context (h); but it would seem that a general or even particular devise of the mortgaged lands will not of itself have the effect of carrying the beneficial interest in the mortgage (i).

It has been held that if a person takes an assignment of a mortgage carrying the legal estate, making a further advance at the time, and he

(a) *Browne v. Lockhart*, 10 Sim. 421, 425: the Vice-Chancellor of England there states the effect and principle of *Latimer v. Neale*, 4 Cl. & Fin. 570; he held that the *Anon.* case, *Mosely*, 246, is not law; *et v. inf.* Sect. iii.

(b) *Livesey v. Harding*, 1 Beav. 343.

(c) *Swan v. Swan*, 8 Price, p. 518; and see, on this subject, *Story v. Johnson*, 2 Yo. & Coll. 586. As to the proper Parties to suits for Redemption and Foreclosure, *v. infra*, Sect. v.

(d) Sir J. Leach, *Ex parte Monro*, Buck, 302; *Jones v. Gibbons*, 9 Ves. 411.

(e) *Silberschildt v. Schiott*, 3 Ves. & B. 49.

(f) See *Ram on Assets*, 521-2.

(g) *Renvoize v. Cooper*, 6 Mad. 373; Sir J. Leach, *Mather v. Thomas*, 6 Sim. 115, 120; and see *Ex parte Barber re Tyas*, 5 Sim. 454; *Galliers v. Moss*, 9 Barn. & Cr. 267, to the contrary, is observed upon in each of these cases; and see 1 Jarm. on Wills. 650.

(h) *Lord Braybroke v. Inskip*, 8 Ves. 417, 421; and the other cases, *Ram on Assets*, 525-6; *et v. Ex parte Brettell*, 6 Ves. 577; *Ex parte Barber*, 5 Sim. 451.

(i) See 1 Jarman on Wills, pp. 633-7; Mr. Jarman there examines the cases cited in *Ram on Assets*, 527, note (n), from which Mr. Ram concludes that a particular devise will carry the beneficial interest.

is informed of the existence of a settlement on the marriage of the mortgagor, but as part of the same information it is stated that such settlement does not include the mortgaged estate, he may hold for the further advances against the persons entitled under the settlement (a).

The general rule is that if an assignment of the mortgage is made with the concurrence of the mortgagor, the interest paid by the assignee to the mortgagee shall be considered as principal if included in the mortgage as such; but where it is assigned without the consent of the mortgagor, the assignee takes it upon the same terms, and subject to the like equities as it stood in the hands of the assignor (b); though this admits of distinctions upon particular circumstances (c). To convert interest into principal the interest must first become due, and then there must be an agreement in writing signed to make it principal, at least so as to affect the estate, and the interest cannot even then be turned into principal to the prejudice of subsequent incumbrances of which the mortgagee has notice (d). On costs of renewal and the like on which the original mortgagee would be entitled to claim interest, the assignee standing in his place will of course also be entitled to claim interest (e). If a mortgagee in possession assigns over his mortgage without the assent of the mortgagor, the mortgagee is bound to answer the profits, both before and after the assignment, though assigned only for his own debt; for he is under a trust to answer the profits of the pledge, and it is a breach of trust to assign such pledge to a person who is insolvent (f). If the mortgagee assigns the mortgage as a security for his own debt he is in the condition of a surety, and he may insist either that proceedings be taken to realize the security or that the creditor shall release him from all beyond what the mortgage may produce (g).

The purchaser of a mortgage, particularly if he be a creditor, as a general rule has a right to claim against the mortgagor, and all de-

(a) *Jones v. Smith*, 1 Phill. 244; see additional note, No. 2.

(b) Lord Hardwicke, *Ashenhurst v. James*, 3 Atk. p. 271; the cases in the notes show that at one time it was considered that it was not necessary that the mortgagor should be a party: *Matthews v. Wallwyn*, 4 Ves. J. 118, 125, 127; *Chambers v. Goldwin*, 9 Ves. 264; *Norrish v. Marshall*, 5 Mad. 481; *Ex parte Monro*, Buck, p. 303; 1 Eq. Abr. 328, pl. 2, but the reference is erroneous. The original mortgagee is therefore a proper party to a bill for redemption; 2 Eq. Abr. p. 594, pl. 3; *et v. infra*. Mr. Coote, referring to *Chambers v. Goldwin*, adds, "As well in re-

spect to payments before as after the assignment," p. 371: but see *Bradwell v. Catchpole*, 3 Swanst. 79, 80, n.; there the mortgagee had money enough in his hands to satisfy the mortgage, but the Lord Keeper would not consider the mortgage as satisfied.

(c) Lord Cowper, *Lord Ossulton v. Lord Yarmouth*, 2 Salk. 449; 1 Vern. 169, n.

(d) *Digby v. Craggs*, Ambl. 612; 2 Eden, 200; *Matthews v. Wallwyn*, 4 Ves. 128.

(e) See Coote, 372; and *Procter v. Cooper*, Prec. Ch. 116.

(f) 1 Eq. Abr. 328, pl. 2; *supra*.

(g) *Gurney v. Seppings*, 1 C. P. Coop. R. 12, on appeal.

giving title under him, the full amount of what is due on the security, whatever he may have given for it; he takes the risk, and therefore is allowed the gain, if any (*a*); but an heir, a trustee, an agent, or an executor, can only claim the amount which he gave for it, unless he has bought in that security to protect one of his own (*b*).

Where the mortgagee in fee on the death of the mortgagor bought in the widow's dower, it was held that the heir of the mortgagor should have the benefit of it on his bringing a bill to redeem; on this principle, that the mortgagee is but a trustee for the mortgagor after his money is paid (*c*).

If the guardian of an infant compounds debts, the infant will have the benefit of it (*d*).

It has been established by the House of Lords, that a mortgage may be the subject of a *Donatio mortis causâ*; the delivery of the mortgage deeds will be sufficient; the real and personal representatives will be trustees for the donee (*e*).

The mortgage, as between the mortgagor and the mortgagee, is a mortgage of the mortgagor's entire interest, saving only the rights of prior incumbrancers, so that if the mortgagor pay off any such prior incumbrance it enures for the benefit of the subsequent mortgagees (*f*): and if a mortgagee purchases the equity of redemption, he cannot set up his mortgage against any other incumbrances of which he had notice at the time of the purchase (*g*).

(*a*) Lord Hardwicke, *Morret v. Paske*, 2 Atk. 53; Lord Cowper, *Anon.* 1 Salk. 155; and see *Bromley v. Holland*, 5 Ves. 620; and *S. C.* 7 Ves. 13.

(*b*) *Darcy v. Hall*, 1 Vern. 48; 3 P. W. 251, note; *Lancaster v. Evers*, 10 Beav. 166, and the cases in the note; and see Coote, 567-8; *Morret v. Paske*, 2 Atk. 54.

(*c*) *Baldwyn v. Banister*, 3 P. W. 251, n.; *v. supra*, p. 645.

(*d*) *Powell v. Glover*, 3 P. W. 251, note.

(*e*) *Duffield v. Elwes*, 1 Bli. N. S. p. 497, reversing Sir J. Leach's decree; see Sir E. Sugden's observations on this decision, *Law of Prop.* p. 447.

(*f*) See *Frazer v. Jones*, 5 Hare, p. 481;

and *Watts v. Symes*, xiii. Jur. p. 245, before the Vice-Chancellor of England, where the previous authorities are cited.

(*g*) *Allen v. Knight*, Lord C., xi. Jur. 529; *S. C.* on original hearing, 5 Hare, 272; *Greswold v. Marsham*, 2 Ch. Ca. 170; *Toulmin v. Steere*, 3 Meriv. 210; *Brown v. Stead*, 5 Sim. 535; *Parry v. Wright*, 5 Russ. 142; 1 Sim. & St. 369; *Smith v. Phillips*, 1 Keen, 694; *Frazer v. Jones*, 5 Hare, 482. Sir E. Sugden thinks that *Toulmin v. Steere* went beyond the previous cases, Llo. & Go. temp. Sugd. p. 251, but it has not been disturbed. But a devisee of the equity of redemption may keep up his security; *Forbes v. Moffatt*, 18 Ves. 384.

ADDITIONAL NOTE.—No. I.

Emblements.—Supra, p. 646.

Where it is said, said Sir J. Leach, that as between mortgagor and mortgagee the mortgagee is not entitled to emblements, the meaning is, that where the mortgagor has personally occupied the premises, and the actual possession is afterwards delivered to

the mortgagee by the sheriff or otherwise, the growing crops which are found on the premises become part of the security, and may be applied to his own use; but the principle does not apply to the case where the growing crops have been carried off by the mortgagor before the mortgagee obtains possession, and between the time of his demand and recovery of possession: *Ex parte Temple*, 1 Gl. & J. 216, and see the remainder of the judgment; this point is material in regard to the taking of the account between the mortgagor and mortgagee, which will be treated of hereafter.

ADDITIONAL NOTE.—No. II.

Notice as affecting Priority.

In *Jones v. Smith*, stated *supra*, p. 656, Sir James Wigram's decision was confirmed by Lord Chancellor Lyndhurst; that case was brought to the attention of Lord Cottenham in the late case of *Penny v. Watts*, (3rd April, 1849,) on an appeal from the Vice-Chancellor Knight Bruce. From some observations which fell from Lord Cottenham in the course of the argument, it would seem that his Lordship does not approve of the decision in that case; probably his Lordship's judgment will be given before the section on Notice, *infra*, Sect. viii., is printed; if so, it will be there stated. *Penny v. Watts* involves the important question, whether the fact of possession is to be considered as constructive notice of any title in the person in possession, beyond that in respect of which he is actually in possession; for instance, of a contract for the purchase of a reversionary interest in the estate.

The observation above alluded to was this, that if on an application to the court for payment of money belonging to the wife to the husband on her consent, it is stated in the affidavit which is required in such cases, that there is a settlement but that it does not include the fund in question, the court is never satisfied with that statement, but requires the settlement to be produced: see *Britten v. Britten*, 9 Beav. 143, and the cases cited in the note; *Bowman v. Bell*, 1 C. P. Coop. temp. Cottenham, 331.

The judgment in *Penny v. Watts* has now (22 April, 1849) been delivered, and no doubt will soon be reported: I collected from the judgment that his Lordship considered that the facts, if proved, would show that the party had actual notice of one instrument, which ought to have put him on inquiry, and then he would have been informed of the existence of the one which was sought to be put in force against him, citing *Taylor v. Baker*, 5 Price, 310. This view of the case rendered it unnecessary to consider the subject of notice from possession; no notice was taken of *Jones v. Smith* in the judgment. As to Notice, *v. infra*, Sect. viii.

SECTION III.—*Doctrines of the Court of Chancery in regard to Proceeding for Redemption—Who may redeem.*

Mode of Proceeding to effect Redemption.

What Persons are entitled to redeem.

In case of Escheat.

Trustee and Cestui que Trust.

Troughton v. Binkes, 6 Ves.

Construction of Clause reserving Right of Redemption.

Mortgage of Estate of Wife.

Redemption of Estate of Insolvent.

Mortgage in Exercise of a Power.

Redemption by Cestui que Trust.

The Mortgagee may redeem the Prior Incumbrancers.

All Arrears of Interest due must be paid.

Owner of Part of the Estate mortgaged must redeem the Whole.

Person who has no Interest must not be joined with one who has.

Title must be established before a Person will be permitted to redeem.

Bill to redeem not to be brought till Time for Payment has expired.

Terms to which the Mortgagor must submit, the same whether he sues or is sued.

Mortgagee cannot dispute his Mortgagor's Title.

Primâ facie, the Mortgagor must pay the Costs of obtaining a Re-conveyance.

Mortgagee will not be compelled to produce Deeds or disclose his Title.

Mortgagor cannot require an Assignment of the Debt.

Dismissal of Bill to redeem operates as a Foreclosure.

Bill by second Mortgagee of Estate in Jamaica.

THE only mode by which the right of redemption can be enforced or extinguished (independently of the operation of length of time), as will have been seen, is, from its very nature, through the medium of the Court of Chancery. As regards Redemption the course is by a bill in the Court of Chancery, filed by the mortgagor or those claiming an interest in the estate through him; and the right to extinguish this equity is by a bill for Foreclosure in the same court. Foreclosure will be the subject of the next Section.

It has been stated that no person will be admitted to come into equity for a redemption but he that is entitled to the legal estate of the mortgagor, unless a special case is made (a); but this rule must

(a) *Franchlyn v. Fern*, Barnardist. p. 30, two previous cases are there cited and recognised; *Troughton v. Binkes*, 6 Ves. 575; and see *Utterson v. Mair*, 2 Ves. J. p. 95; 4 Bro.

be understood in a very extended sense. It may be stated generally that every person claiming any interest legal or equitable in the property mortgaged under or through the mortgagor, by conveyance, by operation of law or otherwise, that is, in privity of title, has a right to redeem the property in order to make his own claims available, whether those who may have a prior claim to redeem are willing to proceed or not (*a*): all titles at law that are not directly against conscience, said Lord Chancellor Somers, shall be assisted here to a redemption (*b*). The party primarily entitled to redeem is he who would have been entitled to redeem at law: where an administrator had mortgaged leaseholds belonging to his intestate, reserving the equity of redemption to himself, his executors, &c., his personal representative, and not the representative of the intestate, was held to be the party to redeem (*c*): the administrator, it was said, had aliened the whole interest, and was not possessed *in auter droit* of any part of it, the demand against him being personal in respect of the assets come to his hands (*d*); but the personal representative of the administrator would clearly hold the mortgaged property when redeemed as trustee for the intestate's estate (*e*). The following (*f*) may be given as instances of the kinds of interests to which the right to redeem has been extended.

Of course the mortgagor, his heirs, or his executors, according to the nature of the property mortgaged, and his assigns, including all subsequent incumbrancers to whom he has mortgaged the equity of redemption, may redeem.

A person claiming under a deed void as being voluntary against a subsequent mortgagee, may redeem the mortgage, as the voluntary deed was binding against the mortgagor (*g*). In a case where a person had bought an equity of redemption which had been abandoned for fifteen years, for an inconsiderable sum, imagining that from some knowledge of law he might be able to unravel a great number of circumstances, and by that means entitle himself to a redemption and make it valuable, being what has been called a "prowling assignee;"

p. 270; and *Doran v. Simpson*, 4 Ves. 651; *Powell on Mortgages*, by Coventry, i. p. 332; and see the cases cited as exceptions to the rule, in Coventry's note to *Powell on Mortgages*, i. p. 332, a; and see Coote, 625.

(*a*) 2 Fonbl. 268; Butler's note, No. 105, Co. Litt. 208; *et v. infra*.

(*b*) *Packington v. Barrow*, Prec. Ch. 218.

(*c*) *Butler v. Bernard*, 2 Freem. 139; and see *Skeffington v. Whitehurst*, 3 Yo. & Coll. 1; *Jarm. Mortgage*, by Sweet, 377.

(*d*) 2 Freem. *ubi supra*.

(*e*) And see *Skeffington v. Budd*, 9 Cl. & Fin. 219; vii. Jur. 814, Lord Campbell. Of the power of the personal representative to dispose of the personal estate of a testator or intestate, *v. supra*, p. 373, *et seq.*

(*f*) The earlier instances are chiefly taken from *Powell on Mortgages* by Coventry, ch. xi.; others will be found in Mr. Coote's very useful work; *et v. infra*, p. 663, note (*a*).

(*g*) *Rand v. Cartwright*, 1 Ch. Ca. 59; 1 Vern. 293; 2 Fonbl. pp. 268-9.

Lord Hardwicke was of opinion that as the representatives of the mortgagor would have been entitled, the assignee was equally entitled to a redemption, though he put the assignee upon terms as to the account (a). Where a man before marriage agreed to leave his intended wife £1000, if she should survive him, and a bond in which the heirs were bound was given by him to her to secure it; she was decreed in equity to have the benefit of the bond, it being in the nature of a marriage agreement, although released at law by the marriage, and was let in as a bond creditor after the death of the husband to redeem a freehold and a copyhold estate mortgaged, both being joined in the mortgage (b). In *Barthrop v. West* (c), a creditor by judgment was permitted to set aside a voluntary conveyance as fraudulent as against him, and to redeem a mortgage term.

Generally any person entitled to the pernancy of the profits may redeem (d). A tenant for years may put himself in the place of the mortgagor, and either himself redeem or get a friend to do it for him (e). A jointress may redeem, and although the jointure be secured only on part of the estate mortgaged, yet she may, indeed must if the mortgagee require it, redeem the whole; so she may if part of it be settled upon her after marriage (f). A dowress before the late Dower Act might redeem a term for years and hold over against the heir till satisfied (g); but not against a purchaser (h): now that the wife is dowable of an equity of redemption in fee, she may of course redeem a mortgage in fee (i). One tenant in common of the equity of redemption may redeem (k).

A judgment creditor may redeem a mortgage of a Leasehold estate, but before the bill is brought to redeem a writ of execution must be sued out, for until that be done the judgment creditor has no lien on the estate (l). Although in general a judgment creditor cannot en-

(a) *Anon.* 3 Atk. 314.

(b) *Acton v. Peirce*, 2 Vern. 480; Prec. Ch. 237; in *Bateman v. Bateman*, (Prec. Ch. 198, but see the note appended,) a doubt is thrown upon the right of a bond creditor to redeem a mortgage for years, till judgment obtained against the heir; according to the modern doctrine, the executor would seem to be the proper person to redeem on behalf of all the creditors; see *Troughton v. Binkes*, 6 Ves. p. 575, *infra*.

(c) 2 Rep. Ch. 62.

(d) *Jones v. Meredith*, Bunb. 346.

(e) Dict. *Keech v. Hall*, Doug. R. 22; 2 Fonbl. 269.

(f) *Howard v. Harris*, 1 Vern. 33, 190; Vent. 364; *Palmer v. Danby*, 1 Eq. Abr.

219, pl. 6; Prec. Ch. 137; *Haymer v. Haymer*, 2 Vent. 343.

(g) *Palmer v. Danby*, Prec. Ch. 137; there the right of the dowress is stated generally: the doctrines on this subject may be seen in Butler's note to Co. Litt. 208, a.

(h) *Swannock v. Lyford*, Ambler, p. 6; 2 Fonbl. 112.

(i) *Supra*, vol. i. pp. 290, 501.

(k) Lord Cottenham, *Wynne v. Styant*, 2 Phill. 306; "which assumes," said his Lordship, "that, as against an incumbrancer, one is entitled to the whole."

(l) *Shirley v. Watts*, 3 Atk. 200; *King v. Marissall*, there cited; *Burdon v. Kennedy*, 3 Atk. 739; other cases are cited, 3 M. & C. 409; and see Redesdale on Pleading, 126, 4th

force his security against his debtor's equitable interest in Freehold estate without previously suing out an elegit (*a*), it has been held that a judgment creditor may before execution file a bill to redeem a mortgage of freehold estate (*b*), which is founded upon this, that inasmuch as the court finds the creditor *in a condition to acquire* a power over the estate by suing out the writ, it does what it does in all similar cases, it gives to the party the right to come in and redeem other incumbrances on the property (*c*). Tenant by elegit and by statute merchant may also redeem (*d*). Where a creditor, on the decease of the mortgagor his debtor, redeems a mortgage term, as he may in certain cases which will be noticed hereafter, he will be in a better condition than the executor (*e*), as a subsequent simple-contract debt cannot be tacked by the mortgagee against a creditor as it may against the executor (*f*).

In the case of Escheat, the right of redemption is not carried to the extent of allowing the lord on the death of a mortgagor, who has mortgaged in fee, to redeem the estate; for as the whole estate has passed from the mortgagor, the estate cannot escheat at law, and equity will not make for him a subject for the escheat to operate upon (*g*). But where a tenant in fee has mortgaged the estate for a term of years, and dies without heirs, so that there is an actual escheat of the inheritance to the lord by the grant being expended, then he may redeem the term; for the equity of redemption of the term being, as every equity of redemption is, an estate in the land, and as whatever estate or benefit the tenant retains which would have passed to his heirs if he had any and which could be the subject of grant, that, the lord as a general proposition may claim by escheat, the lord is considered as entitled to the benefit of the equity of redemption; the

edit.; *Duck v. Dixon*, 17 July, 1819; *supra*, p. 643; and see *Christian v. Field*, 2 Hare, 182.

(*a*) *Neate v. Duke of Marlborough*, 3 My. & Cr. 407; but see Lord Chancellor Sugden's observation on this case, *Rolleston v. Morton*, 1 Conn. & L. 257.

(*b*) *Sharp v. Earl of Scarborough*, 4 Ves. 538; and though the judgment be with stay of execution, *Stonehewer v. Thompson*, 2 Atk. 440, Saunders' note; and see Jarm. Mortgage, by Sweet, 378; but not against a purchaser, where there is a prior legal estate; *Barrett v. Blake*, 2 Ball & B. p. 357. In the same case Lord Manners held that a judgment creditor does not, by not proving under a decree for administration, lose his legal rights against the estate.

(*c*) *Neate v. Duke of Marlborough*. 3 My. & Cr. 416. So, after the debtor is dead, such a judgment must be paid off, or the court could not make a title to the estate, *ibid.*; *Tunstal v. Trappes*, 3 Sim. 286: as to making judgment creditors Parties, vide *infra*, Section v., and *Gordon v. Horsfall*, xi. Jur. 571.

(*d*) *Jones v. Meredith*, Bunb. 346.

(*e*) For if he redeems, the very equity of redemption is assets for the payment of the simple-contract debt, so he must pay both; 1 P. W. 777; *Anon.* 2 Vern. 177; *Demandray v. Metcalf*, Prec. Ch. 419; v. *infra*, Sect. vii.

(*f*) *Coleman v. Winch*, 1 P. W. 777; and see *Vanderzee v. Willis*, 3 Bro. p. 22, to the same effect; *et v. infra*.

(*g*) *Burgess v. Wheate*, 1 Eden, p. 201; *Viscount Downe v. Morris*, 3 Hare, 406-8.

lord was entitled to the benefit of an attendant term whilst such terms existed, so he is entitled, by paying off the mortgage, in effect to render the term attendant, and then it will be extinguished (a). The Crown or its grantee may redeem estates mortgaged which are forfeited by the attainder of the mortgagor (b); and if a mortgagee be attainted of high treason, a bill it seems may be filed against the Attorney-General to redeem: in such case the King cannot be compelled to convey, an *amoveas manus* only can be obtained (c).

As a general rule the *Cestui que trust* must redeem through his trustee; no creditor or annuitant or legatee of the mortgagor who has not a specific security upon the property mortgaged can file a bill to redeem, though the mortgaged property would if redeemed be applied, in a course of administration, in discharge of his claims. If, said Lord Wynford in giving judgment in *White v. Parnter*, in the Privy Council (d), an annuitant of the mortgagor might claim through him to redeem, every legatee of the mortgagor must have the same right of insisting against a mortgagee in possession that the mortgage debt is satisfied, and of calling on the mortgagee to give him an account of the proceeds of the estate; "But," added his Lordship, "from the principle laid down in *Troughton v. Binkes* (e), and the cases referred to by the Master of the Rolls in his judgment in that case, I think that the mortgagor or his heirs (f) only can sue the mortgagee for an account and redemption, unless it can be shown that they and the

(a) *Viscount Downe v. Morris*, 3 Hare, 403, 404, 407, 408: that the lord was entitled to the benefit of an attendant term was established (whether strictly according to principle or not is a question, *ibid.* p. 404); *Thruston v. Attorney-General*, 1 Vern. p. 340. The Vice-Chancellor Wigram, in the above-cited case of *Viscount Downe v. Harris*, observed, that if *Evans v. Brown*, 5 Beav. 114, (an important case as to the liabilities of lands, which have escheated for want of heirs, to the late tenant's debts,) were well decided, the statute 3 & 4 Will. IV. c. 104, (*supra*, vol. i. pp. 174, 295,) had in fact created the very priority between the lord of the manor and the tennor, the alleged want of which was the foundation of the defence in that case. The leading cases, in regard to who has the right to redeem, are brought together in the argument of the case of *Viscount Downe v. Morris*.

(b) *Attorney-General v. Crofts*, 4 Bro. P. C. 136; *Lovell's case*, cited by Sir T. Clarke, Master of the Rolls, 1 Eden, 210.

(c) See *Paulett v. Attorney-General*, Hard. 465; the decision of the court is not stated in the report, but from the remarks of Sir Thos.

Clarke, Lord Mansfield and Lord Keeper Henley, in *Burgess v. Wheate*, 1 Bl. Rep. 145, it may be inferred that the demurrer was overruled; and see *Hodge v. Attorney-General*, 3 Yo. & Coll. 342. The cases on the subject of Equities which may be enforced against the crown, are collected in Jarm. Mortgage, by Sweet, 432, *et seq.* The provisions of the act 4 & 5 Will. IV. c. 23, (*supra*, vol. i. pp. 177, 289; and *supra*, page 6 of this volume,) respecting the escheat or forfeiture of property holden in trust, do not of course affect such cases. In *Rogers v. Maule*, 1 Yo. & Coll. C. C. 6, the mortgagor had died without heir, the mortgagee for a term of years being willing to take the estate in discharge of his mortgage, there being no other fund to pay him, it was so decreed, by consent, with liberty for him to apply to the crown for a grant of the fee-simple: the bill was for the administration of the estate of the mortgagor.

(d) 1 Knapp, 229.

(e) 6 Ves. 573.

(f) Meaning those in whom the right to the estate is vested by descent or otherwise, subject to the claims of the legatee.

mortgagee are in collusion to prevent creditors or legatees from recovering what is due to them from the mortgagor's property (a). Insolvency on the part of the executor or trustee is, it seems, also a sufficient ground for the creditors or legatees, or *cestuis que trust*, to sue (b); in all such cases the executor or trustee must of course be a party: but a creditor of an insolvent debtor cannot file a bill on behalf of himself and the other creditors to redeem on an allegation of collusion between the party sought to be redeemed and the assignee; the course is to have the assignee removed (c).

If the tenant for life procures an assignment of the mortgage, or if the mortgagee purchases the interest of the tenant for life, it is by no means clear that the remainderman can, without the consent of the tenant for life, redeem the mortgage vested in him (d); but whether he can or cannot time will not run against the remainderman if he do not redeem during the tenancy for life (e).

It has before been observed that it sometimes happens that by the language of the proviso for redemption, the right to redeem is limited to a person who had either no interest or a partial interest only in the land at the time of the mortgage, and that from this circumstance it becomes doubtful whether the person to whom the equity of redemption is thus limited does not acquire under the limitation the beneficial ownership of the equity of redemption; or at least a greater interest in it than he had in the land before the mortgage. Speaking generally, a strong indication of intention is necessary to transfer the beneficial ownership of the equity of redemption from the person entitled to the beneficial ownership of the estate at the time of the mortgage, or to vary his rights (f); but the reservation expressed in the deed must be taken to be what was intended by the parties, unless there be something in the character of the parties that necessarily rebuts that pre-

(a) As to collusion and refusal on the part of the trustee or executor to sue, see *Barker v. Birch*, 1 De Gex & Sm. 376, 388; see the additional note.

(b) *Burroughs v. Elton*, 11 Ves. 29; *Utterston v. Mair*, 2 Ves. J. p. 98; *Baddeley v. Curwen*, 2 Coll. 151, was cited before the Vice-Chancellor Knight Bruce, in *Barker v. Birch*, 1 De Gex & Sm. 382, as to the same effect; but his Honour said, he did not consider any such point to have been decided in that case. It was alleged, in that case, that it had been decided in an unreported case, that *neglect* on the part of the executor is not sufficient if he be solvent; p. 380. The execu-

tors, it is to be observed, represent the Residuary legatee, equally as the creditors and specific and general legatees; see the cases cited, Calvert, p. 23.

(c) *Heath v. Chadwick*, 2 Phill. 650; the authorities on the subject are collected by Lord Cottenham in that case; p. 652.

(d) See the dict. of Lord Langdale, *Raffety v. King*, 1 Keen, 618, referring to *Ravald v. Russel*, 1 Yo. 19.

(e) *Raffety v. King*, *ubi sup.*; and *Corbett v. Barker*, 1 Anst. 138; 3 Anst. p. 755; and *Reeve v. Hicks*, 2 Sim. & St. 403; and *Ravald v. Russel*, *supra*.

(f) Butler's note, No. 106, Co. Litt. 208.

sumption (a): where the husband and wife are dealing with the wife's estate, there is something which rebuts the presumption that the equity of redemption should go to the husband's heirs (b). The executors of the husband were held to be entitled to the equity of redemption of a term purchased by him, after marriage, to himself and his wife and the survivor and the executors, &c., of such survivor, and afterwards assigned by him on mortgage without the wife joining in the mortgage, as the mortgage was considered a reduction into possession (c); but where the term has originally belonged to the wife, unless there be something to indicate a plain intention to the contrary, the transaction will be treated as intended only to have the effect of a mortgage, so that the equity of redemption will survive to the wife (d). As regards Borough English and Gavelkind lands, the equity of redemption will follow the descent of the lands (e).

Generally an insolvent cannot file a bill to redeem; the assignee is the proper person; but in a late case the plaintiff, an insolvent debtor, having paid his debts, but being unable from technical difficulties on the construction of the act 5 & 6 Vict. c. 116, to obtain a release of his estate, filed a bill to redeem, which was not demurred to but came to a hearing, the Vice-Chancellor Wigram held that the bill might be sustained; the assignees did not object (f).

If the mortgage be made in the exercise of a Power, the persons claiming in default of appointment may redeem (g).

Every person who has a right to redeem the mortgagor, may redeem any prior incumbrancer on payment of the principal, interest, and costs due to him, the redeeming party being also liable to be redeemed by those below him, who are all liable to be redeemed by

(a) *Anson v. Lee*, 4 Sim. p. 379 (1 Sugd. Pow. 345-7); and see *Barnett v. Wilson*, 2 Y. & Coll. C. C. 418.

(b) *V. supra*, pp. 306-7, 643; *Anson v. Lee*, *supra*; *Ruscombe v. Hare*, 6 Dowl. 1; 2 Bli. N. S. p. 192; Sugd. Law of Prop. 172-3; *Jackson v. Innes*, 1 Bli. p. 104, (1 Sugd. Pow. 348-9). "It is important in practice," says Sir E. Sugden, Law of Prop. p. 176, "to keep in view what really was the ground upon which the case of *Jackson v. Innes* was decided," and which Sir Edward clearly points out.

(c) *Watts v. Thomas*, 2 P. W. 365; *v. sup.* p. 475.

(d) *Clarke v. Burgh*, 2 Coll. 221, 230; see, as to the construction of an equity of redemption, reserved in a mortgage executed by a

widow, under a power reserved in her marriage settlement, *Barnett v. Wilson*, vii. Jur. 593.

(e) *Fawcett v. Lowther*, 2 Ves. 304.

(f) *Preston v. Wilson*, Vice-Chancellor Wigram, xi. Jur. 201; 5 Hare, 185. In this case there are some important observations of the Vice-Chancellor Wigram, as to the Court of Chancery not interfering with the jurisdiction committed to the Court of Bankruptcy; and see, on that subject, *Saxton v. Davis*, 18 Ves. 72, 82-3; and on the point as to giving relief at the hearing when the suit might have been stopped *in limine* by Demurrer, see *Wilson v. Short*, 6 Hare, 385.

(g) Coote, 628, citing *Innes v. Jackson*, 16 Ves. p. 367; but *quære* whether that was the case intended to be referred to.

the mortgagor (a). If a prior mortgagee omits to bring an ejectment or to obtain possession, and the interest runs in arrear, a subsequent mortgagee shall notwithstanding not be allowed to redeem him without paying the whole interest which has so run on, because, though the second mortgagee could not enter, he was not without remedy, for he might have brought a bill to redeem, and so have had the estate to himself; and if he did not choose to enter he might have applied for a receiver to keep down the interest: though the court will not in general grant such an application, unless when the prior mortgagee will not enter (b). Even if the mortgagee suffers the arrear to run on with a design to get the estate on which he lent his money, which may be called an ill intent, yet shall he be at liberty to claim the whole of the interest due (c).

The owner of the equity of redemption of part of the estate in mortgage cannot separately redeem his part: the mortgagee has a right to insist that the whole of the mortgaged estate shall be redeemed together; else, as Sir Thomas Plumer observed, if the estate were sold in twenty lots, there might be twenty bills (d). So if there are two separate mortgages of different estates to the same person, the purchaser of one estate cannot redeem that estate without redeeming the other, provided the legal estate be absolute in the mortgagee (e), when the mortgage-money is advanced by two, and one is dead, his personal representatives must be parties to a bill to redeem, as the interest of the deceased in the mortgage-money devolves upon them (f).

A point of some nicety upon the right of a second mortgagee of a share of the estate to redeem a prior mortgage of the whole without redeeming a subsequent mortgage to the same person of the other shares of the estate was decided in the late case of *Thorneycroft v. Crockett*. The bill was filed by the mortgagee claiming the first and third mortgages for a foreclosure (g); in 1821, a mortgage (first

(a) In *Seton on Decrees*, p. 161, the form of the decree in such cases is stated.

(b) *Aston v. Aston*, 1 Ves. 267-8; and see *Loftus v. Swift*, 2 Scho. & Lef. p. 642; *et v. infra*, p. 689, as to Receivers.

(c) *Aston v. Aston*, *ubi sup.*; *v. inf.* Sect. vi., as to the effect of length of time.

(d) *Cholmondeley v. Clinton*, 2 Jac. & W. 134; *Palk v. Clinton*, 12 Ves. 48, 58; *Henley v. Stone*, 3 Beav. 355, 356.

(e) *Shuttleworth v. Laycock*, 1 Vern. 245, case of heir; *Margrave v. Le Hooke*, 2 Vern. p. 207; *Pope v. Onslow*, 2 Vern. 286, (but see

1 Atk. 300,) cases of assignees; and *Ex parte Carter*, Ambl. 733; *Triburgh v. Lord Pomfret*, and *Titley v. Davis*, 15 Vin. Ab. p. 447, there cited; *Cator v. Charlton*, cited 2 Ves. Jun. 377; *Collett v. Munden*, cited *ibid.*; *Ireson v. Denn*, 2 Cox, 425; cases of purchasers: and see the dict. in *Jones v. Smith*, 2 Ves. J. 376, and *Coote*, 484-9; *et v. supra*.

(f) *Vickers v. Cowell*, 1 Beav. 529, 531; *v. infra*, Section v.

(g) Sir E. Sugden, *Law of Prop.* p. 582; *Printed Cases*, D. P. 1848; *S. C.* xiii. Jurist, but on other points.

mortgage) was made by Henry Crockett, who was trustee for his brother John of two-thirds of the estate, to Messrs. Legge and Co. of the whole estate for 1000 years to secure 6000*l.* and interest, which was divided between Henry and John. Legge and Co., in 1826, transferred this mortgage to Baldwin—in 1831, Henry Crockett conveyed his one-third to trustees to secure 12,000*l.*: he then died leaving his brother Robert his heir. In 1833, Robert as such heir, and John and his son, who claimed under him, mortgaged John's two-thirds of the estate (third mortgage) to Attwood and Co. (subject to the mortgage term of 1000 years) in fee to secure 2000*l.* and interest. In January, 1838, Attwood and Co. transferred this mortgage to the plaintiff Thorneycroft, and afterwards in the same month Baldwin transferred his mortgage term of 1000 years to Thorneycroft, so that the term, as to John's two-thirds, became merged in the inheritance; Thorneycroft therefore stood as first mortgagee of Henry's original one-third for 1000 years, and subject to this term Henry's trustees held their security for 12,000*l.* As to the other two-thirds (John's), Thorneycroft was as mortgagee seised of the two-thirds in fee to secure the first and third mortgages—the mortgage for 12,000*l.* did not affect these two-thirds. Thorneycroft, who was *plaintiff* in the suit, did not make any general case of tacking, but he insisted that he was entitled to tack the mortgage for 2000*l.* to the mortgage debt for 6000*l.* (first mortgage), and that the defendants, the persons entitled to the 12,000*l.* mortgage, must redeem both. The defendants contended that they were only bound to redeem the 6000*l.* mortgage, the only one prior to their own: and so it was decreed by the Vice-Chancellor of England, and an appeal to the House of Lords was dismissed, and the decree was affirmed with costs (*a*).

It is a general rule applicable to suits of this, as indeed of every other description, that persons who have no interest must not be joined with those who have an interest, for the plaintiffs must stand or fall together; nor can a bill be filed by two, each claiming to be solely entitled, seeking that such one of them as may appear to be entitled may be at liberty to redeem or foreclose, not even it seems where it is alleged that whichever may turn out to be entitled they have agreed to divide the subject between them (*b*).

(*a*) Sugd. Law of Prop. 583; the reasons of the respondent, which notice the decree more particularly, and which the House of Lords adopted, are there stated.

(*b*) *Cholmondeley v. Clinton*, 2 Jac. & W. 135; *King of Spain v. Machado*, 4 Russ. 225; *Delondre v. Shaw*, 2 Sim. 237; *Richardson*

v. Nixon, 2 Jo. & L. 250; and see Calvert on Parties, p. 110; and *infra*, Section v. In such case the two parties should first mutually convey their interests in such way that each may be entitled to a moiety of the equity of redemption in undivided shares; then there would be no objection to their joining as plaintiffs.

A person having an alleged title must establish it before he can be permitted to redeem: no person will be permitted to redeem at his peril, leaving the rightful owner to recover against him (a): but where a bill was filed for redemption by a person claiming to be heir-at-law of the intestate mortgagor, against a person who, after notice of the plaintiff's claim, had obtained an assignment of a mortgage term, and who also claimed to be heir-at-law; the court, being satisfied on the evidence of the plaintiff's heirship, at once decreed a redemption (the Court of Chancery being competent for the purposes of the suit to judge of fact equally as a jury) (b), and would not send the question to a jury: as the defendant, who was one of the personal representatives of the intestate, had obtained possession as mortgagee, he was precluded from asserting any other title in that suit; but the decree would not prevent him from asserting his title as heir, at law or in equity, in a proceeding properly framed for such purpose; in that suit he would have his principal and interest paid, and after that he would still be in a condition to contest the plaintiff's claim as heir (c): the defendant being personal representative as well as mortgagee, the decree went on to direct that the plaintiff should have satisfaction out of the personal estate in a due course of administration for what he as heir should pay to the defendant in redemption of the mortgage (d).

A purchaser of an equity of redemption cannot file a bill to redeem an existing mortgage until his purchase is completed. The rule—founded on the maxim, before referred to, that what ought to be done is considered as done—that by the contract of purchase the purchaser becomes in equity the owner of the property, applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others: if it could, said Lord Cottenham, a contract for purchase of an equitable estate would be equivalent to a conveyance of it (e). An assignment of the equity of redemption made *pendente lite* is not open to the charge of maintenance (f).

It is now settled that the mortgagor cannot file a bill to redeem until after the time fixed for payment of the mortgage money has expired (g).

(a) *Lomax v. Bird*, 1 Vern. 182.

(b) See *Lancashire v. Lancashire*, 1 De Gex & Sm. 292; with one exception, namely, as to the validity of a will of real estate, *ibid.*

(c) *Lloyd v. Wait*, 1 Phill. 61, 68, 69.

(d) *Ibid.* pp. 70, 71.

(e) *Lord Cottenham, Tasker v. Small*, 3 My. & Cr. 69. The two contracting parties

may, as I presume, of course join in seeking a redemption.

(f) *Booth v. Creswick*, vi. Jur. 1025.

(g) *Brown v. Cole*, 14 Sim. p. 428: no authorities were cited; the Vice-Chancellor of England decided on the general practice: see, on this subject, *Jarman, Mortgage*, by Sweet, pp. 93, 95, 379; but see *Talbot v. Braddil*, 1

It seems according to the modern doctrine—whatever difference there may have been in former times in the application of this maxim, that he who seeks for equity must do equity (a),—that there is now no distinction as to the equities to be administered between the case of a party coming as a plaintiff or being made a party as a defendant, at least as regards mortgagor and mortgagee. “It has always appeared to me,” said Sir J. Wigram, in the late case of *Sober v. Kemp*, 1848 (b), “that the terms on which a mortgagor or those claiming under him are entitled to redeem, must be the same whether they are to be ascertained in a suit for redemption or for foreclosure (c): it is truly said, that a plaintiff seeking equity must do equity; but in determining what is equity, the question is what are the duties or liabilities which his situation at the time of instituting the suit imposes, and not whether he is plaintiff or defendant on the record” (d): “As a general proposition,” said his Honour, “it may, I believe, be correctly stated, that a plaintiff will never in that character be compelled to give a defendant anything but what the defendant might as a plaintiff enforce, provided a cause of suit arose” (e).

Whether the defendants can by petition obtain a receiver against a mortgagor in possession on a bill filed by him to redeem, is doubtful (f).

A mortgagee can never refuse to restore to his mortgagor or those claiming under him, upon payment of what is due upon the mortgage, the estate which has been vested in him as mortgagee; to him it is immaterial whether the mortgagor's title is good or bad, and he is not at liberty to dispute it (g).

Primâ facie the mortgagor must bear the costs of obtaining a reconveyance of his property. It is incident to the right of the mortgagee to deal with the property for his own benefit, and therefore to deal with it in the ordinary way as with other property: he has a right to do the best he can to protect his estate in the case of his death, he is not bound to incur the peril of allowing his estate to descend to his heir-

Vern. p. 395, there the mortgage was dated in 1657, the time for redemption was fixed for 1688, the court inclined that the plaintiff should redeem before the time; but it appears to have been on the ground that the redemption ought not to have been so fettered; there were other special circumstances in the case: as to Time as a bar to redemption, v. *infra*, Section vi.

(a) V. *supra*, vol. i. p. 422.

(b) 6 Hare, 160.

(c) See *Du Vigier v. Lee*, 2 Hare, 334.

(d) 6 Hare, 160; and see *Hanson v. Keating*, 4 Hare, 5; *et v. infra*, p. 685.

(e) *Hanson v. Keating*, 4 Hare, 4; and see the other cases cited by Mr. Calvert, 113, note (d); vide *supra*, p. 477, note (d), p. 485, note (b).

(f) *Barlow v. Gains*, 8 Beav. 329.

(g) Lord Cottenham, 3 My. & Cr. 70.

at-law; therefore if he devise the legal estate in the mortgage to trustees, and if any one or more of such trustees cannot be found, and it becomes necessary to apply to the court under the stat. 1 Will. IV. c. 60, in order that some person may be appointed to convey in lieu of such trustee, the mortgagor or his representatives must pay the expense of such proceedings, if they seek to redeem (*a*). If the deeds come into the custody of the Court of Chancery by means and in the course of the due administration of the estate of the mortgagee, the costs of obtaining them out of court upon the mortgage being paid off must be defrayed by the mortgagor (*b*). But if the mortgagee has mixed up the mortgaged property with the title to other property, and it becomes necessary to extricate the one from the other, the additional costs so incurred must be borne by the mortgagee (*c*).

Where the heir of the mortgagee is an infant, the mortgagor must pay the expense of the proceeding under the stat. 1 Will. IV. c. 60, to enable the infant to convey (*d*); but it is established by authority, though apparently contrary to principle, that the preliminary proceedings in order to obtain a conveyance from a lunatic mortgagee must be borne by the lunatic's estate (*e*).

It is fully settled that where a mortgagor is proceeding against his mortgagee, a court of equity will not compel the mortgagee to produce his securities, except on payment of what is due to the mortgagee (*f*): if the bill even pray a declaration that the mortgage is invalid that is not sufficient to induce the court to order an inspection (*g*); nor where the mortgagee, pending a suit for redemption, has assigned the mortgage, can the assignee be compelled to produce the deed on an allegation that it was made for fraudulent purposes and in order to embarrass the plaintiff in the prosecution of his suit (*h*): but if the mortgagor has consented to a sale he must produce the deeds for the purpose of making out the title (*i*). The mortgagee, who states that he is a mortgagee of part of the estate in question, is not bound to dis-

(*a*) *King v. Smith*, 6 Hare, 474.

(*b*) *Burden v. Oldaker*, 1 Coll. p. 105; *Wetherell v. Collins*, 3 Mad. 255.

(*c*) *Capper v. Terrington*, 1 Coll. 104; 6 Hare, 475; and see *Midland Counties Railway Company v. Westcomb*, 2 Railw. Ca. 211.

(*d*) *Ex parte Ommaney*, 10 Sim. 298.

(*e*) *Ex parte Richards*, 1 Jac. & W. 264; *Ex parte Baker*, *Ex parte Clay*, Shelford on Lunacy, p. 510; *Re Townsend*, 2 Phill. 348, Lord Cottenham; *King v. Smith*, 6 Hare, 474, 476; in *Ex parte Marrow*, Cr. & P. 142, Lord Cottenham expressed his dissatisfaction with

Ex parte Richards; but as it had been twice acted upon, his Lordship considered that the practice must be considered as settled; but see *Re Lewes*, 1 Hall & Tw. 123.

(*f*) Vice-Chancellor Wigram, *Bentinck v. Willink*, 2 Hare, 8; v. *supra*, p. 654.

(*g*) *Crisp v. Platel*, 8 Beav. 62; and see Daniell's Pract. by Headlam, ii. 1683; but see *Bassford v. Blakesley*, 6 Beav. 131, as to the right to have the inspection of a deed impeached as fraudulent.

(*h*) *Gill v. Eyton*, 7 Beav. 155.

(*i*) *Livesey v. Harding*, 1 Beav. 343.

cover of what part, as that would be to state the contents of his title deeds (a): but the Vice-Chancellor K. Bruce ordered the production of an indorsement on the mortgage, the purport of which was set forth in the answer (b), the only question being the amount due, which depended upon the contents of the indorsement (c); and a mortgagee is bound to produce bills of exchange and promissory notes in his possession for the purpose of showing what is the amount of his debt (d); and the mortgagee must produce a deed which contains a recital amounting to constructive notice (e).

The mortgagor has no right to require the mortgagee to assign the mortgage-debt when it is paid off (f).

In all cases where a mortgagee is made a party to a suit by the mortgagor he is entitled to be redeemed (g), and if the bill be dismissed against him, it is equivalent to a foreclosure (h); but the mortgagor is not bound till decree, so that a dismissal for want of prosecution does not prevent his filing a new bill (i). A person interested in the equity of redemption may have a decree for the execution of a trust, without offering to redeem a person who stands in the character of mortgagee, but is not made a party in that character, but only on a charge that he claims an interest which is denied by the bill (k).

If the plaintiff in a bill for *redemption* do not pay the money at the time appointed by the court, the bill may be dismissed without notice (l), and such dismissal operates a foreclosure (m).

Even in Ireland and Jamaica, where the usual decree is a sale instead of a foreclosure, if a mortgagee is made a party by a subsequent incumbrancer the bill cannot be sustained, unless there be an offer to redeem the prior incumbrancer in the bill; the defect cannot be supplied by an offer at the bar (n).

(a) *Addison v. Walker*, 4 Yo. & Coll. 447.

(b) See, as to this point of pleading as connected with the right to Discovery, *Hardman v. Ellames*, 2 My. & K. 745, 758; *Latimer v. Neale*, 4 Cl. & Fin. 570; 11 Bli. N. S. 112, 156 (explained, 2 Phillips, 490-1); Wigr. on Discovery, pl. 437; but see *Glover v. Hall*, 2 Phill. 484.

(c) *Phillips v. Evans*, 2 Yo. & Coll. C. C. 650; there were other special circumstances in the case.

(d) *Gibson v. Hewett*, 9 Beav. 293.

(e) *Neesom v. Clarkson*, C. P. Coop. Sel. Ca. 93, 96; 2 Hare, 166 (n); and see *Addis v. Campbell*, 1 Beav. 262.

(f) Lord Chancellor, *Dunstan v. Patterson*, 2 Phill. p. 345.

(g) *Drew v. O'Hara*, 2 Ball & B. 562, n.;

Dalton v. Hayter, 7 Beav. 319.

(h) *Cholmley v. Lady Oxford*, 2 Atk. 267
Palk v. Clinton, 12 Ves. 62.

(i) *Hansard v. Hardy*, 18 Ves. 460.

(k) *Dalton v. Hayter*, 7 Beav. 319, 320; the defendant cannot by demurrer avoid discovering what the interest is that he claims, *ibid.* 321; see *Hodgson v. Espinasse*, 10 Beav. p. 473.

(l) *Stuart v. Worrall*, 1 Bro. 581; *Seton on Decrees*, 147.

(m) *Faulkner v. Bolton*, 7 Sim. 319.

(n) *Balfe v. Lord*, as reported 2 Dru. & W. 486; *Gordon v. Horsfall*, xi. Jurist, 573 a. Judgment of the Chancellor of the Duchy of Cornwall in the Privy Council; *Troughton v. Binkes*, 6 Ves. 573, and *Martinez v. Cooper*, 2 Russ. 198, there cited.

ADDITIONAL NOTE.

What Conduct on the part of the Trustee or Executor will entitle the Cestui que Trust or Legatee, &c., to take upon himself to sue, supra, p. 664.

The subject alluded to in the text—namely, under what circumstances, as regards collusion or refusal or neglect of the party properly entitled to sue, so as to let in those who may have a general interest in the recovery of the property, as creditors claiming under a trust-deed or creditors or legatees claiming against the estate of a deceased debtor, to sue—was lately very fully discussed before the Vice-Chancellor Knight Bruce, in the case above referred to, of *Barker v. Birch*, 1 De Gex & Sm. p. 388, and almost all the leading cases on the subject were there cited. The Vice-Chancellor, in giving judgment, said, that if the case ought to be considered as one turning merely on the existence or non-existence of proof as against Mr. Birch and Mr. Lawson, (the parties sought to be charged by the plaintiffs,) of actual refusal to sue, or collusion in fact on the part of Mr. and Mrs. Hilliard, the persons who were properly the parties to sue, or either of them, his Honour was far from thinking that the bill ought not to be dismissed; but his Honour's impression was that, assuming an actual refusal to sue not to be proved,—assuming collusion in fact also not to be proved,—and whether in general an honest refusal by an executor to institute a suit against a solvent person, reasonably alleged to be equitably indebted to his testator, is sufficient (1) or insufficient of itself to enable the universal legatee of that testator to sue the debtor in equity (if he is equitably indebted), making the executor also a defendant,—there were circumstances in that case, which was very special, to justify the giving to the plaintiffs a decree.

(1) *Lancaster v. Evors*, 4 Beav. p. 165, amongst other cases in which creditors and legatees had been held to have such right, had been cited: the Vice-Chancellor observed, during the argument, that Lord Eldon would

hardly have spoken with so much caution and particularity as to Collusion, in *Alsager v. Rowley*, 6 Ves. p. 748, if a mere refusal to sue would have been sufficient.

SECTION IV.—*Of the Remedies of the Mortgagee by Foreclosure and Sale.*

Mode of Proceeding to Foreclose.

General Rules.

By whom and under what Circumstances a Bill to Foreclose.

Cases in which the Mortgagee may obtain a Sale.

Mortgagor dead, Payment out of Assets as Specialty Creditor.

When Bill is taken pro confesso, and the Estate is deficient.

Mortgagor Bankrupt.

Mortgage of Reversion.

of Adowson.

Mortgaged Estate situate in Ireland.

One of the Executors being Mortgagor.

Effect of Decree for Sale as respects the Costs of Sale.

Foreclosure of Copyholds.

Mortgage by Tenant in Tail.

Stat. 3 & 4 Will. IV. c. 74.

1 Will. IV. c. 36, § 15, Rule 13.

Decree against Tenant in Tail claiming under the Mortgagor.

Foreclosure or Sale against an Infant.

Day to show Cause.

Foreclosure against a Feme Covert.

against a Company.

Proceedings by Mortgagor on Covenant or Bond, after Foreclosure.

Opening the Foreclosure.

Lockart v. Hardy, 9 Beav.

Proceedings where the Mortgagor dies without an Heir, &c.

Stat. 1 Will. IV. c. 60.

4 & 5 Will. IV. c. 23.

1 & 2 Vict. c. 69.

Relative Rights of Mortgagor and Mortgagee the same in a Suit to Foreclose as in a Suit to Redeem as regards the Price of Redemption.

De Vigier v. Lee, 2 Hare.

Interest.

3 & 4 Will. IV. c. 27.

3 & 4 Will. IV. c. 42.

Stat. 7 Geo. II. c. 10, giving a summary mode of Relief where Proceedings are taken by the Mortgagee at Law and on Bills for Foreclosure.

Of enlarging the Time fixed for Payment in Bill for Foreclosure.

Recovery of Title Deeds in the hands of Second Mortgagee without Notice.

When a Receiver may be obtained by the Mortgagee.

Recognition of Title by Mortgagor or Mortgagee.

Receipts.

Mode of Relief where the Deeds are lost or destroyed.

Disclaimer by Provisional Assignee, &c., Effect of—Costs.

Requisites for completing the Foreclosure.

Assignment of Mortgage pending the Suit—Supplemental Bill—Costs.

Additional Note, Sober v. Kemp, before Vice-Chancellor Wigram.

THE right on the part of the mortgagee to redeem is, as we have seen, very amply protected; but it would have been very unreasonable to have kept this right entire without, on the other hand, enabling the mortgagee to compel the mortgagor to elect either to exercise this right or to have it extinguished; this has been effected by giving after the time fixed for payment has gone by, to the mortgagee and generally those claiming an interest in the mortgage under him the right—unless, as will be more particularly adverted to hereafter, the mortgagor or his representatives have been allowed to remain in possession for twenty years without payment of interest or any effectual acknowledgment of the mortgage (*a*)—to file a bill praying that the mortgagor may either redeem the estate or be foreclosed of his equity of redemption (*b*). It is no objection to the bill, that the mortgagee has taken the mortgagor in execution (*c*); but if he recovers the debt in the one way he cannot of course enforce it in the other (*d*). The mortgagee is not compelled to enter into possession as a preliminary, for that would subject him to an account, which the court will never force upon a mortgagee (*e*). An intermediate mortgagee is entitled to file a bill of foreclosure against the mortgagor and the subsequent incumbrancers (*f*).

There cannot be a partial foreclosure of a mortgage; thus, a person entitled to a part only of the mortgage money cannot file a bill to foreclose a portion of the estate (*g*): in one case where a trustee had lent trust money belonging to several persons, and the trustees refused to interfere, one of the *cestuis que trust* having filed a bill to foreclose making the trustees but not the other *cestuis que trust*

(*a*) As to the general doctrine of the court, on this point, see *Christophers v. Sparke*, 2 Jac. & W. 230, 235; *Trash v. White*, 3 Bro. 289: payment of interest rebuts the presumption arising from length of time, *Loftus v. Swift*, 2 Scho. & Lef. 642; and it might have been rebutted by other circumstances, *Toptis v. Baker*, 2 Cox, p. 119, 122-3, in the Exchequer: as to the effect of the new Statute of Limitations, 3 & 4 Will. IV. c. 27, s. 40, vide *infra*, Sect. vi.

(*b*) *V. supra*, vol. i. p. 604; as to the effect

of a Tender, *v. supra*, p. 652.

(*c*) *Davis v. Battine*, 2 Russ. & M. 76.

(*d*) See *Taylor v. Waters*, 1 My. & Cr. 266, 272.

(*e*) *Lord Penrhyn v. Hughes*, 5 Ves. 106.

(*f*) *Richards v. Cooper*, 5 Beav. 304.

(*g*) *Palmer v. Carlisle*, 1 Sim. & St. p. 423; and see *Lowe v. Morgan*, 1 Bro. 368: where separate estates are mortgaged, by principal and surety, for the same debt, one cannot be separately foreclosed; *Stokes v. Clendon*, 3 Swanst. 150.

defendants, a decree was made for a foreclosure of one eighth of the estate, corresponding with the proportion of the plaintiff's share of the mortgage money (*a*); but Lord Thurlow would not act upon the decree unless by consent (*b*).

If there be two joint mortgagees, and one sues for foreclosure, the other refusing to join but being a party, the plaintiff is entitled to the common decree for foreclosure of the whole (*c*).

A case for foreclosure may occur in default of payment of the interest, though the time for payment of the principal has not arrived (*d*).

A subsequent mortgagee, after a prior mortgagee has been paid off, may file a bill to have a conveyance of the legal estate without praying for a foreclosure (*e*).

A bill for foreclosure may be filed by the mortgagee as incident to his rights as mortgagee, notwithstanding a notice to pay off and a tender; though if it shall turn out that the full amount due has been tendered to him, and due notice to pay him off had been given, he will have to pay the costs (*f*); and he may file such a bill, notwithstanding a decree for redemption, for the mortgagor notwithstanding the decree may make default, and it would therefore be unjust not to let the mortgagee act in regard to his securities as if he were to continue the owner of the mortgaged property (*g*).

The signing a receipt in full, and a delivery of the title deeds, the estate not having been reconveyed, will not prevent the mortgagee from filing a bill for foreclosure and for a restoration of the title deeds, if the amount in respect of which the receipt was given consisted in part of securities which have turned out not to be available (*h*).

In the case of a mortgagee whose security is composed both of land and of stock, or personal chattels or a policy, the decree to be made is, it seems, to direct that the mortgagee first realize his collateral securities, and afterwards to give the common decree of foreclosure as regards the real estate (*i*).

In a complicated case where there are different suits, the court will

(*a*) *Montgomerie v. Marquis of Bath*, 3 Ves. 560.

(*b*) See Mr. Vesey's note, 3 Ves. p. 560; *v. infra*, Section v. as to Parties.

(*c*) *Davenport v. James*, xii. Jur. 827.

(*d*) *Burrowes v. Molloy*, 2 Jo. & L. 526; *Roddy v. Williams*, 3 Jo. & L. 1, 3, 18, 23; this point however is not specifically adverted to, excepting in the marginal note; *Stanhope v. Manners*, 2 Eden, 197; *Gladwyn v. Hitchman*, 2 Vern. 135.

(*e*) *Grugeon v. Gerrard*, *infra*.

(*f*) *V. supra*, p. 652; and *Roberts v. Williams*, 4 Hare, 129.

(*g*) Judgment delivered by Maule, J., in *Grugeon v. Gerrard*, on appeal, in Duchy Court of Lancaster, 4 Yo. & Coll. 128, *et seq.*

(*h*) *Teed v. Carruthers*, 2 Yo. & Coll. C. C. 31; and see the cases cited by the Vice-Chancellor Knight Bruce, *ibid.* p. 40. But a subsequent security may be so taken as to be held to be a substitute, *ibid.* p. 39; *Shore v. Shore*, 2 Phill. 378.

(*i*) *Dyson v. Morris*, 1 Hare, 423-4.

make a decree for foreclosure, or such other decree or decrees as the justice of the case may require as between the various parties (a).

If a person has agreed for a given time not to foreclose the mortgagor, he is bound by it, and in that case he cannot file a bill to redeem a prior mortgagee, because he has no right to file such a bill without praying to foreclose the mortgagor (b).

The court will presume that an instrument purporting to be a security for money is a mortgage giving the ordinary remedies of foreclosure, unless the terms of the instrument exclude that construction (c); but where the contract is that a certain sum of money and interest shall be a charge on the estate, and if the same be not paid at a particular time the party entitled to the money shall have power to Sell the estate, there is no right of foreclosure arising out of such a contract; if the incumbrancer unnecessarily file a bill for the interference of the court he may be liable to costs (d).

Where there is a simple mortgage without a power of sale still a Sale instead of a foreclosure may be obtained by the mortgagee in certain cases (e). Thus, where the mortgage is in fee, and the mortgagor is dead, a bill may be filed by the mortgagee against the personal representative and the heir or devisee, for payment of the mortgage debt out of the personal estate as far as it will extend, and that the deficiency be raised by sale of the mortgaged estate (f); or that there may be a sale of the estate, and the deficiency made good out of the personal assets (g): the mortgagee filing the bill on behalf of himself and the other creditors does not lose any of the benefits which his mortgage confers (h). Where the personal estate of the deceased mortgagor is deficient, a mortgagee may pray a sale of the mortgaged premises, in the first instance, where the heir and personal representative are the same person; but Lord Thurlow held that if they are different persons, it is necessary first to have an account of the

(a) *Dodd v. Lydall*, 1 Hare, 333, 337; v. *infra*, p. 692.

(b) *Coote*, 599; *Ramsbottom v. Wallis*, Appendix, p. 704, there cited; *Burroues v. Molloy*, 2 Jones & L. 521.

(c) *Balfe v. Lord*, 2 Dr. & W. 480, 488-9.

(d) *Sampson v. Pattison*, 1 Hare, 535-6; *Dyson v. Morris*, 1 Hare, p. 413; and see *Viscount Downe v. Morris*, 3 Hare, p. 404; and *Ex parte Barnett*, in *re Allen*, viii. Jur. 366.

(e) See, on this subject, the cases collected by Mr. Seton, On Decrees, pp. 107, 174; and *Coote*, On Mortgages, 600, *et seq.*

(f) *Daniel v. Skipwith*, 2 Bro. 155; *Hodg-*

son v. Parker, mentioned in note to *ib.* p. 154.

(g) See *Seton on Decrees*, 173-4; *King v. Smith*, 2 Hare, 239.

(h) *Skey v. Bennett*, 2 Yo. & Coll. C. C. 405; *Aldridge v. Westbrooke*, 5 Beav. 188, 193; and see *Wild v. Lockhart*, *infra*; but see p. 653, *supra*, n. (h), as to interest. In *Raikes v. Hall*, cited 3 Yo. & Coll. 605, Lord Abinger refused to give relief to a person suing as mortgagee and general creditor, and put him to his election; and in *Burney v. Morgan*, 1 Sim. & St. p. 362, the Vice-Chancellor said that a mortgagee had no common interest with the creditors, and could not sue on their behalf.

personal estate (a); however a creditor by mortgage and collateral bond cannot sue, as sole specialty creditor for the purpose of obtaining payment out of the real assets, unless he make all parties interested in disputing that fact parties (b). An equitable mortgagee may also obtain a sale where the mortgagor is dead (c); but this subject will be treated of hereafter. If the mortgagee being out of possession sues as a creditor, on behalf of himself and others (d), he will not be permitted to restrain a person who is executor and trustee of the real estate from acting according to his judgment in the proper management of the property, and turning it to account, either by felling timber or otherwise; as a general creditor he will with the others have the benefit of whatever may be thus realized (e). Where the mortgagee of a leasehold having a covenant to pay, surrendered the lease with a view to a new lease being obtained, that arrangement being expressed to be without prejudice to any other security the mortgagee might have, and the new lease had not been assigned to him as had been agreed; though he could not foreclose, the covenant in the original mortgage was held not to be extinguished (f).

It was held by Sir J. Jekyl, M. R., that where an order is made for taking a bill for foreclosure *pro confesso* for want of an answer, and the estate is deficient in value to pay the incumbrance, a sale may be obtained in the first instance; but in ordinary cases it seems that the fact of the deficiency of the security will not alone warrant a decree for sale, though the mortgagor will naturally in such case sue on his specialty for the deficiency, and thus open the foreclosure if obtained; but the M. R. said it was often in such cases referred to a Master to set a value on the estate, and the plaintiff to take it *pro tanto* (g).

Where the mortgagor becomes bankrupt the mortgagee may obtain a sale under Lord Rosslyn's Order, 8th March, 1794 (h). Where the mortgage is of a dry reversion (i), or of an advow-

(a) *Daniel v. Skipwith*, 2 Bro. C. C. 155.

(b) *White v. Hillacre*, iv. Jur. 102; 3 Yo. & Coll. p. 609.

(c) *Brockelhurst v. Jessop*, 7 Sim. p. 442; v. *infra*, Sect. x., Equitable Mortgages.

(d) See Seton on Decrees, p. 174.

(e) *King v. Smith*, 2 Hare, 243; see however *supra*, p. 648.

(f) *Greenwood v. Taylor*, 14 Sim. 505; and see *Teed v. Carruthers*, *supra*.

(g) *Dashwood v. Bithazey*, Moseley, 196: Curs. Canc. p. 356: according to the dict. of Lord Hardwicke, *Lord Kinnoul v. Money*, 3 Swanst. 208, n., the mortgagee may pray a sale, if he thinks the estate be a scanty security; but, as Mr. Coote has observed, how is the fact to be ascertained? see pp. 601, 602, 2nd edition: v. *infra*, *Simmons v. Wood*, 2 Hare,

p. 644.

(h) See Arch. Bank. Laws, by Flather, pp. 161-2, for the cases on this subject.

(i) *Daniel v. Skipwith*, 2 Bro. 155; *How v. Vignes*, 1 Ch. Rep. 33; but there the bill was against the heir. In *Tasker v. Small*, 6 Sim. 625, a person, tenant in tail in remainder, after a life interest, was empowered, by his marriage settlement, to raise 15,000*l.* by mortgage, annuity, or otherwise, and subject thereto, his interest in the estate was to be settled: it was held, by the Vice-Chancellor of England, that he was entitled to sell his entire interest, as it was not worth more than 15,000*l.*: ultimately however (see 3 My. & Cr. 63,) the bill was dismissed on an objection as to parties (see pp. 68, 71, as to the principal point).

son (a), the mortgagee may obtain a sale. Where the mortgaged estate is situate in Ireland, or in a colony where the course of the courts there is to decree a sale, if a suit be instituted by the mortgagee in the Court of Chancery here, it would seem that the proper course is to pray a sale: if there be already a suit in the court where the land is situate, and then a suit is brought here, and the accounts can be more conveniently taken in the latter suit, the court will restrain proceedings in the foreign suit till the accounts are taken, the mortgagor undertaking to consent to any order to be made in the foreign suit which this court may think reasonable (b). Where one of the executors is indebted to the testator on mortgage, if his co-executors should find it necessary to sue him they should pray a sale, not a foreclosure, the mortgagor having an interest in the mortgage as executor which would not be foreclosed (c).

A decree for sale of an incumbered estate instead of foreclosure, does not, *primâ facie*, alter the relative rights of the parties, the purchase-money is substituted for the estate, and as a general rule the security of the mortgagee is not to be diminished by deducting from it a proportionate part of the costs of the sale (d). If the decree for sale is conceded upon terms, in order to prevent the operation of the general rule the terms must appear (e); the sale may have been for the benefit of the first mortgagee, but it is also, and probably much more, for the benefit or convenience of the subsequent mortgagees, who might not have been able to redeem the prior incumbrances: Lord Langdale therefore, in a late case where the subject was fully discussed, held that the money arising from the sale of each estate separately incumbered, ought to be treated in the same manner as the estate itself would have been, and that the mortgagees ought to be paid their principal interest and costs according to their respective priorities, and that the costs of the sale ought not to be paid, in the first place, out of the general fund (f). This distinction seems to have been taken; where the bill is filed by a subsequent incumbrancer or other person interested in the estate, to settle priorities and obtain satisfaction, if the first

(a) *Mackenzie v. Robinson*, 3 Atk. 559.

(b) *Beckford v. Kemble*, 1 Sim. & St. 15; *et v. supra*, pp. 11, 12; *v. supra*, p. 672.

(c) Dict. Lord Hardwicke, *Lucas v. Seale*, 2 Atk. 56.

(d) *Upperton v. Harrison*, 7 Sim. p. 444; the early cases are collected in Mr. Simons's note; *Hepworth v. Hexlop*, 3 Hare, 485.

(e) *Barnes v. Racster*, 1 Yo. & Coll. C. C. 403; and see *Clare v. Wood*, 4 Hare, 82; and *see Aldridge v. Westbrook*, 5 Beav. p. 188,

supra.

(f) *Wild v. Lockart*, 10 Beav. 323. The bill was filed by the first incumbrancer over parts of the estate, against the second incumbrancer on that part, and the first incumbrancer over other parts, over which the plaintiff had a subsequent incumbrance, and numerous other incumbrancers; the sale was made by consent, without prejudice:—and see, on this subject, Daniell's Pract. by Headlam, ii. 1264.

mortgagee insists upon being redeemed or that the bill be dismissed against him with costs, as he may, but he gives up that right and for the convenience of all parties consents to a sale, he will have his costs according to the general rule; but if instead of doing so, he merely states his title and takes the benefit of the suit for the purpose of obtaining payment with the other parties of what is due to him, and a sale is made with his consent, he must submit to having the costs of the suit first deducted (a). Where the mortgagee having a power of sale prays for a sale only, he can have no other relief at the hearing; but leave has been given to amend by adding a prayer for foreclosure. Although there be a power of sale the mortgagee may foreclose (b). If a mortgagee with a power of sale files a bill to foreclose, he will not on motion be directed to sell (c).

A mortgagee of a copyhold estate who is not in possession, may bring his bill against the mortgagor, before admittance, for a foreclosure, and after he has obtained such decree his course is to proceed by ejectment for possession of the mortgaged premises (d); if no surrender has been made, and the mortgagor is foreclosed, he will be ordered (at the expense of the mortgagee) to surrender the estate (e).

Before the abolition of recoveries, where a bill was filed to foreclose a mortgage made by Tenant in tail not perfected by recovery, the court did not compel the tenant in tail, on his covenant for further assurance, specifically to suffer a recovery, but decreed him to make a good title to the mortgagee (f): Lord Thurlow held that, under a covenant of a tenant in tail mortgagor for further assurance, he might be compelled to do such acts as were in his power to perfect the title (g); but if he died before he had actually done such acts, even though there had been a decree against him, his issue were not

(a) This I understand to be the effect of *Brace v. Duchess of Marlborough*, Mos. 50; and *White v. Bishop of Peterborough*, Jacob's R. 402; and see *Pace v. Marsden*, Seton on Decrees, 275; *Cooke v. Brown*, 4 Yo. & Coll. p. 227; there the mortgagee prayed a sale: *Barnes v. Ræster*, 1 Yo. & Coll. *supra*; there the bill prayed a foreclosure; but see the cases in the preceding notes.

(b) *Kerrick v. Saffery*, 7 Sim. 317.

(c) *Anon.* 23 or 24 April, 1818, before Vice-Chancellor Leach, Mad. MS. 1 Pr. and P. 668.

(d) *Sutton v. Stone*, 2 Atk. 101, Justice Wright.

(e) *Hill v. Price*, 1 Dick. 344; see Jarm. Mortgages, by Sweet, 406, from whence several of the authorities above cited are taken; and Coote on Mortgages, 601, *et seq.*

(f) *Sutton v. Stone*, 2 Atk. 101, Mr. Justice Wright; *Tourle v. Rand*, 2 Bro. 652.

(g) *Tourle v. Rand*, 2 Bro. *ubi sup.*; *Pye v. Daubuz*, 3 Bro. p. 595: see, on the subject of imperfect or voidable conveyances by tenant in tail, Jarman, Mortgage, by Sweet, p. 209, where the effect of the statute 3 & 4 Will. IV. c. 74, s. 38, is stated; where also (p. 210-11) the effect of the 21st section of the same statute, as to mortgages granted by tenant in tail, is stated; *et v. supra*, p. 639.

bound (a). By the 47th section of the stat. 3 & 4 Will. IV. c. 74, it is enacted, that "no disposition by a tenant in tail resting only in contract either express or implied, or otherwise, and whether supported by valuable consideration or not, shall be of any force at law or in equity *under this act*, notwithstanding such disposition shall be made or evidenced by deed:" no such deed therefore will have any effect *under that act*, and it cannot bind the issue of the tenant in tail or those in remainder; but the Court of Chancery may still enforce a contract made by tenant in tail as against himself under his covenant for further assurance (b); and by one of Sir E. Sugden's acts, 1 Will. IV. c. 36, s. 15, rule 13, the court itself may execute the decree against a tenant in tail in custody for a contempt.

A decree of foreclosure against a person claiming as tenant in tail under the mortgagor made absolute, or a release executed by him in a suit for foreclosure, the time for redemption having gone by, though the foreclosure may not have been made absolute, is binding on his issue and on those in remainder (c).

When the devisee or heir of the mortgagor is an Infant, a decree of foreclosure may be obtained against him; but the ordinary course is, where the mortgagee requires it or consents, to direct a reference to the Master to inquire whether a sale of the premises is for the infant's benefit, though where it is clear that it will be for the benefit of the infant, the court may at once direct a sale (d). If a sale be directed the infant will be ordered to convey under the 11th section of the statute 1 Will. IV. c. 47 (e). Where the decree against an

(a) *Attorney-General v. Day*, 1 Ves. Sen. 224; *Powell v. Powell*, Prec. Ch. p. 279; the defendant had stood out all process of contempt; "Since," said the Lord Keeper, "he did not make use of his power by fine or recovery, his issue could not be bound by any other act of his."

(b) This clause (§ 47) was introduced into the bill by Mr. Hayes. "The all-absorbing nature of equity," says that eminent lawyer, "ever seeking to insinuate its jurisdiction, rendered that precaution necessary:" Introduction to Convey. i. p. 163. But in expounding that clause (same page), Mr. Hayes only applies it to the issue and remaindermen, though he adds, "All equitable relief in the case of a defective or informal assurance is expressly and anxiously excluded," *ibid.*; and see Sugd. V. and P. 227, § 7.

(c) *Reynoldson v. Perkins*, Amb. 564; and see Powell on Mortgages, by Coventry, vol. ii. p. 972, *et seq.*; *Roscarrick v. Barton*, 1 Ch. Ca.

217; "The release," said Lord Hardwicke, "was equal to an absolute foreclosure by order."

(d) *Davis v. Dowding*, 2 Keen, p. 245; *Clinton v. Bernard*, 1 Dru. 287; *Monday v. Monday*, 1 Ves. & B. 223; *Booth v. Rich*, 1 Vern. 295; but this seems to have been a bill for the general administration of the estate: — *v. Mansell*, 1807, Mad. MS., 1 Pr. and P. 667. This is an exception to the general rule, in order to prevent foreclosure; but the analogy is not carried out so as to sell or mortgage an infant's real estate, only because it may be for his benefit; *Brookfield v. Bradley*, Jac. R. 635; *Hill v. Maurice*, 1 De G. & Sm. p. 214.

(e) *Scholefield v. Hoofield*, 8 Sim. p. 470. An infant tenant in tail is within this clause, *Penny v. Pretor*, 9 Sim. p. 135; *Radeliffe v. Eccles*, 1 Keen, 131. The application under this act must be by petition, not by motion, 1 Yo. & Coll. 75.

infant is to foreclose, the practice has always been to give him a day to show cause against the decree on his coming of age (a), and the statute 1 Will. IV. c. 47, ss. 10, 11, enacting that the parol shall not demur, has made no alteration in the practice in this respect (b); but the infant when of age is not allowed to unravel the account, nor is he entitled to redeem the mortgage by paying what was reported to be due with subsequent interest; he can only show error in the decree or falsify the accounts for fraud or error (c): where an infant had a day to show cause and afterwards attained twenty-one, and left the kingdom to avoid his creditors, permission was given to serve the clerk in court with the subpœna (d). Under special circumstances the court will refuse to make a decree of foreclosure against an infant (e).

If a bill be brought against Husband and Wife, to foreclose the equity of redemption in the wife, whether the mortgage be made before or after marriage, the wife will be decreed to be foreclosed though under coverture; no day is given to her or her heirs to redeem or to show cause after the coverture shall be determined (f).

When a bill of foreclosure is filed against a company, the decree to be made is a reference to the Master, to take the account and to fix a day of payment, and if not paid at the day, then liberty for the plaintiff to apply as he may be advised (g).

On the foreclosure being made absolute, according to the course of the court, the estate becomes to all intents the real estate of the mortgagee (h).

If a mortgagee in fee die in possession, and the heir on whom the mortgage *descends* obtains the equity of redemption, according to Lord Commissioner Trevor, if there be not a deficiency of assets, the heir will be entitled to retain the mortgaged estate (i); but it may well be doubted whether he would not now be considered as con-

(a) *Goodier v. Ashton*, 18 Ves. 83; *Booth v. Rich*, 1 Vern. p. 295; *Spencer v. Boyes*, 4 Ves. 370, where the form of the decree is given; *Bishop of Winchester v. Beavoir*, 3 Ves. 317.

(b) *Price v. Carver*, 3 My. & Cr. p. 157; and see *Lewis v. John*, 1 C. P. Coop. R. 8.

(c) *Mallack v. Galton*, 3 P. W. 352. In *Lyne v. Willis*, 2 Eq. Ab. 11; *S. C.* 3 P. W. 352, note, this is said to be the settled practice: *Bishop of Winchester v. Beavoir*, *ubi sup.*; *Spencer v. Boyes*, 4 Ves. 370; *Williamson v. Gordon*, 19 Ves. 114; *Sheffield v. Duchess of Bucks*, West, R. 682; *Blatch v. Wilder*, *ibid.* 324.

(d) *Elecock v. Glegg*, 2 Dick. 764.

(e) See Coote, p. 614.

(f) *Mallack v. Galton*, 3 P. Wms. p. 352; and the cases in the notes, *Burke v. Crosbie*, 1 Ball & B. 503.

(g) *Chambers v. Portsea Water Works*, 8 Feb. 1820, before Vice-Chancellor, Mad. MS. 1 Pr. and P. 667.

(h) *Le Gros v. Cockerell*, 5 Sim. 389; as to making the foreclosure absolute, *v. infra*, p. 692.

(i) *Fisk v. Fisk*, Prec. Ch. p. 11; 2 Foulb. p. 284: the next of kin are certainly only volunteers, as is the heir.

structively a trustee for the persons interested in the personal estate (a): according to another early case, if the heir has foreclosed, he may keep the estate, paying the mortgage-money to the executor (b); but this case is open to the same observation.

It has been noticed in a former page, that if a debt be secured by the mortgage of a real estate, and also by covenant and collaterally by bond, the mortgagee may pursue all his remedies at the same time (c). If he obtain full payment on the bond or covenant, the mortgagor is, by the fact of payment, entitled to redeem the estate, and foreclosure is prevented or not allowed. But if the mortgagee obtains only part payment on the bond or covenant, he may go on with his foreclosure suit, and, giving credit in account for what he has recovered on the bond or covenant, he may foreclose for non-payment of the remainder. On the other hand, if he obtains a foreclosure first, and alleges that the value of the estate is not sufficient to satisfy the debt, he is not absolutely precluded from suing on the bond or covenant: but it is held that by doing so, he gives to the mortgagor a renewed right to redeem, or, in other words, Opens the foreclosure (d); and consequently upon the commencement of an action against the mortgagor on the bond after foreclosure, he may file a bill for redemption, and upon payment of the whole debt secured by the mortgage he is entitled to have the estate back again, and the securities given up (e). After foreclosure, therefore, the court will not restrain the mortgagee from suing on the bond, provided he retains the mortgaged estate in his own power, ready to be redeemed, in case the mortgagor should think fit to avail himself of the opening of the foreclosure. The question, whether such an action could be sustained, after the mortgagee had sold the estate, and deprived himself of the power of restoring it to the mortgagor on full payment of the whole debt, was in some doubt (f) till the late case of *Lockart v. Hardy* (g), before Lord Langdale. The mortgagee in that case had sold the estate for

(a) *V. supra*, pp. 299, 302, 650, 651; however the next of kin as well as the heir are equally volunteers.

(b) *Clerkson v. Bowyer*, 2 Vern. p. 67, and *Globe v. Lord Carlisle*, there cited; 2 Foulb. p. 285. Mr. Coote, p. 608, does not object to this doctrine; *sed v. ibid.* 617; and see *Freak v. Hearsey*, 1 Ca. Ch. p. 51.

(c) *Supra*, p. 646; and see Jarm. Mortgage, by Sweet, 404, where other cases are cited; and Powell on Mortgages, by Coventry, ii. 1002.

(d) See *Dashwood v. Blythway*, 1 Pr. n. 317; Finch's R. 406.

(e) 9 Beavan, 356.

(f) See *Tooke v. Hartley*, 2 Bro. p. S. C. 2 Dick. p. 785, where an injunction was refused; and the notes of Lord Henley & Mr. Belt, in their respective editions; and *Perry v. Barker*, before Lord Eldon, 8 Ves. 527; Lord Erskine, 13 Ves. 198; and Coventry's note on this case, Powell on Mortgages, p. 1005.

(g) *V. supra*, p. 347, additional note.

sum less than the amount of the debt, and then offered to prove for the deficiency in a suit for the administration of the mortgagor's estate. In giving judgment his Lordship said, It does not seem unreasonable, when the difference between the whole debt, and the price of the estates fairly sold, is all that is sought to be recovered in the action, that the mortgagee should be permitted to proceed; but I apprehend, said his Lordship, that the rules as to opening the foreclosure are founded on this; that in this court, the mortgagor, if he does not pay the whole debt, may lose the whole estate, however valuable, but that if he does pay the whole debt, he is entitled to have the estate restored to him; and it seems to follow, that the mortgagee, having got the estate, is not to proceed against the mortgagor for full payment, if he cannot restore the estate. If this be so whilst the estate remains in his hands, how can it be altered by any separate dealing of his own with the estate, without the consent of, or any agreement with, the mortgagor? The mortgagee had, by his securities, a right to foreclose the mortgage, and if he thought the estate insufficient, a further right to proceed on his personal securities, thereby giving to the mortgagor a renewed right to redeem; but when he has so dealt with the estate that the mortgagor cannot redeem (a), it appears to me, said his Lordship, that he is not entitled to proceed; and that this court ought to restrain him from proceeding on the personal securities: and his Lordship decided, that the mortgagor in that case was not at liberty to enforce his securities (b).

The foreclosure may be opened on other grounds than those above stated, but it is not easy to extract any definite principle upon which the court acts in such cases. In one case (c) where a first mortgagee after foreclosing the second mortgage devised the premises to the mortgagor, the second mortgagee was let in to redeem: in another case the decree of foreclosure was opened after 16 years, the equity of redemption being worth much more than what was due, and the mortgagor having been in distressed circumstances (d); no doubt it was assumed that the mortgagee had unfairly taken advantage of such distress. If the decree has been obtained by fraud or collusion or improper practices, the foreclosure may be opened under the general jurisdiction; a devise of the estate as money, or referring to it for a collateral purpose as money, will not of themselves open the foreclosure (e).

(a) See *Perry v. Barker*, 8 Ves. 531.

(b) *Lockhart v. Hardy*, x. Jurist, p. 532; 9 Beav. 355-7.

(c) *Cook v. Sadler*, 2 Vern. 235.

(d) *Burgh v. Langton*, 15 Vin. Abr. 476,

pl. 2; 2 Eq. Ab. 609.

(e) Mr. Coote, 604-5, has collected the early cases where foreclosures have been opened, and has also stated those in which it has been refused.

Where the mortgagee had taken possession a considerable time, and then brought an action on the bond, the balance appearing to be inconsiderable, a perpetual injunction was awarded (a).

Under the old practice, an executor of a mortgagee would have been restrained from enforcing payment, and the money would have been ordered into court, where there was no heir of the mortgagee who could re-convey (b); but the difficulty has been provided against to a great extent by some late Acts of Parliament. Doubts having arisen as to whether the statute 1 Will. IV. c. 60, s. 8 (c), extended to a mortgagee who should have died without an heir within the jurisdiction, which was assumed in the statute 4 & 5 Will. IV. c. 23, s. 2, (which enlarges the powers given by the statute 1 Will. IV. c. 60); the statute 1 & 2 Vict. c. 69, was passed, by which it is provided, that where any mortgagee shall have died *without having been in possession of the land or in the receipt of the rents and profits* thereof, and the money due on such mortgage shall have been paid to his executor or administrator, and the devisee or heir, or other real representative or any of such devisees, &c., shall be out of the jurisdiction or not amenable to the process of the court, or it shall be uncertain, where there were several devisees or representatives who were joint tenants, which of them was the survivor, or it shall be uncertain whether any such devisee, &c., be living or dead, or if known to be dead it shall not be known who was his heir, or where such devisee or heir or representative shall have died without an heir, or in case of neglect to convey, &c., the court may appoint a person to convey, in like manner as by the act of 1 Will. IV. c. 60 the court is empowered in the place of a *trustee* or the *heir* of a trustee (d).

The relative rights of mortgagor and mortgagee are, as before observed, the same in a bill to foreclose as in a bill to redeem, at least as to the price of redeeming the mortgage. In the case of *De Vigier v. Lee*, before referred to, the Vice-Chancellor Wigram had to consider this principle in reference to what amount of Interest under the law as it stands may be recovered in a suit to redeem or to foreclose: the Vice-Chancellor said, In order to determine the price of redemption upon a bill to redeem a mortgage, the court ought to inquire what

(a) *Perry v. Barker*, 8 Ves. 527; and *S. C.* 13 Ves. 198.

(b) *Schoole v. Sall*, 1 Sch. & Lef. 177.

(c) *V. supra*, p. 616.

(d) Sugd. V. and P. 226, n. (i); and see

Hill on Trustees, p. 277, *et seq.*; and *Ex parte Whitton*, 1 Keen, 278; *Re Thomson*, 12 Sim. 392; *In re Wilson*, 8 Sim. 342; and *Ex parte Bird*, 9 Sim. 426.

the terms of redemption would be in a suit to recover the mortgage-money out of or by means of the charge upon the land, which a bill for foreclosure is: if in the result of the inquiry the court should find that in a suit for foreclosure or other suit seeking to affect the land, no more than six years' interest would be recoverable by the mortgagee, the court, as the Vice-Chancellor thought, would be bound to fix the same limit in determining the price of the redemption on a bill to redeem. Under the letter of the statute, 3 & 4 Will. IV. c. 27, s. 42, no interest of money charged upon land could be recovered in any action or suit for more than six years, though the payment of such interest was secured by bond or covenant, or both; and if the law had rested on that statute, neither on a bill to foreclose nor on a bill to redeem could interest have been demanded by the mortgagee for more than six years (a): this could not have been intended, and accordingly, by the statute 3 & 4 Will. IV. c. 42, s. 3, passed at a later period of the same session, the right of the creditor to bring an action upon the bond or covenant was extended to or declared to exist for twenty years, notwithstanding the 42nd section of the first-mentioned statute; the Vice-Chancellor was therefore of opinion that in the case before him whatever might have been his opinion if the money had not been secured by a bond or covenant, the foreclosure could not be intercepted without payment of the principal and the arrears of interest due, extending to twenty years; nor could the estate be redeemed, looking to the effect of the latter statute, excepting on the same terms (b).

By the statute 7 Geo. II. c. 20 (c), intituled "An Act for the more easy Redemption and Foreclosure of Mortgages," it is enacted that, where any Action shall be brought upon a bond, for payment of money secured by mortgage or performance of the covenants therein contained, or where any action of ejectment shall be brought by any mortgagee, or any person claiming under him, for the recovery of the possession of the mortgaged lands or hereditaments, and no suit for foreclosure or redemption shall be pending; if the person or persons having the right to redeem shall pay to the mortgagee, &c., or on his refusal to accept, shall bring into court all the principal moneys and interest due on such mortgage, and all such costs as have been expended in any suits at law or in equity upon such mortgage, (the same to be ascertained by the proper officer of the court,)(d) the same shall be taken

(a) See *Du Vigier v. Lee*, 2 Hare, 332.

(b) *Du Vigier v. Lee*, *ubi supra*, 338, 339, *et v. sup.* p. 669. There are some important observations in this judgment, relating to other

points arising on the construction of these statutes; *v. infra*, Sect. vi.

(c) See Jarman, Mortgage, by Sweet, 407.

(d) Upon staying proceedings in ejectment

in full discharge of the mortgage; and the court may compel the mortgagee, &c., at the costs of the mortgagor to assign, surrender or re-convey such mortgaged lands, &c., and deliver up the deeds, evidences, and writings in his possession: and where any Suit shall be brought in any court of equity, to compel the defendants, claiming a right to redeem, to pay to the plaintiff the principal money and interest due on such mortgage, or such principal and interest, together with any sum or sums of money due on any incumbrance or specialty charged or chargeable on the equity of redemption, and in default to Foreclose the defendant or defendants, such court of equity, upon application made by the defendant or defendants in the suit, having a right to redeem, and upon his and their admitting the right and title of the plaintiffs in the suit, may at any time before the hearing make such order or decree therein as might have been made in case such suit had been regularly brought to a hearing; and that all parties shall be bound by such order or decree, to all intents as if such order had been made at or subsequent to the hearing of the cause. But it is declared that the act is not to extend to any case where the person against whom the redemption is prayed shall, by writing under his own hand or that of his attorney or agent, to be delivered before the money shall be brought into such court of law to the attorney on the other side, insist either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different principal sums than what appear upon the face of the mortgage, or shall be admitted on the other side, nor to any case where the right of redemption to the mortgaged lands, &c. in question shall be controverted or questioned by or between different defendants in the same cause or suit; and it is provided that nothing in the act shall prejudice any subsequent mortgagee or incumbrancer.

This act, the real purpose of which was to give a new jurisdiction to courts of law, but which gave no new jurisdiction to the Court of Chancery (*a*), places the suit in the same situation as if it had been brought to a hearing, and the same consequences therefore follow (*b*). No reference can be had under this statute, unless all the parties interested in the equity of redemption join in the application and admit the plaintiff's title, which an infant cannot (*c*), and unless the bill

by mortgagee on payment of debt and costs under the statute 7 Geo. II. c. 20, the costs are taxed only as between *party and party*, and not as between attorney and client; *Doe dem. Capps v. Capps*, 3 New Cas. p. 768; 5 Dowl. P. C. 683; note to 2 Coll. 626.

(*a*) Sir J. Leach, 1 Sim. & St. 332, *Praed*

v. Hull; in the construction of the statute, a covenant under seal is considered to be a bond; *Streeton v. Collier*, 10 Law T. 227, C. P.

(*b*) *Wakerell v. Delight*, 9 Ves. 36.

(*c*) *Lushington v. Price*, 9 Sim. p. 651; *Taylor v. Coates*, 3 Hare, 203.

is confined to mere foreclosure (a); nor where the right to redeem, or the amount of principal and interest alleged to be due is in dispute, for the Master is not at liberty to examine into the state of the account as against the statement in the bill (b); nor can a reference be obtained where the bill prays a sale and not a foreclosure, unless by consent without reference to the statute (c). However, where some of the defendants are infants, and one of the adults offers to pay the amount claimed, the court under its general jurisdiction may on motion make an order, analogous to an order under the statute, where the allowing the party paying to redeem, and thus to obtain the legal estate, cannot prejudice the infants, as will be the case where the subject is personal estate, and the party redeeming is executor (d). It is indispensable that the mortgagor should apply under the act before the mortgagee, if he has proceeded at law, is entitled to take out execution (e). In the case of *Piggin v. Cheetham* (f), the Vice-Chancellor Wigram allowed the party applying under the act to file an affidavit to show that he was the only party interested in the equity of redemption, he not having answered, and the bill having charged that the defendant had made subsequent charges; but in a later case the Vice-Chancellor of England held that such an affidavit was not necessary where the bill merely contained the common charge that there were other incumbrances (g).

In a foreclosure suit great indulgence is shown to the mortgagor in respect of the payment of the money, so as to prevent an absolute foreclosure—the time fixed has been extended four times, and that although the third was expressed to be peremptory, there being a fair prospect that the mortgagor would be able to obtain the money within the extended time (h). However the court must have some reason assigned for enlarging the time even once; but it does not require a very strong one (i). Regularly the mortgagor should apply before the time fixed for payment has expired, but a slip may be excused (k). Even the enrolment of an order absolute for foreclosure in a foreclosure suit does not, any more than an enrolment of the decree for foreclosure,

(a) *Bastard v. Clarke*, 7 Ves. 489.

(b) *Goodtitle dem. Bishop*, 1 Yo. & J. 344; *Huson v. Hewson*, 4 Ves. 105-6.

(c) *Praed v. Hull*, 1 Sim. & St. 331; and see *Aberdeen v. Chitty*, 3 Yo. & Coll. 379; *Jarman, Mortgage*, by Sweet, 410.

(d) *Grane v. Mitchell*, 10 Sim. 485.

(e) *Amis v. Lloyd*, 3 Ves. & B. 16.

(f) 2 Hare, 80.

(g) *Reeves v. Glastonbury Canal Company*, 14 Sim. 351.

(h) *Edwards v. Cunliffe*, 1 Mad. 287; and see *Jones v. Creswicke*, 9 Sim. 304.

(i) *Nanny v. Edwards* (Lord Lyndhurst), 4 Russ. 125, confirming the order of the Vice-Chancellor; the motion was refused in that case with costs: *Eyre v. Hanson*, 2 Beav. 478.

(k) *Renevoize v. Cooper*, 1 Sim. & St. 365.

prevent the court from enlarging the time for payment on the usual terms upon a proper case being made (a). If the mortgagee has received rents between the Master's report and the day fixed for payment, another day must be fixed (b).

For many years past the practice has been to enlarge the time only on the terms of first paying the interest and costs already reported, and these being paid subsequent interest is to be computed on the principal only, that alone remaining unpaid; if for any special reason the court should think fit to enlarge the time without ordering an immediate payment, it would be proper, as was the old practice, to order the subsequent interest to be computed on the aggregate amount of principal, interest and costs before computed (c). The court is enabled in proceedings under the statute 7 Geo. II., above referred to, to grant further time for payment of the mortgage money in the same way as in an ordinary suit for foreclosure (d). Where a defendant has allowed a decree *nisi* to be made absolute against him by not appearing to show cause against it, he is not entitled to a rehearing, excepting on special grounds (e).

If title deeds have been delivered to a subsequent mortgagee, without notice express or constructive of any prior mortgage, the Court of Chancery will not take them out of his hands, but will leave the mortgagee who has foreclosed to obtain them if he can at law (f).

(a) *Ford v. Wastell*, 6 Hare, 229; 2 Phill. 593. It was not disputed that, in this case, the defendant's interest in the property to be foreclosed, which was an undivided share in the residue of an estate to be administered in a suit then pending, was worth three or four times the amount of the debt; and it is stated in the Report that there were other circumstances of hardship in the case: the bill was filed by a judgment creditor, under the statute 1 & 2 Vict. c. 110; *v. ibid.* p. 230: the Lord Chancellor, p. 231, states the common form of the application.

(b) *Garlick v. Jackson*, 4 Beav. 154: so where the mortgagor had been prevented by the mortgagee from receiving the rents, the time was enlarged on terms; *Geldard v. Hornby*, 1 Hare, 251.

(c) *Lord Langdale, Brewin v. Austin*, 2 Keen, 212 (which was subsequent to *Bruere v. Wharton*, 7 Sim. 483, following *Robinson v. Pennyman*, Lord Colch. MS., where the interest was computed on the principal, interest and costs); and see *Dan. Pr.* by Headlam, ii. 989: where the mortgagee seeks payment in an administration suit (as in such cases the mortgagor is not asking for delay) the subse-

quent interest is computed on the principal only, *ibid.*, and *Whatton v. Craddock*, 1 Keen, p. 267; and more especially against a subsequent incumbrancer, *Neal v. Attorney-General*, Moseley, 246 (1 Keen, 269); and see *Maghee v. Mahon*, 1 Molloy, 151, but that was a special case: Lord Manners was inclined to give interest upon the principal and interest found due and ordered by the former decree to be paid in one month. Under special circumstances of duress and oppression, Lord Manners held that the fact that the party has used due diligence to execute the decree, and has been baffled, may be brought to the knowledge of the court by petition, and does not require a supplemental bill, which had been filed in that case, see pp. 154-55: interest, said his Lordship, forms no part of the substance of the decree, but is only incidental.

(d) *Wakerell v. Delight*, G. Coop. R. 28; S. C. 9 Ves. 36.

(e) *Booth v. Creswicke*, Cra. & Ph. 361; as to the mode of obtaining relief against a decree obtained by fraud or mistake, see *Davenport v. Stafford*, 8 Beav. 503.

(f) *Kendall v. Hulls*, xi. Jur. 864. This case is important on the point of what know-

If a man has a legal mortgage, he cannot have a Receiver appointed, though the tenants are numerous and the rents difficult to collect (a); he may take possession. If he has only an equitable mortgage, that is, if there be a prior mortgage carrying the legal estate, then if the prior mortgagee be not in possession, the other may have a receiver, without prejudice to the first mortgagee taking possession; but if the first mortgagee be in possession, the subsequent mortgagee cannot come here for a receiver, he must redeem the first mortgagee; and in taking the accounts the first mortgagee will not be allowed any sums that he may have paid over to the mortgagor after notice of the subsequent incumbrance. If the mortgagee in possession will swear that there is a sixpence due to him, the court will not take away the possession from him; whilst anything remains due the court cannot substitute another security for that which the mortgagee has contracted for (b). If it appear by the bill that there is a prior mortgagee who is not in possession, the court may, though this has been doubted, at the instance of subsequent incumbrancers, appoint a receiver, in the absence of the prior mortgagee, and even where the mortgagor is out of the jurisdiction; but of course without prejudice to the first mortgagee taking possession (c). There may be cases where, though the mortgagee may not be entitled to foreclose until a future period, as after the death of the mortgagor, he may be entitled to a receiver in the interim (d).

If a receiver be in possession, he cannot be disturbed without leave of the court (e). But when a party is prejudiced by having a receiver put in his way, the course has been either to give him leave to bring an ejectment, or to permit him to be examined *pro interesse suo* (f), which may perhaps be the more convenient course (g).

ledge on the part of the solicitor is constructive notice to the party who employs him; see *Toulmin v. Steer*, *infra*, Sect. viii., Notice.

(a) *Sturch v. Young*, 5 Beav. p. 557; and the cases in Mr. Beavan's note; and *supra*, p. 647-8.

(b) Lord Eldon, *Berney v. Sewell*, 1 Jac. & W. 648-9; and see *Phipps v. Bishop of Bath and Wells*, 2 Dick. 608; *McClellan*, 163; *Bryan v. Cormick*, 1 Cox, 423; *Dalmer v. Dashwood*, 2 Cox, 382-3, is a special case.

(c) *Ibid.* *Tanfield v. Irvine*, 2 Russ. 151-2, and *sup.* pp. 647, 648; but see *Holmes v. Bell*, 2 Beav. 298; *Browne v. Blount*, 2 Russ. & M. 83; and *Andeston v. Stather*, 2 Coll. 212; but in those cases the rights of the absent party would have been affected: and see *Lowry v. Fulton*, 9 Sim. p. 114.

(d) *Burrowes v. Molloy*, 2 Jo. & Lat. 521.

(e) *Angel v. Smith*, 9 Ves. 335.

(f) As to the practice in such cases, see *Hamlyn v. Lee*, 1 Dick. 94; *Gomme v. West*, 2 Dick. 472; *Hunt v. Priest*, *ib.* 540; *Anon.* 6 Ves. 287; and *Daniell's Ch. P.* by Headlam. The order may be obtained on motion or petition; *Walker v. Bell*, 2 Mad. 21, a case where the estate was in the hands of sequestrators: in that case (p. 24) Sir J. Leach refers to the early cases: *Dixon v. Smith*, 1 Swanst. 457; *Dickenson v. Smith*, 4 Mad. 177; 1 Jac. & W. 179, note; *et v. supra*, p. 647.

(g) *Brooks v. Greathed*, 1 Jac. & W. 178. There the petitioner had filed a bill himself, which he had not prosecuted with due diligence, and on that account he was left to his action.

In one case (*Davis v. Barrett*, 13 Law J. N. S. Rolls, 304), the defendant, a mortgagee,

As regards Recognitions of the title of the party seeking to foreclose or to redeem, it may be observed that, if a person pays money to another, it must be presumed that he is satisfied with the title of the receiver; he cannot, therefore, generally speaking, dispute that the person to whom he has paid interest as mortgagee is really such; but the receipt of the money does not imply an admission that the party paying is the person properly bound to pay it, or that such party has the right to redeem (*a*).

It will be proper here to consider the relief that is given when the Deeds have been Lost or destroyed by the mortgagee.

It is the general duty of the mortgagee to take care that all the instruments deposited with him are forthcoming (*b*). When the mortgagee has lost the title deeds, and the mortgagor files a bill for Redemption, the mortgagee must indemnify the mortgagor for the loss of the deeds; the mortgagor is justified in filing a bill in such a case, in order that he may obtain a sufficient indemnity (*c*); and where the mortgagor is ready to pay, and a delay is occasioned by the loss of the deeds, the mortgagor will not be compelled to pay interest during the interval, and if he should have paid it compulsorily, it will be ordered to be returned to him (*d*).

On a bill for foreclosure, the mortgage deeds being lost by the plaintiff, if the defendant redeem, the plaintiff, generally speaking, will be ordered to pay the costs of the suit, and to give an indemnity to the defendant in respect of the loss, such indemnity to be settled by the Master (*e*); in default of payment there will be a foreclosure in the common form. In one case (*Smith v. Bicknell*) on a bill for redemption, some of the material deeds having been *stolen* from the mortgagor, a redemption was decreed without costs to the mortgagor (*f*); but the language of the Vice-Chancellor of England, in *Lord Middleton v. Eliot*, where *Smith v. Bicknell* was cited, would

was appointed the consignee, manager and receiver of the mortgaged estates.

(*a*) *James v. Biou*, 2 Sim. & St. 606.

(*b*) *Lord Middleton v. Eliot*, xi. Jur. 742-3; 15 Sim. p. 535: as to when a receiver will or will not be considered as the agent of the mortgagee, though not appointed by him, see *Jones v. Smith*, 1 Hare, 71-2.

(*c*) *Middleton v. Eliot*, *ubi supra*; *Stokoe v. Robson*, 3 Ves. & B. 51; 19 Ves. 385.

(*d*) *Middleton v. Eliot*, xi. Jur. p. 743-4; and see, on this subject, *Gibson v. Nicol*, 9 Beav. 403.

(*e*) *Stokoe v. Robson*, 3 Ves. & B. p. 51; S. C. 19 Ves. 385. The decree is set out,

Seton on Decrees, 225-6, where, and p. 227, Mr. Seton has collected the cases in which, in equity, relief has been given on a lost instrument upon an indemnity; and see *Shelmardine v. Harrop*, 6 Mad. 39; *Schoole v. Sall*, 1 Sch. & Lef. 176; *Lucraft v. Hite*, A.D. 1785, stated from Reg. Lib. 2 Hare, 14; the form of the bond of indemnity in the case of lost title deeds is given 6 Mad. 44; and see *Bentinck v. Willink*, 2 Hare, 13, a case which arose upon a mortgage of an estate in Demerara, the mortgagee having lost the *Grosse* or official engrossment of the mortgage, usually obtained from the court where the mortgage is registered.

(*f*) *Smith v. Bicknell*, 3 Ves. & B. 51, n.

imply that in all cases, unless perhaps under very special circumstances, the mortgagee must pay the costs when he cannot produce the deeds: in that case the mortgagee had brought an action of ejectment, the costs of which he was also ordered to pay; the suit was one to redeem (*a*). In a late case on a bill for foreclosure, it appeared that the mortgagee had, his mind being in a disordered state, destroyed the title deeds; a reference to the Master was asked on the part of the mortgagee, for the purpose of enabling the mortgagor to raise the money to pay off the mortgage, and that the Master might inquire as to the loss sustained by the mortgagor by the destruction; the first part of the application was refused; but the Vice-Chancellor of England directed a reference to ascertain what ought to be paid as compensation for the damage done to the estate by the destruction, the same to be set off against the mortgage debt (*b*).

According to the modern authorities neither a provisional assignee nor a puisne incumbrancer who disclaims, can have his costs against the party seeking to foreclose (*c*). But where a defendant in a bill to foreclose properly disclaims, he having no interest in the equity of redemption, as a general rule he is entitled to his costs against the plaintiff, particularly if no application has been made to him prior to filing the bill (*d*). If the plaintiff should have properly made a person who disclaims a party, and such party is held to be entitled to his costs against the plaintiff, the plaintiff will be entitled to add such costs to his mortgage debt (*e*). The disclaiming defendants will be foreclosed, not simply dismissed, at least if that is essential to the mortgagor's title (*f*). The mortgagor's trustee to bar dower is a proper party to a bill for foreclosure; but he is not entitled to his costs as against the mortgagee (*g*).

A bill for foreclosure may be taken *pro confesso* in vacation (*h*).

(*a*) *Middleton v. Eliot*, 15 Sim. 536-7.

(*b*) *Hornby v. Matcham*, xii. Jur. p. 825; and see *Coulson v. Williams*, 9 Ir. Eq. R. p. 287.

(*c*) *Appleby v. Duke*, 1 Phill. 272; *Cash v. Belcher*, 1 Hare, 310; *Gabriel v. Sturgis*, 5 Hare, p. 97; *Gibson v. Nicol*, 24 Law J. N. S. 195; 9 Beav. 403: in that case the bill was filed by the second mortgagee to foreclose and redeem, the assignee of the insolvent mortgagor disclaimed, but was brought to the hearing, the proceeds were only sufficient to pay the first mortgagee; the bill was dismissed against the disclaiming defendant without costs; and see *Ohrly v. Jenkins*, xi. Jur. 1001.

(*d*) *Silcock v. Roynon*, 2 Yo. & Coll. C. C.

376; *Teed v. Carruthers*, *ibid.* p. 41; *Gabriel v. Sturgis*, 5 Hare, p. 101, where the distinctions are noticed.

(*e*) *Abblett v. Edwards*, Rolls, 3 June, 1840, stated 10 Sim. 562, in note.

(*f*) *Perkin v. Stafford*, 10 Sim. 563; *Collins v. Shirley*, 1 Russ. & M. 638, cited from Reg. Lib. 10 Sim. 562.

(*g*) *Horrocks v. Ledsam*, 2 Coll. 208.

(*h*) *Simmons v. Wood*, 2 Hare, 644: 1 & 2 Will. IV. c. 36, § 15, rule 2, recognised 1 Phill. 648. By the decree, the plaintiff's bill was taken *pro confesso*; an account of the mortgage debt, interest and costs was directed, and the usual decree for foreclosure made in default of payment, *ibid.* p. 647.

A foreclosure is not complete till an absolute order for foreclosing has been obtained, which the plaintiff the mortgagee is entitled to on the mortgagor or other person entitled to redeem making default in payment on the day fixed by the Master for payment, unless the time has been enlarged, as has been before adverted to: a mere decree *nisi*, however old, cannot of itself be pleaded (*a*): the foreclosure may be made absolute, though the mortgagee does not attend at the time fixed for payment (*b*): after twenty years' possession the court will not set aside a foreclosure merely on a point of form (*c*).

Where in the progress of a suit for foreclosure and before decree, the plaintiff, the mortgagee, assigns his interest, the assignee may file a supplemental bill to have the benefit of the suit, though the costs are not to be charged against the mortgaged estate (*d*); but where after a decree in a suit by a second mortgagee to redeem the first, and foreclose the subsequent mortgagees, one of the subsequent mortgagees assigned his interest in the premises to A. and A. then filed a bill against all the parties to the former suit praying the benefit of that suit, and to redeem those who were prior to him and foreclose the others; the bill was dismissed as against all the parties excepting A.'s assignor, and A. was declared to be entitled to stand in his place (*e*).

(*a*) *Sinhouse v. Earl*, 2 Ves. p. 450; see Seton on Decrees, 139, 140; Dan. Pr. ii. 988.

(*b*) *Anon.* 1 Coll. 273.

(*c*) *Jones v. Kenrick*, 5 Bro. P. C. p. 244; 2 Eq. Ab. 602. In *Higgins v. Franks*, x. Jur. 328; the form of the decree, under special

circumstance, where there are two mortgages, to secure property advanced by two or more persons, in different proportions, is given.

(*d*) *Coles v. Forrest*, 10 Beav. 553.

(*e*) *Booth v. Creswicke*, 8 Sim. 352.

ADDITIONAL NOTE.

Sober v. Kemp, before the Vice-Chancellor Wigram.—*Specific Performance and Foreclosure.*

In the case of *Sober v. Kemp*, 6 Hare, 155 (v. *sup.* p. 676, at note (*a*)), the plaintiff, n 1828, entered into a contract with Mr. Kemp, for the purchase of a house in Sussex Square: the plaintiff took possession: the plaintiff had constructive notice that the house in Sussex Square, together with two other houses, had been previously mortgaged to one Sivewright; he had actual notice in 1842: Mr. Kemp died in 1844; his widow was devisee of his estates. In 1845 the plaintiff obtained a transfer of the prior mortgage from Sivewright; the defendants, Messrs. Baring, claimed to be mortgagees, under a mortgage dated 1840, of three houses, two of which were included in Sivewright's mortgage (but not including the house in Sussex Square); the other defendants claimed under a mortgage of the same premises in 1847. The bill prayed that the defendant, the widow, might specifically perform the contract for the sale of the

house in Sussex Square, free from incumbrances; it also prayed an account of what was due on Sivewright's mortgage, the plaintiff offering, on being redeemed, to reconvey the premises comprised in that mortgage, excepting the Sussex Square house and if the defendant, the widow, should not redeem, that the other defendants might redeem, or be foreclosed. It was insisted that Sivewright could not have required the defendants to redeem, without conveying to them *all* the property comprised in his mortgage, and the plaintiff could have no better right; it was also objected that a suit for specific performance could not be combined with a suit for foreclosure. The Vice-Chancellor Wigram, in giving judgment, said, "If the effect of a suit for foreclosure were to compel the mortgagor or the subsequent mortgagees to redeem the plaintiff, it is clear that it would be unjust to compel them to pay the whole amount of the money secured upon the premises which are subject to the mortgage, now vested in the plaintiff, and to take a conveyance of part only of the property comprised in that security; but the subsequent mortgagees cannot be injured by having the option given to them either to redeem the plaintiff's mortgage upon the property comprised in her security, and take a conveyance of the premises which are subject to the security of the subsequent mortgages, or to be foreclosed of the latter, and retain their security over the other property comprised in their mortgages, discharged from the prior mortgage of the plaintiff." The question was whether the plaintiffs were in a condition to compel the defendants to exercise this option. The plaintiff, as the Vice-Chancellor observed, under the contract, obtained only an equitable title; by taking a transfer of Sivewright's mortgage he acquired the legal estate. Mr. Kemp himself could not have redeemed otherwise than subject to the contract as to the house in Sussex Square; and if he had redeemed, the plaintiff might have brought a bill for a specific performance of the contract, and would have been entitled to that relief on the same terms as those on which it was sought in that suit: the plaintiff had the same equity against those who claimed under Mr. Kemp, as he would have had against Mr. Kemp: the plaintiff having got the legal estate, sought to avail herself of that legal estate for the purpose of protecting her interest in the property to the extent of the moneys she had actually advanced and no further; she was entitled, in a bill to foreclose, to insist on the same equities as she would in a bill to redeem; and his Honour made a decree for the specific performance of the contract and for a redemption of the remainder of the premises by the defendants, according to their successive priorities (1).

(1) According, in this respect, to the precedent, *Seton on Decrees*, "Mortgages," No. IX. p. 571.

SECTION V.—*Of the Parties to Bills for Redemption and for Foreclosure.*

General Rules applicable to this Subject.

Mortgagor and his Representatives.

Subsequent Mortgagee of a part of the Mortgaged Estate.

Where the Mortgaged Estate is assigned to Trustees in trust for Creditors or others.

Costs of Parties to whom the Mortgagee has transferred his Interest.

Trustees for Sale.

Foreclosure by Cestuis que Trust.

Persons having a Partial Interest in the Equity of Redemption.

Representatives of a deceased Tenant for Life.

Foreclosure—Personal Representatives of Mortgagor.

Personal Representatives of Mortgagee—Heir.

Where the Mortgagee has absolutely assigned his Interest.

Interest, however small, is regarded.

Judgment Creditors.

Subsequent Incumbrancers.

Incumbrancers becoming such pendente lite.

Estate limited in strict Settlement—Owner of first Estate of Inheritance.

Persons necessary for effectuating the ultimate Decree.

Persons having Paramount Charges.

Bill by Second Mortgagee to foreclose the Third.

Bill to be paid out of Surplus of a Fund to be paid to a Bankrupt.

It has already been stated that redemption and foreclosure can only be enforced through the medium of the Court of Chancery, and as the ascertaining who are proper parties to a suit for the one purpose or the other is a necessary preliminary, it may be well here to refer to the general rules on the subject.

In the simple case of a bill by the mortgagor to redeem an only incumbrance, or of a bill by an only incumbrancer to foreclose the mortgagor, no difficulty can occur as to the parties; it is where other persons have acquired interests in the estate, or in the equity of redemption, by operation of law, or by means of the powers of disposition which both the mortgagor and the mortgagee and those claiming under them have over their respective estates, that difficulties arise as to who are the proper parties to a bill for redemption or foreclosure.

In every suit, whether to redeem or to foreclose, care is taken that

the estate shall ultimately get into the proper hand ; and that no one having an interest in the estate incumbered, or having an incumbrance on the estate, shall be excluded, in the one case from his right to redeem, in the other from his right to be paid what is due to him or to foreclose the persons whom he has a right to call upon to pay. In every suit for foreclosure where there are successive incumbrances and all are sought to be foreclosed, each of them is let in to redeem according to the order in which their securities are ranked, which is usually according to their dates, though that order is subject to variations, as will be stated in a subsequent section (a): every such suit has a double aspect, embracing as regards the different characters of the parties both redemption and foreclosure, and it is impossible to say *à priori* whether its final end will be redemption or foreclosure, or who in case of redemption will be the party to redeem: in framing the bill, in reference to the parties, regard must be had to both alternatives.

It may be stated generally that every suit, whether for redemption or foreclosure, ought to be so framed as regards parties, that the court may be enabled effectually to ascertain and determine the rights of all parties as regards the subject-matter, and so make a final end of the litigation in respect of it (b): as far as is possible the court endeavours to make a complete decree that shall embrace the whole subject, and determine upon the rights of all parties interested in the estate; but these rules must be occasionally departed from where convenience requires it (c).

From the very nature of the suit, whether for redemption or foreclosure, it must first be ascertained what is due upon each security, whether it is sought to be redeemed or whether a foreclosure is sought in respect of such security, and for that purpose in every decree an account is directed to be taken of what, if anything, is due; but this cannot be effectually done without all persons who are interested in the

(a) *V. infra*, Sect. vii. I need scarcely observe that Mr. Calvert has published a valuable Treatise on the difficult subject of Parties to Suits, from which I have derived great advantage, and to which the practitioner will refer for the cases which are not embraced in the succeeding pages.

(b) As regards all suits in equity, "the strict rule," said Lord Eldon. "is that all persons materially interested in the subject of the suit, however numerous, ought to be parties, that there may be a complete decree between all parties having material interests; and where the same account would have to be

taken at the instance of persons having the same kind of security as the party seeking to enforce his security, the court will in general require that all persons who could require the same account should be parties, that one account may be taken, binding upon all;" *Cockburn v. Thompson*, 16 Ves. 325; and see *Palk v. Lord Clinton*, 12 Ves. 58; Lord Redesdale, Pl. 164; Calvert on Parties, pp. 5-13; *Melish v. Brooks*, *infra*.

(c) Sir Wm. Grant, *Palk v. Clinton*, 12 Ves. 58; and see *Richardson v. Hastings*, 7 Beav. 326-7.

taking the account, and also all such persons without whose presence the account cannot properly be taken, being brought before the court (a). The court is also influenced in requiring that all parties interested should be before the court, by the principle which is acted upon in most other cases, namely, the avoiding multiplicity and diversity of suits, more especially where the same account would have to be taken over again.

If there be several incumbrances succeeding the original mortgage, and a bill is filed to obtain the Legal estate by redemption, it is obvious that every person who has a right to redeem ought to be made a party, in order that the legal estate may not be got in by any one to the prejudice of another who is absent, but who may have a preferable right to the advantage which the legal estate confers; so, in reference to the option which the mortgagor or his representatives have to redeem, it is obvious that every person who has the legal estate or any redeemable interest which passed from the mortgagor on the original mortgage, ought to be a party, so that on payment of the money secured, the mortgagor, or those claiming under or through him, may have back from such persons all that was pledged. If the suit be defective in any of these particulars, though a decree may be obtained, from the omission not being discovered or relied upon, it is plain that the decree can hardly be final and effectual so as to give a complete title to the party who may foreclose or who may redeem. It is however to be observed that where the party seeking relief is bound to do an act as a preliminary to his obtaining any relief, the court will not always require that all those who may be required to join in doing the act should be parties (b).

It will be seen in the sequel that there may be persons having *prima facie* an interest in the mortgaged premises whom it may not be necessary or proper to include as parties; the distinction as applied to such cases would seem to be, that where the decree which is sought, or which according to the circumstances must or even may be pronounced according to the course of the court, will in any way affect the rights or interests of the absent parties, the omission will be fatal to the progress of the suit (c); if it cannot affect the rights of the absent parties, the suit may be permitted to proceed, and such a decree may be obtained

(a) See Calvert on Parties, *et seq.* The statutes 2 Will. IV. c. 33 and 4 & 5 Will. IV. c. 82, and the General Orders, 8th May, 1845, have provided for the service of subpoenas on persons resident abroad; the orders and the decisions upon them are stated by Mr. Calvert, pp. 76, 77.

(b) *Baker v. Walters*, 8 Beav. 97.

(c) This may happen as regards interlocutory applications; for instance, where the plaintiff may have to apply for a receiver; see *Gibbon v. Strathmore*, before the Vice-Chancellor of England, 1841, Calvert, p. 16.

as the case may warrant, as between the parties, in the absence of the other persons, even though the suit might have been so constructed as to seek relief, which would have made them necessary or proper parties, and have finally settled all questions as regards the incumbrances on the property (a).

With these general remarks, which will be found, I believe, to be the key to many of the decisions, I propose now to state by way of illustration some of the leading authorities on the subject of Parties to bills for Redemption and Foreclosure.

It is obvious that in a bill for foreclosure the mortgagor or his representatives must always be made parties, they being the parties who are ultimately to pay or to be foreclosed, and in each view interested in seeing that the account is properly taken (b). If the mortgagor has become a bankrupt or an insolvent, he will be represented by his assignees (c); but where the mortgagor has parted with his interest, for instance, if on his marriage he has settled the mortgaged premises, not reserving any interest in himself, and then becomes bankrupt or insolvent, his assignees are not necessary or proper parties to a bill to foreclose (d). If a bill for foreclosure be filed against the mortgagor, and he then becomes bankrupt, and a supplemental bill is filed against his assignees; on the suit being brought to a hearing the decree will give a right of redemption to the bankrupt as well as the assignees: so that in such case the court will not make an immediate decree under the statute 7 Geo. II. c. 20, on the application of the assignees

(a) The Vice-Chancellor Wigram, in reference to the 40th of the General Orders of August, 1841, (which authorizes the court, if it shall think fit, to make a decree, saving the rights of absent parties,) stated in the case of *Faulkner v. Daniel*, 3 Hare, 212, that a party may stand in one of these positions:—he may be a necessary party to a suit, because other parties to the record cannot have justice done them in his absence [such is the case in foreclosure and redemption suits, as regards the person having the legal estate]; or he may be a necessary [proper] party, as having an interest of his own which the court may be able to protect by saving his rights in the decree [which however can seldom be the case in mortgage suits, as the account can hardly be properly taken in the absence of a party entitled to redeem or to foreclose]: or he may have an interest of his own, which the court may not be able to protect, see 2 Hare, 586;

it may be observed that a person who has a prior right to redeem is in this condition, where a person ranking below him seeks to redeem so as to get the legal estate. In *Walker v. Jefferys* (1 Hare, 341; *et v. ibid.* 296), the Vice-Chancellor Wigram refused to make a decree, on the ground that a party, who was in equity the owner of property, might be seriously prejudiced if the legal estate were without notice to him assigned to another person.

(b) Vide, *inter alia*, *Pierson v. Robinson*, 3 Swanst. 139, *in notâ*; *Farmer v. Curtis*, 2 Sim. p. 466; there the heir of the mortgagor could not be found: *Scholefield v. Heafield*, 7 Sim. 668; and see *Baker v. Wetton*, ix. Jur. p. 98, Vice-Chancellor of England; *S. C.*, on other points, 14 Sim. 426.

(c) *Collins v. Shirley*, 1 Russ. & M. 638; the assignees had disclaimed in that case: *Kerrick v. Saffery*, 7 Sim. 317.

(d) *Steele v. Maunder*, 1 Coll. 535.

alone (a): no person who has a right to redeem can be an improper party to a bill for foreclosure (b).

A second mortgagee who files a bill to redeem a prior mortgage must make the heir of the mortgagor a party; and that, though the second mortgage is only of part of the estate comprised in the first, and under a different title (c). "It is impossible," said Lord Thurlow, "that a second mortgagee should come into court against the first mortgagee, without making the mortgagor or his heir a party; the natural decree is that the second mortgagee shall redeem the first mortgage, and that the mortgagor shall redeem him or be foreclosed" (d).

An account may be obtained of the rents received by a devisor mortgagee, in a suit to redeem the devisee, though the personal representatives of the devisor are not parties (e), unless a balance should be claimed against his estate.

It is clearly settled that a subsequent mortgagee of a part must redeem the entire mortgage of a prior mortgagee, and all the parties necessary for this purpose must be introduced (f).

Trustees can generally sustain suits in respect of the property conveyed to them in trust (g), they may therefore foreclose; and they will thus acquire the money, or the absolute interest for the benefit of their *cestuis que trust*: but it is not enough to foreclose the equity of redemption of trustees, therefore where a bill is filed to foreclose, in order that the plaintiff may have an effectual foreclosure, all the *cestuis que trust* must be parties; indeed, in most cases, it is the *cestuis que trust* who have to redeem (h). Trustees have only such rights of property as are expressly given to them, or are required for the execution of their trusts; if the purposes for which they were clothed with the trust are at an end, or may be presumed to have been abandoned, the trustees to whom the equity of redemption may have been conveyed cannot file a bill to redeem the estate, when the purpose can

(a) *Garth v. Thomas*, 2 Sim. & St. 188.

(b) See *Tylee v. Webb*, 6 Beav. 557.

(c) *Palk v. Lord Clinton*, 12 Ves. 48, 58.

(d) *Fell v. Brown*, 2 Bro. 278; recognised, 12 Ves. 58, 59; *Farmer v. Curtis*, 2 Sim. 466; the heir, in that case, could not be found, yet the objection prevailed; it was a bill by a second mortgagee for redemption and foreclosure. In *Howes v. Wadham*, Ridg. Ca. Hardwicke, p. 201, (Calvert, p. 14.) Lord Hardwicke, under special circumstances, made a decree in the absence of the heir of the mortgagor, declaring that a person who had the

legal interest of the first mortgagee, and had contracted to purchase the equity of redemption, should be considered a trustee of the legal estate for the plaintiff, though he could neither decree a redemption or foreclosure, or a sale, as was prayed by the bill.

(e) *Trulock v. Robey*, 15 Sim. 277-281.

(f) *Palk v. Clinton*, 12 Ves. 59-60.

(g) As to suits where the trustees are to give a receipt for the purchase money, and their receipt is to be a sufficient discharge, see the 40th Order of Aug. 1841.

(h) *V. infra*.

only be for the execution of the trust which is at an end ; at least without the concurrence of the parties beneficially interested (a).

Where a person mortgages property and then assigns it to trustees in trust for creditors, it being stipulated that the creditors shall sign releases and give discharges, and the property is to be divided between them rateably ; if the creditors or any of them sign the deed, it is not sufficient in a bill for redemption to make the trustees parties : generally speaking, all the creditors must also be parties : the court however will consider a numerous body of creditors as sufficiently represented by a limited number, even where they are sought to be charged ; but the reason why the whole are not made parties ought to be stated on the bill (b).

Where the mortgagee has devised or assigned the mortgage, whether the mortgage be in fee or for a term, upon certain trusts, the trustees and *cestuis que trust* under the trust deed or will must be parties (c). If the mortgagee has made several conveyances in trust in order to entangle the property, it is not necessary for the mortgagor to trace out all the persons interested to make them parties (d) ; but where no such intent appears, the general rule must prevail, though the parties may be numerous (e). And the mortgagor must pay the costs of all persons claiming under the mortgagee made parties to the suit (unless their claims are adverse to one another) (f). In a case before Sir J. Leach, where it was contended that it was sufficient in a bill for foreclosure to make the trustees for sale upon certain trusts parties, they having power to give receipts to the purchaser, his Honour said ;

(a) *James v. Biou*, 2 Sim. & St. 607-8 : the trustees were in the receipt of the rents and profits of a mortgaged estate under an old conveyance of the equity of redemption, in trust to sell and pay the mortgage debts and certain other debts long since satisfied ; the redemption of the mortgages was not necessary to the performance of the trust for sale had it subsisted ; it was the mortgagee who took the objection and prevailed.

(b) *Holland v. Baker*, 3 Hare, p. 70 ; the trustees were parties as creditors, but this was held not to be sufficient ; the creditors appeared to be fifty-four in number.

(c) *Wetherell v. Collins*, 3 Mad. 255 ; *Coles v. Forrest*, 10 Beav. 557 ; *Anderson v. Stather*, 2 Coll. 209 ; and see *Redesdale* on Pl. 174-5 ; *Drew v. Harman*, 5 Price, 319, where Chief Baron Richards said, " As a matter of indulgence the *cestuis que trust*, not parties, might, in certain cases, be let in by petition to have their interests ascertained and protected ; " *Whistler v. Webb*, Bunb. 53.

(d) *Yates v. Hambly*, 2 Atk. 237.

(e) *Osborn v. Fallows*, 1 Russ. & M. 743.

(f) *Skipp v. Wyatt*, 1 Cox, 353 ; *King v. Smith*, 6 Hare, 475 ; *Wetherell v. Collins*, 3 Mad. 255 ; *Bartle v. Wilkin*, 8 Sim. p. 238 ; even where the second mortgagee, pending a suit for foreclosure, assigns his interest, the costs occasioned by that assignment were held by Lord Langdale to be chargeable against the mortgaged estate ; but not where the mortgagee so assigning his interest is plaintiff in the suit ; *Coles v. Forrest*, 10 Beav. 556. But the additional costs cannot be charged against the estate, to the prejudice of a subsequent incumbrancer, where the assignment is made by a prior incumbrancer after decree ; *Barry v. Wrey*, 3 Russ. p. 465 ; *Coles v. Forrest*, *ibid.* p. 556 ; and see *Smith v. Chichester*, 2 Dru. & W. 403 ; *Capper v. Terrington*, 1 Coll. 102 ; *Burdon v. Oldaker*, *ibid.* p. 107 ; *Reade v. Sparkes*, 1 Moll. 8 ; *Ex parte Ommaney*, 10 Sim. p. 298. (Mr. Beavan's note) ; v. *infra*, 706 ; and, as to the costs of the mortgagee generally, v. *infra*, Section xi.

The author of the trust has declared that in case of a sale the presence of the parties beneficially interested in the sale shall not be necessary ; but this declaration has no application to a bill of foreclosure filed against the trustees, and the general rule must prevail that all parties interested in the equity of redemption shall be parties to such a suit for foreclosure (a).

The owner of an estate made a mortgage and a further charge to the plaintiff, and afterwards conveyed the equity of redemption to trustees in trust for his daughter and her children. In a bill for foreclosure by the first mortgagee, the trustees were made parties and appeared at the hearing ; but the daughter and her children being out of the jurisdiction (though made parties) did not appear. The Vice-Chancellor Knight Bruce held that the suit could not proceed in their absence, they being the first persons interested in the equity of redemption (b).

Where a marriage settlement contains the usual power to appoint new trustees and one retires ; though a memorandum be indorsed on the deed to that effect, if no new trustee has been appointed and the continuing trustee lend part of the trust money on mortgage the retiring trustee must be a party to a bill for foreclosure, else the mortgagor would not be relieved from the possibility of a new suit being instituted against him (c).

Generally speaking, as has already been observed, the trustee is the party to sue (d), but if the *cestui que trust* of the mortgage money do file a bill seeking to foreclose he must make his trustee a party (e).

If a bill is filed to have the benefit of a charge upon an estate, all persons must be made parties who claim an interest in the charge (f) : and where there are numerous mortgagees of tolls or dues arising from one subject or undertaking, all the mortgagees must sue together, at least all must be parties, in order that there may be but one account (g).

(a) *Calverley v. Phelps*, 6 Mad. 232.

(b) *Anderson v. Stather*, 2 Coll. p. 212; 1x. Jur. p. 806. The Vice-Chancellor, in giving judgment, said, "If none of the parties before the court were to redeem, the parties not before the court might be absolutely foreclosed and lose their rights. The only mode of avoiding that seems to be payment by some person before the court of what is due. Payment could not be made without a transfer of the security. That security may turn out to be no security at all, for the persons first interested in the equity of redemption may be admitted to show that nothing is due. That is the

ground upon which Lord Thurlow, in *Fell v. Brown*, and Sir L. Shadwell, in *Farmer v. Curtis*, *supra*, appear to have acted. I am afraid the cause must stand over." 2 Coll. 212; and see *Browne v. Blount*, 2 Russ. & M. 83, and the cases in the note.

(c) *Adams v. Paynter*, 1 Coll. 533.

(d) *Barker v. Birch*, 1 De G. & Sm. 383; *supra*, p. 698.

(e) *Wood v. Williams*, 4 Mad. 186.

(f) Vice-Chancellor of England, *Newton v. Earl Eymont*, 5 Sim. 137.

(g) *Mellish v. Brooks*, 3 Beav. 22, 27.

Where the mortgagee has mortgaged his mortgage interest, the derivative mortgagee cannot file a bill to foreclose the mortgagor without making the original mortgagee or his representative a party, in order that they may be present at taking the account of what is due on the original mortgage (a); but if the original mortgagee should file a bill to redeem the derivative mortgagee, or the derivative mortgagee should file a bill to foreclose his mortgagor, the original mortgagor would have no interest, and therefore would not be a proper party.

Where the mortgagor assigned his interest in the fund mortgaged to trustees in trust to sell and pay the debt due to the mortgagee, and the residue to the mortgagor, it was held that the trustees were improperly made parties to a bill by the mortgagee to foreclose; the assignment being a mere private arrangement of the mortgagor which he might cancel at pleasure (b).

A person having a partial interest in the equity of redemption cannot file a bill to foreclose, without making all the other persons interested in the equity of redemption parties (c).

The mortgagee's remedy is against the mortgaged estate, he has nothing to do with any adjustment of accounts between the parties who may become successively entitled to the mortgaged premises; therefore the representatives of a deceased tenant for life who ought to have kept down the interest are not in such case necessary parties (d).

On a bill for foreclosure of a mortgage in fee brought by the mortgagee against the heir of the mortgagor, it is not necessary or even, it seems, proper to make the executor a party (e): The executor, said Sir W. Grant, is named in every mortgage deed, (that is, that on payment by the heirs, executors or administrators the estate shall be void) and in every case (f) the personal representative is to pay if there are assets, though the heir is to have the benefit (g); but this is a matter in which the mortgagee ought not to be mixed up: and though the mortgage be created by means of a term it is the same, for with that species of term the personal representatives have nothing to do (h). But if the mortgagee by his bill calls upon the court actively to interfere, not merely to foreclose—as to decree a sale—then the rule that

(a) *Slade v. Rigg*, 3 Hare, 35.

(b) *Hobart v. Abbot*, 2 P. W. 643.

(c) *Henley v. Stone*, 3 Beav. 355.

(d) *Wynne v. Styant*, 2 Phill. 305.

(e) *Duncombe v. Hansley*, mentioned in note (A) to *Knight v. Knight*, 3 P. W. 333; *Bradshaw v. Outram*, 13 Ves. 234; *Cary v. Ash*, 9 March, 1808, Mad. MS., 2 P. and P. 231; *Knight v. Knight*, which Mr. Maddock

cites as *contra*, was a bill for the specific performance of a covenant, which the executor might have performed in part: and *Plunket v. Penon*, 2 Atk. 50, evidently was not a case of a mortgage.

(f) Not however as against specific or pecuniary legatees; v. *supra*; et *infra*, Sect. xii.

(g) *Bradshaw v. Outram*, *ubi sup.*

(h) *Ibid.*

complete justice should be done as between the two estates, the real and the personal (*a*), comes into operation, and the personal representative, if the personal estate is primarily liable, must be made a party (*b*).

If a bill be brought by the heir of the mortgagee to foreclose, the executor ought to be made a party, for the heir of the mortgagee is a trustee for the executor (*c*): so if a bill be brought against the heir of the mortgagee to redeem, the personal representative must be a party, "for if it should fall out upon the account that money should be paid by the mortgagor, that is to be paid to the executor or administrator, and not to the heir (*d*)."¹ The heir need not be a party to a bill by a devisee to redeem (*e*).

Where several persons are entitled to the mortgage money as joint tenants, all must be made parties to a bill for the foreclosure of the mortgage (*f*): a person who becomes entitled to a part of the mortgage money in severalty cannot foreclose a proportionate part of the estate, the other persons interested must be parties (*g*).

Where a mortgage is made to several jointly, though the debt and the security survive at law, yet as in equity the mortgagees are tenants in common, the representatives of any of the deceased mortgagees must be made parties to a bill either for redemption or foreclosure (*h*); and where two or more have mortgaged and one is dead, and the representatives of the deceased mortgagor have any possible interest, they ought to be made parties (*i*).

Where the mortgagee has absolutely assigned the mortgage without the previous authority of the mortgagor, or his declaration that so much is due, the mortgagee is not a necessary party to a bill for redemption; It is enough, said Lord Eldon, to make that man a party who has contracted to stand in the place of the original mortgagee

(*a*) *Knight v. Knight, Plunket v. Penon*, *ubi sup.*

(*b*) *Daniel v. Skipwith*, 2 Bro. 155; *Christophers v. Sparke*, 2 J. & W. p. 229, dict.; *M' Donough v. Shewbridge*, 2 Ball & B. 563.

(*c*) *Freake v. Horseley*, 2 Eq. Ab. p. 77; *Meeker v. Tanton*, 2 Ca. Ch. 29; *Gobe v. Carlisle*, cited *Clerkson v. Bowyer*, 2 Vern. 67; though, as before stated, (*supra*, p. 682.) it was held, in that case, that the heir was only to be a trustee to the extent of the money secured by the mortgage which he had foreclosed, and that he might keep the estate on paying that amount to the executors; and see the decree, Raithby's note; but see the dict. *Winn v. Littleton*, 1 Vern. 4; and *Ascough v. Johnson*, 2 Vern. p. 66: the heir who buys up

incumbrances can only be entitled as against creditors to what he gave for them, *Lancaster v. Evans*, 10 Beav. 166.

(*d*) *Anon.* 2 Freem. 52.

(*e*) *Lewis v. Nangle*, 2 Ves. 431.

(*f*) *Lowe v. Morgan*, 1 Bro. 368.

(*g*) *Palmer v. Lord Carlisle*, 1 Sim. & St. p. 425.

(*h*) *Vickers v. Cowell*, 1 Beav. 529.

(*i*) *Chalié v. Gwynne*, 6 Law J., N. S., 274, Rolls; mortgage by tenant for life (dead), and tenant in tail, they had subsequently sold the estate to the mortgagee, and the contract had not been completed; the representatives of the tenant for life would be entitled to some part of the purchase-money, and were therefore held to be necessary parties.

and all assignees, till the title was got in by himself (a). Where the mortgagee assigns only a part of the benefit of his security he is a necessary party (b).

However minute the interest which a person may have still he must be a party. Sir Francis Vincent having a life interest subject to a term of 1000 years to secure 3000*l.* and interest, demised the estate for a term of 200 years if he should so long live to one Lyde for securing 1900*l.* and interest with a power of sale; the sale was made and the plaintiff became the purchaser, he then filed a bill against the first mortgagee to redeem; it was held that Sir F. Vincent was a necessary party: "The interest of Sir F. Vincent," said the Vice-Chancellor, "may be very small, but it cannot I think be disregarded (c)."

As regards subsequent incumbrancers: where the bill is filed by a first mortgagee to foreclose, it has long been the practice (d) to make all Judgment Creditors intervening between the first mortgagee and the subsequent mortgage parties to the suit; though cases of judgments confessed *pendente lite*, cases of fraud, and cases of parties inconveniently numerous, may exist in such a manner as to form exceptions to the rule: and Judgment Creditors are such parties that they are not within the operation of the 26th Order of 23rd August, 1841, which provides that where no direct relief is sought against a party to a suit, it shall not be necessary for the plaintiff to require such party, not being an infant, to appear and to answer the bill; for their interests are not identical with that of the plaintiff, and in effect direct relief is prayed against them (e).

The principle as affecting judgment creditors being made parties was elaborately discussed by the Lord Chief Justice, the Master of the Rolls, and the Lord Chancellor Sugden, in a late case in Ireland. It was alleged that according to the existing practice there, it was not necessary to bring judgment creditors before the court; of this practice the Lord Chancellor highly disapproved: his Lordship's reasons, though directed against the existing practice in Ireland, are very mate-

(a) *Chambers v. Goldwin*, 9 Ves. 269; Sir J. Leach, in *Norrish v. Marshall*, 5 Mad. 479, puts it on the ground that the mortgagee has no longer any interest.

(b) *Norrish v. Marshall*, *ubi supra*.

(c) *Hunter v. Macklew*, 5 Hare, 242.

(d) In *The Bishop of London v. Bearor*, the court ordered a bill of foreclosure to stand over, to make one judgment creditor a party, but would not determine the general point, whether all incumbrancers should be parties; 3 Ves. p. 314. In *Calverley v. Phelps* and

others, before the Vice-Chancellor, 26 April, 1822, 6 Mad. p. 229, it was said, (though not stated in the Report,) "that *Winchester v. Bearor* was not now the rule of this court, a judgment creditor having no lien on the real estate," (i. e. before execution sued out,) "but only a right to subject it to his debt;" Mad. MS., P. and P. ii. 233: but *quære* as the law now stands whether that reasoning can apply; v. *infra*, *Rollleston v. Morton*.

(e) *Adams v. Paynter*, 1 Coll. p. 532; and see, as to this Order generally, *Calvert*, p. 86.

rial as illustrative of the general principle as affecting incumbrancers generally of every description. The reason, said the Lord Chancellor (*a*), why you bring the judgment creditor before the court, is because he can execute his judgment at law, therefore the avowed object is to bind him, not to benefit him, and it would be unjust to bind him in his absence. When the judgment creditor had only a demand against the equitable estate, the court, said his Lordship, felt it had a power it could exercise more stringently than when his demand attached upon the legal estate, and because he could not attach the estate at all excepting through the medium of this court it said, "We will bind you, though absent;" that also, continued his Lordship, is manifest injustice; he has a right in equity, and how can you deprive him of that right? What right have you to distribute the fund upon which he has a lien, without giving him an opportunity of defending himself? The judgment creditor has an incumbrance, he is therefore entitled to watch the proceedings to see that they are fair, and that the demand sought to be established is a real one; no proper title can be made to a purchaser under such a decree, unless this court is prepared to grant an injunction against all such creditors, which it clearly has no power to do. The court, continued his Lordship, cannot bind parties in their absence, the purchaser is therefore bound by the judgment, and the creditor may proceed upon his judgment at any time. I conclude, therefore, said his Lordship, that even independently of the act (3 & 4 Vict. c. 105, s. 22) (*b*), it is a right if not a duty to bring him before the court. But when you come to the act, it is impossible to argue the question: that which was by the Statute of Westminster a general lien, by this act becomes a specific *charge*—under the act of parliament there is no question but that the judgment, whether on a legal or equitable estate, becomes an *equitable estate*, and then it assumes quite a different character and becomes a specific incumbrance: and his Lordship, though unwillingly in reference to the particular case, held that subsequent judgment creditors were necessary parties (*c*).

(*a*) *Rolleston v. Morton*, 1 Conn. & L. 264; 1 Dru. & W. 171; and see *Henry v. Smith*, 1 Conn. & L. p. 512; and *Gordon v. Horsfall* (case from Jamaica), in the Priv. Co., xi. Jur. 573, b. The general right of the judgment creditor is there put upon this footing, that he has a right to have the legal impediment against his obtaining execution at law, which is created by the mortgage, put out of the way; but the statute 1 Vict. c. 110, gives the judg-

ment creditor here a direct claim to redeem; see the cases cited above in this note.

(*b*) Which corresponds with the English act, 1 & 2 Vict. c. 110, § 13, directing that judgments registered shall operate as a *charge* upon lands; v. *supra*, vol. i. p. 505, note.

(*c*) *Rollestone v. Morton*, 1 Con. & Law. pp. 266-7; 2 Dru. & W. 192-3; the judgment there is a little varied in language.

This much appears to be clear upon the authorities which have been cited, that on a bill to foreclose a mortgage, in order that the plaintiff may obtain a *complete* title under a foreclosure, all persons who have incumbrances on the estate at the time of the commencement of the suit posterior in point of time to the plaintiff's mortgage must be made parties. If the plaintiff should foreclose the mortgagor and such incumbrancers as he has made parties, as it has been held he may, in some cases, though it may appear that there are other incumbrancers (*a*); yet he will be liable to be redeemed by any incumbrancer not a party to that suit, on fair and equitable terms in regard to the expenses he has incurred and interest (*b*), and this whether he had any notice of that incumbrancer's title or not (*c*). Lord Alvanley in noticing the general course of the court, and almost universal practice to insist upon every one having a right to redeem being made a party, stated the principal reason to be the gross injustice that might else result; as the court might compel a mortgagee to reconvey to a mortgagor where it appeared by his own answer he had no right to it, and thus cut out the intervening incumbrancer, and give the mortgagor the legal estate to keep him off with (*d*).

It is now well established as a general rule, that incumbrancers who become such after a bill filed are not necessary parties, they being affected by the doctrine of *lis pendens* (*e*): an alienation pending a suit is void as regards the interests of the other parties (*f*), or, it may perhaps be stated more correctly, the purchaser takes subject to the effect of the suit; and this applies both as regards the

(*a*) *Draper v. Clarendon*, 2 Vern. p. 518. Foreclosing does no mischief in such a case, but if the mortgagor were to redeem and get the legal estate, it might; *v. infra*, note (58).

(*b*) *Cockes v. Sherman*, 2 Freem. 14, 15, 1st and 3rd points; *Lomax v. Hyde*, 2 Vern. 185; *Godfrey v. Chadwell*, 2 Vern. 601.

(*c*) *Morrel v. Westerne*, 2 Vern. 663; and a decree obtained without making parties those whose rights are affected by it, is void as against them; *Giffard v. Hort*, 1 Scho. & L. p. 386; but see *Wrixon v. Vize*, 1 Conn. & L. 303-4, and the cases there cited as to opening the accounts which have been taken; the Lord Chancellor there intimated that he should not follow *Dick v. Butler*, 1 Molloy, 42. The cases on this subject are collected by Mr. Calvert, On Parties, 180-185: and see his observations on this subject, p. 186, *et seq.*

Mr. Daniell, (Practice, i. p. 373,) in reference to *Newton v. Lord Egmont*, 5 Sim. 130, says, "It is the general and almost universal

practice, in suits for establishing charges on estates, to make all persons entitled to incumbrances subsequent to the plaintiff's charge, parties to the suit."

(*d*) Lord Alvanley, *Bishop of Winchester v. Bear*, 3 Ves. p. 316. At the same time his Lordship said, he would not lay down that it was absolutely necessary that all incumbrancers should be parties, as that would arm a man with a shield to avoid foreclosure, it must depend upon the circumstances, *ibid.* 317: and in the late case of *Rolleston v. Morton*, above referred to, 1 Conn. & L. p. 263, Lord Chancellor Sugden expressed the same disinclination.

(*e*) *Garth v. Ward*, 2 Atk. 174; *Bishop of Winchester v. Paine*, 11 Ves. 195; *Quarrel v. Beckford*, 1 Mad. 269, 273.

(*f*) *Walker v. Smalwood*, Amb. 676; *Gaskell v. Durdin*, 1 Ball & B. p. 167; *Moore v. Macnamara*, *ibid.* 187-8.

mortgagor and mortgagee. It is a maxim, said Sir Thomas Plumer, *pendente lite nihil innovetur* (a); and the true interpretation of that rule is, that a conveyance does not vary the rights of the parties in that suit; with regard to them it is as if it had never existed; for suits would be interminable, if one party pending the suit could, by conveying to others, create a necessity for introducing new parties; and though, ordinarily, a decree binds only the parties to the suit, yet he who purchases during the pendency of the suit is bound by the decree that may be made against the person from whom he derives title (b): an assignment, for instance, of the equity of redemption, pending a bill for redemption, puts the assignee upon the same footing as the person from whom he obtained the assignment (c); so, the purchaser of an estate charged with debts, pending a suit by creditors, is bound (d): however in all these cases the purchase, during the pendency of the suit, is not absolutely annulled; the purchaser takes, but subject to the effect of the suit upon the property (e). However, Sir Wm. Grant observed, in *The Bishop of Winchester v. Paine* (f), that if the legal estate were acquired during the pendency of the suit, it might be necessary, in order to obtain it, to have recourse to a new suit (g). The same learned Judge also determined, in the last-cited case, that the suit having abated by the death of the mortgagor, did not render it necessary to make parties those who, when the bill of revivor was filed, were incumbrancers, but were not such when the original bill was filed; and he observed that, if the incumbrancers had acquired their title during an abatement of the suit, there would be a difficulty; though Lord Nottingham seems to have thought they would not be necessary parties. There may be other cases besides that above alluded to of the legal estate having passed, where by reason of an alienation *pendente lite* the suit cannot properly go on without the alienee being made a party by supplemental bill; for instance, where a party has obtained the title deeds, or where he has obtained possession or has received the rents; where it may be proper, and even necessary that an alienee *pendente lite* should be made a party. The Vice-Chancellor Knight Bruce, in conformity with the doctrine above stated, lately laid down that where one of several plaintiffs after the institution of a suit executes an instrument

(a) Co. Litt. 344, b.

(b) *Melcalfe v. Pulvertoft*, 2 Ves. & B. 204-5-6-7; *B. of Winchester v. Paine*, 11 Ves. 197.(c) See case put by Lord Hardwicke, in *Garth v. Ward*, 2 Atk. 175; *sed v. infra*, p. 707, *Solomon v. Solomon*.(d) *Walker v. Smalwood*, Ambl. 676.(e) See *Melcalfe v. Pulvertoft*, 2 Ves. & B. p. 200.

(f) 11 Ves. 195.

(g) See *Redesdale*, Pl., 73, 74; *et v. supra*, p. 699, note (f).

which merely affects that plaintiff's equitable interest, the suit may be heard as if no such assignment had been made, and that those who claim under the assignment must take such course to enforce their rights as they may be advised (*a*); but the Vice-Chancellor of England has since held, in a case where some of the plaintiffs in a suit to administer an estate mortgaged their interests, which were equitable, pending the suit, that the mortgagee ought to be made a party (*b*).

Where the estate mortgaged is limited in strict settlement, it is sufficient to bring the first tenant in tail before the court, as he represents the inheritance, which will be bound by the decree (*c*). If there be no person entitled to an estate of inheritance, the tenant for life being present, the court will act on the inheritance (*d*); contingent limitations and executory devises to persons not in being may in like manner be bound by a decree against a person claiming a vested estate of inheritance; but a person in being claiming under a limitation by way of executory devise not subject to any preceding vested estate of inheritance by which it may be defeated, must be a party to a bill affecting his rights (*e*). If by the birth of any person, or any contingency happening pending the suit, the rights of the parties are varied or new rights come into existence, the persons having such new rights must be brought before the court by supplemental bill (*f*).

Generally speaking, every person who may have to do an act to effectuate the ultimate decree must be a party; thus the trustee in whom the legal estate is vested, and the heir of a mortgagee to whom the mortgaged premises have descended, must be a party to a bill for foreclosure filed by the executor of a mortgagee, for if the estate should be redeemed he would have to convey (*g*): generally speaking, the same principle applies to every person who would be a necessary party to the conveyance, in case of the premises being redeemed (*h*).

Annuitants or other persons whose charges are paramount to the

(*a*) *Eades v. Harris*, 1 Yo. & Coll. C. C. p. 234.

(*b*) *Solomon v. Solomon*, 13 Sim. 516, as to the Costs, *v. sup.* p. 699.

(*c*) *Lloyd v. Johns*, 9 Ves. 65; *Reynoldson v. Perkins*, Amb. 564.

(*d*) See *Giffard v. Hart*, 1 Scho. & L. 407, 408; Calvert, 59: but the rule seems to be limited to the case of where the issue of the tenant for life would be entitled to the inheritance; Calvert, p. 60.

(*e*) And see *Goodess v. Williams*, 2 Yo. &

Coll. C. C. 598.

(*f*) *Redesdale*, Pl., pp. 173-4.

(*g*) *Wood v. Williams*, 4 Mad. p. 186; bill filed by *cestui que trust* of a mortgage: *Scott v. Nicoll*, 3 Russ. 476. On a bill to redeem, the person having the legal estate must be before the court, for otherwise the mortgagor cannot have a complete re-conveyance; *Wood v. Williams*, before Vice-Chancellor Leach, April, 1819, Mad. MS., Fr. and P. i. 236.

(*h*) See *Adams v. Paynter*, 1 Coll. 532.

mortgage are not proper parties to a bill for sale or foreclosure of the mortgaged estate; the estate whether foreclosed or sold will still be liable to their charges (*a*).

A second mortgagee may file a bill against the mortgagor and a third mortgagee for foreclosure, leaving out the first; such bills are supported on the ground of convenience (*b*), and because the second mortgagee, if he should foreclose, only puts himself in the condition of the mortgagor; and even if the third mortgagee should pay off the second and redeem, or if the mortgagor should redeem both, the first mortgagee will be left in the same condition as before, indeed his case will be simplified (*c*).

A bill may be sustained for payment out of a surplus coming to a mortgagor, without making the prior incumbrancers parties, if the decree sought will leave the interests of the prior incumbrancers wholly untouched (*d*); but this can only apply where the claims and priorities of such incumbrancers have been definitively ascertained, and there are no accounts to be taken in which they are interested (*e*).

The title of a mortgagee cannot be impeached in the absence of his mortgagor (*f*).

A very useful order was issued by Lord Cottenham (39th Order, 1841), under which the cause may be set down to be heard simply on the question as to the want of parties; but it has been found necessary in many cases to leave the question open to be discussed at the hearing, when the aspect of the case may be entirely altered, if the parties shall think fit to do so (*g*).

By another order (the 40th) if the defendant shall object at the hearing that the suit is defective for want of parties, not having taken the objection by plea or answer, the court is at liberty to make a decree saving the rights of the absent parties (*h*).

(*a*) *Delabere v. Norwood*, Lord Colchester's MS., 3 Swanst. p. 144; it is there said that if the annuities in that case had been subsequent to the mortgage, the annuitants would not have been necessary parties; but if not they could not of course have been foreclosed, and whoever might have redeemed they would have had a right to redeem in respect of their annuities; so that it is at least convenient that they should be parties.

(*b*) Vice-Chancellor of England, *Rose v. Page*, 2 Sim. 472.

(*c*) See *Richards v. Cooper*, 5 Beav. 304.

(*d*) *Lewis v. Lord Zouche*, 2 Sim. 392.

(*e*) *Cocker v. Lord Eymont*, 6 Sim. p. 316; and see *Newton v. Lord Eymont*, 4 Sim. 574,

and 5 Sim. 130.

(*f*) *Wright v. Wood*, Vice-Chancellor K. Bruce, xii. Jur. 597.

(*g*) *Welham v. Welham*, 10 Beav. p. 248; and see *Greenwood v. Rothwell*, 7 Beav. 279; and see, as to this order, *Lovell v. Andrew*, 15 Sim. 581.

(*h*) See *Feltham v. Clark*, 1 De G. & S. 307. and *Faulkner v. Daniel*, 3 Hare, 199. As to what charge in a bill of a claim on the part of a defendant as mortgagee, or otherwise, where the claim is negated by the bill, will sustain the bill against him as a proper party on demurrer by him, see the late cases of *Dalton v. Hayter*, 7 Beav. p. 313; and *Hodgson v. Espinasse*, 10 Beav. p. 473.

SECTION VI.—*Time as a Bar—Statute of Limitations.*

Long Adverse Enjoyment and the Omission for a great Length of Time to assert apparently Just Claims, have an important effect in Equity.

Doctrine of the Court of Chancery in respect of Adverse Possession before the Statute 4 & 5 Will. IV. c. 27.

Statute 3 & 4 Will. IV. c. 27, § 28, § 40, and § 42.

Retrospective Operation of the Act.

Where the Mortgagee in Possession acquires a Life Interest in the Property mortgaged.

Time of filing the Bill to be looked to, not the Service of the Subpœna.

Effect of making a Person a Party by Amendment.

What Section of the Act applies to a Bill for Foreclosure.

Dearman v. Wyche, before Vice-Chancellor of England.

Wrixon v. Vize, before Lord Chancellor Sugden.

Construction of Acts 3 & 4 Will. IV. c. 27, and 1 Vict. c. 28, as to Right to demand Interest.

Where there is a Trust subsisting.

Length of Time as a Bar must be relied on by Pleading.

Where Time may be taken Advantage of by Demurrer.

Additional Notes.

No. I.—As to Provisions in the Stat. 3 & 4 Will. IV. c. 27, and 3 & 4 Will. IV. c. 42, for Persons under Disabilities.

No. II.—Effect of the Stat. 1 Vict. c. 28.

No. III.—Effect of the Stat. 3 & 4 Will. IV. c. 27, where the Representation is Dormant.

A LONG adverse enjoyment, as we have had frequent occasion to notice, and an omission for a great length of time, unexplained, to assert an apparently just claim (*a*), have a most important influence in barring equitable rights. Before the passing of the act to be presently mentioned, it had been established that this court ought not to relieve after an adverse possession of 20 years, and the court regarded more the antiquity of possession by the defendant than the novel accruer of title to the plaintiff (*b*): that doctrine had important consequences

(*a*) See *Pattison v. Hawkesworth*, 10 Beav. p. 377. The general doctrine as to the bar from length of time, and the effect of the recent statutes, as affecting trusts, has been fully considered by Mr. Lewin, ch. xxv. p. 608, *et seq.*: and by Mr. Hill, p. 248, *et seq.*

(*b*) *Corbett v. Barker*, 1 Anst. 138; *Ravald v. Russell*, 1 You. 9; *Collard v. Hare*, 2 Russ.

& M. 675, 683; *Cholmondeley v. Clinton*, 4 Bli. N. S. 1: see the Vice-Chancellor of England's exposition of the doctrine established by these cases in *Bennett v. Colley*, 5 Sim. p. 191, affirmed, on appeal; and *Ashton v. Milne*, 6 Sim. p. 378; and see *Searle v. Colt*, 1 Yo. & Coll. C. C. 51; and *Jarm. Mortgage*, by Sweet, p. 383.

on the general doctrine of the court, as regards the equitable right to Redeem and the right to Foreclose. "The new Statute of Limitations (3 & 4 Will. IV. c. 27), which places equitable rights upon the same footing with legal ones, and provides expressly within what period a mortgage may be redeemed, has rendered some important decisions in the Court of Chancery and in the House of Lords, upon the effect of adverse possession, as between equitable claimants, of little value" (a): but it may be useful still to refer to some of the leading authorities.

It has been said to be a rule, "once a mortgage and always a mortgage (b)"; but, by the general doctrines of the Court of Chancery, although if a mortgagee enters in his character of mortgagee, or by virtue of his mortgage title alone, he is for the period of twenty years liable to account if called upon, and liable to become trustee for the mortgagor if payment be tendered to him; yet holding himself ready to answer these liabilities he owes no other duty: he may, if permitted, hold on for twenty years without accounting or admitting his mortgage title, and if he does so his title becomes as absolute in equity as it was previously at law: the mortgagor having for twenty years neglected to tender payment, or to procure an account or admission, is held to have lost his right of redemption; so that the mortgagee in this case has only to look at what was, at first, his mortgage title, and to the length of possession without account or admission (c).

If however there had been acknowledgments within twenty years that the estate was held in mortgage, and accounts had been kept, a possession even of thirty (d), forty (e), or fifty years (f), would not have barred a redemption; the time began to run from the last of the admissions, and if the mortgagor and those claiming under him had continued to pay interest, or what was equivalent to it, length of time was in such case no bar to redemption of however ancient date the mortgage might be (g). It was also held that if a man took notice by a

(a) Sugd. Law of Prop. 579. Sir Edward Sugden has, in that and the following pages, shortly stated the effect of the important case of *Cholmondeley v. Clinton*, as to this point: this case is stated, as to the point of Construction which it involves, *supra*, vol. i. pp. 550, 553. The decisions on the statute are so numerous, both at law and in equity, that it is impossible to do more than refer to the most material of those which may be applicable to the present subject.

(b) *Newcomb v. Bonham*, 1 Vernon, p. 8; *Howard v. Harris*, 1 Vern. p. 33; *James v. Oades*, 2 Vern. 402; *Grounds and Rudiments*, 246.

(c) Lord Langdale, *Raffety v. King*, 1 Keen, 616-17.

(d) 2 Atk. 333; and see *Hodley v. Healey*, 6 Mad. 181; *Rayner v. Oastler*, *ibid.* p. 274; *Cowne v. Douglas*, 1 M'Clel. & Y. Ex. R. 321.

(e) *Smart v. Hunt*, 4 Ves. 478, in note.

(f) See *Lake v. Thomas*, 3 Ves. p. 17, and what is said in *Edsell v. Buchanan*, 2 Ves. J. 84; *S. C.* 4 Bro. C. C. 256; and *Proctor v. Cowper*, 2 Vern. p. 377; *S. C.* Pr. Ch. p. 116; *Hodley v. Healey*, 6 Mad. 184; Sir J. Leach there drew a distinction as to acknowledgments made after the twenty years had elapsed.

(g) 1 P. Wms. 271; *Anon.* 2 Atk. p. 333; *Yates v. Hambly*, 2 Atk. 363.

will, or any other deliberate act (*a*), an answer for instance to a bill in Chancery (*b*), or a recital in a deed (*c*), that he was a mortgagee, acknowledgments of that nature would have taken the case out of the rule that a mortgagor should not redeem after twenty years' possession by the mortgagee; and that, although the acknowledgment were in a deed (a surrender, for instance, of a copyhold subject to the mortgage,) to which neither the mortgagor or any person claiming under him was a party (*d*): but the mere demand of an account was not alone sufficient to prevent the effect of such a length of time (*e*); though the settlement of an account of what was due for principal and interest was (*f*), unless it were by a person not lawfully authorized (*g*). Even parol evidence of acknowledgments might be adduced to show that the mortgage was subsisting, but such evidence was required to be clear and unequivocal (*h*). What the effect would be of mortgage accounts kept by the mortgagee, without any communication on the subject with the mortgagor, had not been decided (*i*). The time began to run from the time the mortgagee entered into possession, and continued to run against all persons claiming under the mortgagor (*k*); but the possession must have been of the whole of the estate, not of a part only (*l*).

The rule acted upon by the court, it may be observed, was not founded on a presumption of an absolute conveyance or release, but was a positive rule introduced for the sake of quieting titles after so long a neglect to disturb them, analogous to the bar created by the statutes of limitations at law (*m*).

By the statute 3 & 4 Will. IV. c. 27, s. 28, it is enacted, that when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the

(*a*) *Perry v. Marston*, 2 Bro. C. C. p. 399. This decree was afterwards reversed, but on another point; see *Reeks v. Postlethwaite*, G. Coop. 164; see also *Anon.* 3 Atk. 314; *Whiting v. White*, G. Coop. 4.

(*b*) *Proctor v. Oates*, 2 Atk. 140.

(*c*) 2 Bro. C. C. p. 399; and see *Carew v. Johnston*, 2 Sch. & Lefr. 295; *Smart v. Hunt*, 4 Ves. 478, n.; *Hardy v. Reeves*, 4 Ves. 466; *S. C.* on re-hearing, 5 Ves. 426.

(*d*) *Hansard v. Hardy*, 18 Ves. 455; and see *Hardy v. Reeves*, 4 Ves. 466; *Daniell v. Golby*, before Vice-Chancellor Leach, 27 Feb. 1818, MS., Mad. Pr. and P. i. p. 654; and see *Price v. Copner*, 1 Sim. & St. p. 347; *S. C.*, stated 6 Sim. 378.

(*e*) *Hodle v. Healey*, 1 Ves. & Bea. 540.

(*f*) *Anon.* 2 Atk. 333.

(*g*) *Barron v. Martin*, G. Coop. 192.

(*h*) See *Whiting v. White*, 2 Cox, p. 290; *S. C.* G. Coop. p. 6; *Reeks v. Postlethwaite*, Coop. 171; *Barron v. Martin*, *ibid.* 192; and the other cases, Jarm. Mortgages, by Sweet, p. 385.

(*i*) *Per* Lord Eldon, in *Barron v. Martin*, 19 Ves. 333.

(*k*) *Ashton v. Milne*, 6 Sim. pp. 369, 378; *Raffety v. King*, 1 Keen, p. 610.

(*l*) *Burke v. Lynch*, 2 Ball & B. 432.

(*m*) *Corbett v. Baker*, 1 Anst. 138; and see 3 Anst. p. 759; *Belch v. Harvey*, Mad. MS., P. and P. i. 654; *Grenfell v. Girdlestone*, 2 Yo. & Coll. 662, 679, 680, 682; and see Jarm. Convey. by Sweet, 500; and Lewin on Trusts, 620. As to the Presumption of actual Payment, or that the debt was never due arising from length of time, see *Christophers v. Sparke*, 2 Jac. & W. 223, before Sir Thos. Plumer.

mortgagor or any person claiming through him shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the mean time an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given *to the mortgagor*, or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage (a).

By the 40th section of the same act it is enacted, that after the said 31st day of December, 1833, no action or suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of

(a) The general rule, it will be remembered, is that a mortgage cannot be redeemed in part, *supra*, p. 666.

any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given (*a*).

The 42nd section of the act limits the mortgagee's right to recover the arrears of interest to six years next after the time when it accrued or an acknowledgment in writing to the party entitled or his agent (*b*); but it is provided that where a prior mortgagee has been in possession within one year next before an action or suit by a subsequent incumbrancer, he may recover the whole amount of interest which accrued during the time of such possession.

On a bill for redemption, it appeared that in 1816 the mortgagee entered into possession: the mortgagee in 1827 assigned the mortgaged premises to one Finden, subject to the equity of redemption, an acknowledgment which would have kept alive the right to redeem before the statute. In 1833 the Statute of Limitations was passed, enacting, as will have been observed, that the acknowledgment must be to the mortgagor or his agent (*c*); and none such had been made within twenty years before the bill was filed, namely, 1845; the statutable term of twenty years expired in 1836; the Vice-Chancellor Wigram held that the right to redeem was barred (*d*).

Where a mortgagee in possession becomes entitled to the interest of the tenant for life, by purchase or otherwise, his possession is not

(*a*) The 40th section applies equally where a judgment is sought to be enforced against the personal estate or against the land, *Watson v. Birch*, 15 Sim. 523, 524, 529. A reference in a suit to which the claimant is not a party, at the instance of an admitted incumbrancer, to inquire who were incumbrancers on the estate other than the petitioner, does not prevent the statute from running against the claimant who is not a party; *ibid*. As to acknowledgments by the agent of the party to be charged, see *Hyde v. Johnson*, 3 Scott, 289, on the stat. 9 Geo. IV. c. 14; but see the distinction taken by the Vice-Chancellor of England between that stat. and the stat. 3 & 4 Will. IV. c. 27,

Lord St. John v. Boughton, 9 Sim. 225, where his Honour held that an acknowledgment by the agent of a trustee who was liable to pay, was sufficient under that statute; the letter was signed "for" the trustee. Sir E. Sugden, V. and P. p. 637, note (*y*), has collected the cases on this subject.

(*b*) But *v. infra*, p. 716.

(*c*) *V. supra*, p. 712; see *Lucas v. Dennison*, 13 Sim. p. 584. In *Trulock v. Robey*, 12 Sim. 402, a letter written to the grandfather of an infant was held to be sufficient, he being treated as agent in the letter; see pp. 406-7.

(*d*) *Batchelor v. Middleton*, 6 Hare, 84.

adverse; it is to be assumed that he keeps down the interest, which every tenant for life as between himself and the remainderman is bound to do (*a*), so that time does not run against the remainderman during the continuance of the tenancy for life (*b*); and the same rule applies where the mortgagee is tenant in common with others of the mortgaged estate (*c*).

The time of suing dates from the filing of a bill, not the service of a subpoena, unless perhaps under special circumstances (*d*). As regards the effect of making a person a party by amendment to a suit already existing, it may be observed, that Lord Cottenham intimated an opinion that a defendant who was not made a party until after the prescribed term, might claim the benefit of the 3rd section of the statute, 2 & 3 Will. IV. c. 100, (which provides that that act shall not prejudice any person against whom proceedings had not been commenced,) although the suit had been commenced against the other parties within the prescribed time (*e*).

The question whether the right of redemption is barred or not, as Mr. Jarman has observed, is very important in this respect, that if the right is extinguished, the property, if the mortgage be in fee, becomes the *real* estate of the mortgagee and passes to his devisee or heir; if not, it remains part of his personal estate (*f*).

In a late case the Vice-Chancellor of England stated his opinion to be that, although it has been said that a bill of foreclosure only seeks the exclusion of an equity, yet it is in substance a suit for the recovery of the money secured by the mortgage, and that it is therefore within the operation of the 40th section of the Statute of Limitations, 27 Will. IV. c. 27 (*g*). In *Henry v. Smith*, 1842 (*h*), Lord C.

(*a*) *Lord Penrhyn v. Hughes*, 5 Ves. 99; *Hayes v. Hayes*, 1 Ch. Ca. 223; but tenant in tail in possession, of full age, is not, *Burges v. Mawbey*, T. & R. 107; Jarman, Mortgage, by Sweet, 373-4.

(*b*) *Corbett v. Barker*, 3 Anst. p. 755; *Brocklehurst v. Jessop*, 7 Sim. 438; *Raffety v. King*, 1 Keen, p. 617, and *Ravald v. Russell*, there referred to; and see *Burrell v. Lord Egremont*, 7 Beav. 205, 234-5-6-7; and *Hyde v. Dallaway*, 2 Hare, 530.

(*c*) *Wynne v. Styan*, 2 Phill. 303-6.

(*d*) *Coppin v. Gray*, 1 Yo. & Coll. C. C. 208; *Morris v. Ellis*, 7 Jur. 413; and see *Forster v. Thompson*, 2 Conn. & L. 568, case of a bill of revivor.

(*e*) *Plowden v. Thorpe*, 7 Cl. & Fin. 137, 164; West, 62.

(*f*) See Jarman, Mortgage, by Sweet, 385.

(*g*) *Dearman v. Wyche*, 9 Sim. 570; on a

plea of the statute: the Vice-Chancellor added, "If the decision in *Doe v. Williams*, 5 Ad. & Ell. 291, as to adverse possession, be correct, and I confess it appears to me to be so, there is no commensurate restriction upon a corresponding suit for the recovery of the land;" but see *Wrixon v. Vize*, 2 Conn. & L. p. 150, *infra*. *Doe v. Williams* turned on the construction of the 2nd, 3rd, 14th and 15th sections of the act 3 & 4 Will. IV. c. 27, and the statute 1 Vict. c. 28, was passed, as before noticed, in consequence of this decision, under which it became doubtful whether a mortgagee might not be barred, though interest had been paid to him during the whole time; *per* Vice-Chancellor Wigram, 2 Hare, 332: the act had further to be amended in respect of other oversights; see *Du Vigier v. Lee*, 2 Hare, 332, 333; and 3 Dru. & W. 117.

(*h*) *Henry v. Smith*, 1 Conn. & L. 514; 2

Sugden incidentally said he did not find any objection to this decision of the Vice-Chancellor of England, and Sir J. Wigram also appears to have approved it (a). However, on the subject being afterwards brought before Lord C. Sugden, in *Wrixon v. Vize* (b), his Lordship, on reconsideration, altered his opinion. "The 40th section," said his Lordship, "is confined to actions and suits to recover money secured by any mortgage, judgment, lien, or legacy; and the terms of that section may render it necessary to distinguish the cases within the early sections, and those subject to this; even where the 15th section has no operation. Now it is settled, that a mortgagee of the legal estate may recover the land under the 2nd section, although the right to recover the money falls within the 40th section. Why should not the same distinct rights belong to a mortgagee in equity? Why may he not, for example, file a bill of foreclosure in equity, to obtain the estate, discharged of all equity of redemption, or pursue his remedies at law or in equity for the money upon his bond or covenant. In *Dearman v. Wyche* (c), with which, when I had occasion to refer to it incidentally (d), I was inclined to concur, the Vice-Chancellor held, that a bill of foreclosure fell within the 40th section, for it is in substance a suit in equity for recovery of the money. It is, the court said, a suit to recover money. But, with great respect I say it, I cannot, upon consideration, take this view of the statute. I think that the statute provides a remedy for the recovery of the estate, and also a remedy for the recovery of the money; clearly so, when both are pursued, or one is pursued, at law, and equally so, I think, when both the remedies are enforced, or only one of them is enforced, in equity. A foreclosure suit may lead to the payment of the money; but this is optional with the defendant: it cannot be enforced against him. The plaintiff's right is simply to foreclose; but he can only accomplish that upon a previous condition. The right of the defendant to pay the money, whilst the only right of the plaintiff is to the estate discharged of the equity, can hardly bring the case within the 40th section, which applies strictly to an action or suit to recover the money secured by any mortgage. This right at law cannot be confounded with the right to recover the estate; why should it in equity? It cannot, I think, be said, that the suit is not to recover the land, as it is already vested in him, for this expression would be strictly accurate, where

Dru. & W. p. 387: the question in that case was in regard to the recovery of interest on judgments.

(a) See *Du Vigier v. Lee*, 2 Hare, p. 334; but see also p. 336, *ibid*.

(b) 2 Conn. & L. 138; 3 D. & W. pp. 119, 120.

(c) 9 Sim. 570.

(d) *Henry v. Smith*, 2 Dru. & W. p. 387.

the mortgage is of the equitable estate; and where the mortgage is a legal one, yet the suit is, in effect, to recover or obtain the equity of redemption, which is, in the view of equity, an actual estate." His Lordship, in the case before him, held that the right to file a bill to foreclose, whether the mortgage be legal or equitable, falls within the 24th section of the 3 & 4 Will. IV. c. 27, and the 7 Will. IV. & 1 Vict. c. 28, and that the time is governed by the legal right of the party to bring an action, or if he have not the legal estate, by the right he would have had if his estate had been a legal instead of an equitable one (a).

The Vice-Chancellor Wigram, on the construction of the acts 3 & 4 Will. IV. c. 27, § 42, and 3 & 4 Will. IV. c. 42, § 3, has held that a mortgagee of land whose debt is secured by a bond or covenant is entitled in a foreclosure suit to the full arrears of interest for twenty years, and is not confined to six years' interest only (b). In *Berrington v. Evans* (c), before Lord Lyndhurst as Lord Chief Baron, the point was whether a bill filed by one creditor in behalf of others prevented the statute for the limitation of actions, 3 & 4 Will. IV. c. 27, § 40, from running against a creditor who had let twenty years elapse without bringing in his claim; it was decided that the case was within the statute, but Sir E. Sugden appears to doubt the correctness of this decision (d). The receipt of the rents by an equitable mortgagee is *prima facie* a payment of principal or interest, so as to take the case out of the operation of the statute 9 Geo. IV. c. 14, which requires that every acknowledgment, in order to have the effect of a new or continuing contract to be enforced by action of debt or on the case, shall be in writing (e).

The appointment of a Receiver does not prevent the bar under the statute *against* a stranger, but the appointment of a receiver prevents, at least in this court, time for running *in favour* of a stranger to the suit: the possession of the court by its receiver is the possession of the suitor, and time cannot run against a person in possession (f).

(a) 3 Dru. & W. 119; but see *Du Vigier v. Lee*, additional note, No. 1. The case of *Wrixon v. Vize*, 2 Conn. & L. 138, and 3 Dru. & W. 104, and the case of *De Vigier v. Lee*, 2 Hare, p. 331, should be referred to by the practitioner; they contain ample commentaries on the statute 3 & 4 Will. IV. c. 27, and the authorities.

(b) *Du Vigier v. Lee*, 2 Hare, 326, 337-8-9; *et v. supra*.

(c) 1 Yo. & Coll. p. 438; and see *Watson*

v. Birch, *supra*. *Sterndale v. Hankinson*, 1 Sim. 393, was decided before the statute, consequently when the court had a discretion to apply the bar from length of time or not; 1 Yo. & Coll. 439.

(d) V. and P. p. 637; and see *Wrixon v. Vize*, 3 Dru. & W. 118.

(e) *Brocklehurst v. Jessop*, 7 Sim. 442.

(f) Lord Chancellor Sugden, *Harrison v. Duignan*, 2 Dru. & W. 295, 301-2: that was a case of an infant; the Master had found that

The late case of *Norman v. Stiby* (a), may perhaps not improperly be here introduced. One Parsons pretending to be seised in fee, sold and conveyed an estate to one Young for 5105*l.*; Mrs. Davidge lent him 5000*l.* of the purchase money, which was secured to her by a demise of the estate: it turned out that Parsons was tenant for life only; he died in 1808, and Young was ousted in 1809; he claimed the 5105*l.* in a suit for the administration of Parsons' estate (*Cox v. King*), and after great delay (viz. in 1845), it was allowed to him: in 1846 the persons claiming as residuary legatees under Mrs. Davidge, who had died in 1816, filed a bill against the defendants, who were representatives of both Young and Mrs. Davidge, praying that 5000*l.* of the money recovered in the suit of *Cox v. King*, might be applied in payment of the 5000*l.* advanced by Mrs. Davidge, and that it might be declared that it formed a lien on the money so recovered, or that the whole might be paid out of the estate of Young. The defendants demurred, relying on the Statute of Limitations; the plaintiffs insisted that as the claim of Young was founded on the loss of Mrs. Davidge's money, they had a right to have the money recovered substituted for the estate lost, and that it had been the duty of Young's executors to recover it for that purpose. Lord Langdale, though not deciding the point, yet was so strongly inclined to think that it might be made out at the hearing, that he overruled the demurrer. Where an estate was conveyed in trust to sell, the proceeds to be applied first in payment of a debt which was agreed to have priority, then in discharge of a mortgage debt of the plaintiff who had a covenant for payment, it was held that until the completion of the sales the statute 3 & 4 Will. IV. c. 42, § 3, did not begin to run as against the covenant (b).

Length of time must be pleaded or relied upon by demurrer or by answer (c). In order that advantage may be taken of length of time by demurrer, the time from which the possession of the mortgagee began to run must appear with reasonable certainty: in a bill to redeem a mortgage, 25 years old, it was alleged that the mortgagee entered shortly after the mortgage was made; it was held by the Vice-Chancellor of England, that it could not be assumed on this statement that the mortgagee had entered within the first five years (d).

the property of the infant was subject to the mortgage, but that was not allowed to alter the rights of the minor to insist on the statute; and see *Wrixon v. Vize*, 3 Dru. & W. 123.

(a) 9 Beav. 560.

(b) *Bennett v. Cooper*, 9 Beav. 257; the leading cases at law as to admissions of the debt are cited, *ibid.* p. 255.

(c) *Harrison v. Borwell*, 10 Sim. 382.

(d) *Baker v. Wetton*, 14 Sim. 426, distinguishing that case from *Vernon v. Vernon*, 2 My. & Cr. 145; on the subject of taking advantage of length of time by demurrer, according to the general rules of the court, independently of the statute, see Redesd. Pl. 212, and the cases in the note (c).

ADDITIONAL NOTE.—No. I.

Provision for Persons under Disabilities by Statute of Limitations, 3 & 4 Will. IV. c. 27, and 3 & 4 Will. IV. c. 42, (Act for the Limitation of Actions on Specialties, &c.)

“By the act 3 & 4 Will. IV. c. 27, no provision, or at least no adequate provision,” said the Vice-Chancellor Wigram, in *Du Vigier v. Lee*, 2 Hare, 333, “is made for the interest of persons under disabilities so far as the interest of such persons may be affected by some of the clauses of that act. The interests of such persons, if adequately protected at all, are so by force of the 4th, 5th, and 7th sections of the 3 & 4 Will. IV. c. 42.” Those sections are as follow:—

“IV. And be it further enacted, that if any person or persons that is or are or shall be entitled to any such action or suit, or to such *scire facias*, is or are or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, feme covert, *non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discover, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this act, have done; and that if any person or persons against whom there shall be any such cause of action is or are or shall be, at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond the seas.

“V. Provided always, that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid, or in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff or plaintiffs in any such action, on any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute.

“VII. And be it further enacted, that no part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any Islands adjacent to any of them, being part of the dominions of his Majesty, shall be deemed to be beyond the seas within the meaning of this act, or of the act passed in the twenty-first year of the reign of King James the First, intituled ‘An Act for Limitation of Actions, and for avoiding of Suits in Law.’”

It was in the same case, namely, *Du Vigier v. Lee*, 2 Hare, 335 (1843), that the Vice-Chancellor Wigram held that mortgages are charges within the meaning of the 42nd section of the stat. 3 & 4 Will. IV. c. 27, *v. supra*, p. 716, and that he must treat

a bill for foreclosure as a suit to recover money charged upon land within the meaning of the same section of the act; and that if the plaintiff had no bond or other specialty for securing the payment of his debt—if he had no security for his principal and interest other than a charge upon the land—the consideration of the case before him might possibly have ended in a declaration that the mortgage was redeemable upon the payment of the principal and six years' interest; and that equitable mortgages were within the operation of the 42nd section of the act 3 & 4 Will. IV. c. 27; and see *Henry v. Smith*, 1 Conn. & L. 510, *et seq.*

ADDITIONAL NOTE.—No. II.

Effect of the Stat. 1 Vict. c. 28.

Doubts having been entertained whether the statute 3 & 4 Will. IV. c. 27, § 1, had not the effect of barring the mortgagee in every case, after the lapse of twenty years from the day of default (*v. supra*, p. 714), the statute 7 Will. IV. & 1 Vict. c. 28, was passed to remove them. By that act, after reciting the former statute, and the doubts respecting its effect, it is enacted, "that it shall and may be lawful for any person entitled to and claiming under any mortgage of land, being land within the definition contained in the first section of the said act, to make an entry, or bring an action at law, or suit in equity, to recover such land, at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, any thing in the said act notwithstanding."—See Jarman, Mortgage, by Sweet, p. 386, and *Brocklehurst v. Jessop*, 7 Sim. 438, there cited.

ADDITIONAL NOTE.—No. III.

Effect of Stat. 3 & 4 Will. IV. in cases where the Representation is dormant.

By the recent statute, 3 & 4 Will. IV. c. 27, time runs in every instance during the dormancy of the representation, for it is enacted, sect. 6, "that for the purposes of that act, an administrator claiming the estate or interest of the deceased person, of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration."—See Jarman, Mortgage, by Sweet, p. 387.

SECTION VII.—*Doctrine of Tacking one Security or Debt to another—
and of the Priorities of Incumbrances, and what Circumstances will
affect the natural Order of their Priorities.*

When further Sums advanced by the Mortgagor to the Mortgagee.

Principle on which the Right to Tack is founded in such case.

Under old Law Prior Judgment Creditor could not tack.

Provisions of 2 Vict. c. 11, as to Judgments, &c. (note).

Principle does not apply to case where the Security does not and cannot affect the Land.

But Bond Debt may be tacked against Heir or Devisee—Principle of the Distinction.

Effect of Stat. 3 & 4 Will. IV. c. 104, as to Copyholds.

Where Heir or Devisee takes subject to Payment of Debts.

Bond may be tacked against Executor.

Tacking not permitted as against Creditors.

Tacking where the Mortgagee holds two Mortgages from the same Person.

Priorities as between several Incumbrancers, Effect on by means of Tacking and otherwise.

The Advantages of having a Better Equity.

What is a Better Equity.

Acts of Omission as affecting this Question.

Case of Bugden v. Bignold, before Vice-Chancellor K. Bruce.

Right of Tacking by acquiring the Legal Estate.

Mazims on which such Right to Tack is founded.

Process by which Right to Tack is effected.

General Requisites to enable a Person to tack.

Illustrations.

Where first Mortgagee has made further Advances.

Requisite that the Advance should have been made on the Credit of the Land.

Subsequent Mortgagee buying in first Incumbrance.

Pendente Lite.

After Decree.

Emplimentation of the Rule that the Money must have been advanced on the Credit of the Land in these cases.

Lacey v. Ingle, before Lord Cottenham.

When Purchaser of Equity of Redemption bound to pay off a Judgment.

Extinction and Merger of Incumbrances.

Mortgagor or Purchaser of Equity of Redemption paying off first Mortgage.

Principles by which the Court of Chancery is governed as to cases of Merger.

Mortgage paid off by Tenant for Life.

By Tenant in Tail.

Cancellation and Release of Mortgage.

Additional Notes.

No. I.—*Moore v. Frere*, 8 Price.—*Effect of Covenant by Trustee to stand possessed of Legal Estate as regards Priorities.*

No. II.—*Ingram v. Pelham*, before Lord Hardwicke.

No. III.—*Judgment of Lord Hardwicke in Wortley v. Birkhead.*

No. IV.—*March v. Lee*.—*Of purchasing in Securities by a subsequent Mortgagee.*

WHEN the mortgagor or those claiming under him come to redeem it frequently happens that some person who is sought to be redeemed claims to be paid, not only what is due on his original mortgage, but some other debt, that is, to Tack one security to another; this may also happen on a bill to foreclose; and sometimes on a bill for the administration of the assets of a deceased person: and where there are several persons claiming in succession incumbrances on the estate mortgaged, one of the mortgagees may claim a right to tack as against the others; or he may by reason of his having obtained the legal estate, or for some other reason, seek to have a priority, so as to disturb the natural order of the securities, which is according to their dates: so that the court frequently has to settle the priorities between the different claimants, and to determine in what order they are severally to redeem or to be foreclosed, or in what order they are to be paid off. It is proposed now to consider the general doctrines applicable to these subjects: the right to tack as against the mortgagor, and the right as between the incumbrancers themselves, depend on somewhat different principles, and must therefore be separately considered.

When additional sums are lent by the person who obtained a mortgage for the first advance, the right of tacking depends upon the principle which has often been adverted to, namely, "He who would have equity must do equity" (a). If therefore the mortgagee has lent a further sum to his mortgagor, and it is secured to him by a mortgage or charge upon the estate, or by a statute (b) judgment or recognizance, all of which though not actual *liens* upon the estate, by complying with certain requisites may be made such, the Court of Chancery will not allow the mortgagor to redeem the mortgaged property, against the will of the mortgagee, by payment of what is due on the first mortgage only, but will require the mortgagor to pay all that is due to the mortgagee in respect of the further sums so secured (c). The assign-

(a) *Supra*, vol. i. p. 422; *Demandray v. Metcalf*, Pr. Ch. 420, and 1 Eq. Abr. 324.

(b) *Matthews v. Cartwright*, 2 Atk. 347; the main question in that case relates to the next division of the subject.

(c) And that against a subsequent mort-

gagee also if the mortgagee had no notice of the subsequent incumbrance when he made the further advance, *v. infra*. The reason given is because it is to be presumed that the mortgagor lent his money upon the statute or judgment, as knowing he had a hold on the

nees of the mortgagor by deed generally stand in this respect in the same situation as the mortgagor; and under the old law, though no execution had issued, the mortgagee might tack his judgment against the assignees in bankruptcy; for the judgment, it was held, was incorporated with the mortgage (*a*); now however judgments are of no avail against creditors, unless they be registered (*b*). A mere parol agreement, to secure the further advance on the land, is not sufficient (*c*): such a contract cannot affect the land by reason of the Statute of Frauds.

But though a prior mortgagee might tack a subsequent judgment to the mortgage, it was held, under the old law, that a prior judgment creditor obtaining from the mortgagor, or getting in a subsequent

land by the mortgage, and in that confidence ventured a further sum on a security which, though it passed no present interest in the land, yet must be admitted to be a lien thereon; 4th resolution of Master of the Rolls, *Brace v. Duchess of Marlborough*, 2 P. W. 493: it was afterwards attempted to apply this reasoning to a bond, *v. infra*, but without success.

(*a*) *Baker v. Harris*, 16 Ves. 397. There the bill was filed by a second mortgagee whose mortgage was dated after the judgment obtained by the first mortgagee; the mortgagor was bankrupt: the objection taken was that by the stat. 21 Jas. I. c. 19, a creditor having a security by judgment, whereof no execution is served or executed, shall not have a lien in respect of such judgment; the reasons given for the decision are equally applicable to all, the mortgagor, his assignees, and subsequent incumbrancers. The 6 Geo. IV. c. 16, has repealed the provisions of the 21 Jas. I. c. 19, and in lieu of them has a distinct provision on the subject of judgments, § 108, which provides for the case of a mortgage of or lien upon property: as to the effect of this section and of the stat. 1 Will. IV. c. 7, in regard to judgments by default, *nil dicit*, &c., as affecting the subject now under consideration, see Coote on Mortgages, 476-7, and *Crosfield v. Stanley*, 4 Bar. & Adol. 87, there cited.

(*b*) Judgments will be so often referred to in this section that I have thought it would be convenient to bring together the material provisions of the late acts on the subject, though they have before been adverted to. By the stat. 2 Vict. c. 11, § 1 (*v. supra*, vol. i. p. 290), docketing, under 4 & 5 Will. & M. c. 20, is put an end to; by § 2 no judgment already docketed under the act 4 & 5 Will. & M. c. 20, shall affect any lands, &c. as to purchasers, mortgagees, or creditors, unless registered according to the act 1 & 2 Vict.

c. 110 (*v. supra*, vol. i. p. 505, note); by § 4 all judgments, decrees, and orders, which since the recited act of 1 & 2 Vict. c. 110, shall have been registered, or may thereafter be registered, are void against purchasers, mortgagees, and creditors, unless registered within five years before the execution of the conveyance to the purchaser or mortgagee, or before the right of the creditors accrued, and so *toties quoties*; see Jarman, Mortgage, by Sweet, p. 64 a, note; by § 5 it is provided that as against purchasers and mortgagees, without notice of any such judgments, decrees, orders, &c. none of such judgments, &c. shall bind or affect any lands, &c. or any interest therein, further or otherwise or more extensively in any respect, although duly registered, than a judgment would have bound such purchaser before the act 1 & 2 Vict. c. 110, where it had been duly docketed according to the law then in force (see, on this section, Jarman, Mortgage, by Sweet, 64 b, note). By § 7, no *lis pendens* shall bind a purchaser or mortgagee without express notice thereof, unless the bill, &c. be registered. By §§ 12 and 13 purchasers are protected from the effect of secret acts of bankruptcy, and from acts of bankruptcy of which they have notice, unless a commission be issued within twelve months after such act of bankruptcy; and see 6 & 7 Vict. c. 66. By the new Statute of Limitation, 3 & 4 Will. IV. c. 27, § 40, a judgment is absolutely barred at the end of twenty years from the time when a present right to receive the debt shall have accrued to some person capable of giving a discharge, unless kept alive by part payment or a written acknowledgment. *Et v. supra*, p. 704, as to the effect of the statute 1 Vict. c. 110; *et v. supra*, vol. i. pp. 290, 295, and p. 259.

(*c*) *Ex parte Hooper*, 1 Meriv. 7; and see *Ex parte Coombe*, 4 Mad. 251. In these cases the mortgagor had become bankrupt.

mortgage, could not tack the judgment to it, because the judgment was not a *specific* lien on those lands (a), and the mortgagee did not on the original debt trust to the security of the estate, as did the mortgagee in the case first stated (b); so that, in refusing to pay the judgment as the price of redemption, the mortgagor was not refusing to do equity. The same reason may possibly still apply where a person has obtained a judgment for an antecedent debt; but if a person should now lend money on the security of a judgment, as under the new law he may by registering his judgment, immediately obtain a charge upon the lands of his debtor, so that it may be considered as equivalent to an actual charge (c), in such case he would now perhaps be at liberty to tack.

The doctrine of tacking, at least as against real estate, does not extend to a loan for which the mortgagee, even subsequently to the original mortgage, has taken a security, which is not of itself and cannot of itself be made as against the mortgagor a lien on the estate; for instance, a bond is not and cannot be made a lien on the estate as against the mortgagor, for if judgment be recovered upon it, it is the judgment and not the bond that gives the lien (d). This had been doubtful before Lord Hardwicke's time (e), but it is now the settled law (f); and it makes no difference whether the bond debt is prior or subsequent to the mortgage; though, as before mentioned, a different doctrine prevails in the case of a mortgage of a term (g). The reason operates with greater force in favour of a purchaser or a second mortgagee or the assignees of a bankrupt, against whom there-

(a) The judgment creditor may in fact extend after-acquired lands, *et v. inf.* p. 739-40.

(b) Lord Hardwicke, *Anon.* 2 Ves. p. 662 (case 228). The reason applies to the mortgagor himself as well as third persons; and see *Morret v. Paske*, 2 Atk. 53, where similar reasoning is applied to the case of a bond.

(c) *V. supra*, p. 704.

(d) *Morret v. Paske*, *ubi sup.* A debt by simple contract cannot in any case be tacked to a mortgage as against the mortgagor, see *Ex parte Hooper*, 1 Meriv. 7, though there be a parol agreement to that effect, *ibid.* Mr. Coote, p. 492, citing *Halliley v. Kirtland*, 2 Ch. Rep. 360, p. 162, last edition, states that a mortgagee of a leasehold or personal chattel may tack a bond debt to his mortgage against the mortgagor: as to mortgages of Personal estate, *v. infra*, Sect. ix.

(e) Lord Hardwicke, *Shrapnell v. Blake*, West's Rep. 167; 2 Eq. Abr. 603; and see *Jones v. Smith*, 2 Ves. J. 376; the decisions to the contrary are there stated.

(f) *Jones v. Smith*, 2 Ves. J. 376; and see *Hamerton v. Rogers*, 1 Ves. J. 513; *Du Vigier v. Lee*, 2 Hare, 339; *Monger v. Kett*, 12 Mod. 559; *Challis v. Casborn*, 1 Eq. Abr. 325, § 9; Pr. Ch. 407; *Louthian v. Hasel*, 3 Bro. 162. The contrary had been decided, in *Baxter v. Manning*, 1 Vern. 244; a distinction was there taken between the case where the mortgagee sought to foreclose and where the heir sought to redeem, 1 Eq. Abr. 324, § 1. Mr. Maddock thought the distinction still existed, vol. ii. 659, last edit. note (k), but the authorities referred to do not seem to me to bear out the proposition. I assume, from the before-cited observations of the Vice-Chancellor Wigram, *Hanson v. Keating*, 4 Hare, 6-8, that now the question must always be, What are the equitable rights of the parties, independently of their relative positions on the record? there may be special circumstances affecting this as every other general rule; and see *Farr v. Sheriffe*, x. Jur. 632.

(g) *Halliley v. Kirtland*, *supra*, note (d).

fore the mortgagee cannot tack the bond (a). Where the mortgagee holds a security for part of the debt, and another security for other part of the same debt, but which the mortgagee cannot tack, for instance a bond, a bill may be filed by the mortgagee to enforce payment of his *whole* debt by foreclosure and otherwise in the same suit, though as regards the part secured by bond his remedy is at law; the ordinary rule being that where a person is drawn into a court of equity to enforce part of his demand, he may assert his full rights in that court; and *à fortiori* this may be done against volunteers claiming under the mortgagor (b).

As regards the Heir, or a Devisee (c) of the mortgagor, where there is a bond debt in which the heirs are bound, neither the heir nor the devisee is permitted to redeem without paying both the mortgage and the bond, and that whether the bond precede or follow the mortgage (d); but the right on the part of the mortgagee to insist on the payment of his bond debt is given, not because the mortgagee has any such claim on the principles of natural justice or equity, but only to avoid circuity of action; for as the bond debt, though in another right, might be recovered against each, they are therefore required to pay both at once: this right is bounded by the reason on which it is founded, and therefore is never carried beyond the case of an heir and devisee, and generally speaking only so far as their individual rights are concerned; and in particular it is not applicable to a purchaser of the equity of redemption from the heir or the devisee or executor, or to creditors (e).

The late act 1 & 2 Vict. c. 110, has extended the remedy of the

(a) Lord Hardwicke, West's Rep. p. 167; *Morrel v. Paske*, 2 Atk. 53.

(b) Vice-Chancellor Wigram, *Du Vigier v. Lee*, 2 Hare, pp. 339, 340. The case itself was one where the defendants, who represented the mortgagor, contended that the mortgagee was limited by the stat. 3 & 4 Will. IV. c. 27, § 42, to six years' interest, and that if, under the stat. 3 & 4 Will. IV. c. 43, § 3, he was entitled to twenty years' interest on his bond and covenant, it was a personal demand only, and that the land was discharged from more than six years' arrears, see 2 Hare, 336-7; and see *Lloyd v. Wait*, 1 Phill. 61. The Vice-Chancellor, in *Du Vigier v. Lee*, 2 Hare, 338, was of opinion, as the plaintiffs contended, that the two acts must be taken together, and that the meaning is that six years' arrears only can be recovered, unless there is a bond or specialty; but the Vice-Chancellor stated that equitable mortgages would remain within the operation of the act, c. 27, § 42; but this part of the case will be noticed hereafter. The second marginal note

to *White v. Hillacre*, 3 Yo. & Coll. 597, which may seem at variance with the Vice-Chancellor's dictum in the text, is, as stated by the reporters, 4 Yo. & Coll. 583, not warranted by the judgment. It is the constant practice of the court to allow bills to be framed by mortgagees on behalf of themselves and all other the creditors of a deceased mortgagor; Vice-Chancellor K. Bruce, *Skey v. Bennett*, 2 Y. & Coll. C. C. 406; v. *supra*, p. 676, note (h).

(c) *Challis v. Cashborn*, 1 Eq. Abr. 325, § 9; Pr. Ch. 407; *Heams v. Bance*, 3 Atk. 630.

(d) *Windham v. Jennings*, 2 Rep. Ch. 128.

(e) Lord Hardwicke, *Shrapnell v. Blake*, 1 West, 167; *Shuttleworth v. Laycock*, 1 Vern. 245; *Coleman v. Winch*, 1 P. W. 775; *Bayly v. Robson*, Prec. Ch. 89; *Price v. Fastnedge*, Amb. 685; *Troughton v. Troughton*, 1 Ves. 87; *Lowthian v. Hasel*, 3 Bro. 163; and Lord Henley's note, *Vanderzee v. Willis*, 3 Bro. 21. "Where, therefore, no circuity of action could reach the property there is no tacking;" see *Ex parte Petit*, 2 Gl. & J. 51; 2 Fonbl. 273.

creditor to the entirety of his deceased debtor's lands, copyhold as well as freehold, so that the principle of the old doctrine that a judgment could not be tacked against the heir or devisee of copyholds is no longer applicable.

And now that by the statute 3 & 4 Will. IV. c. 104 (a), lands are liable to the payment of simple-contract debts, the preventing circuitry of action will equally apply where the heir or devisee seeks to redeem, and the mortgagee has also a simple-contract debt; so that in that simple case probably the mortgagee may claim to tack, where it will not interfere with the claims of other creditors: however the specialty creditor might have brought an action against the heir or devisee, and by suing out an elegit on his judgment have obtained a preference over other specialty creditors; a simple-contract creditor cannot obtain any preference, for his only remedy is in equity.

The mortgagee cannot tack his bond where the devisee takes under a trust for payment of debts, or the heir takes subject to a charge created by the will of the mortgagor (b); for the bond, so far as it affects the land after the death of the obligor, is only a general charge on the assets (c); nor can a bond be tacked against *puisne* incumbrancers, whether by mortgage, judgment or otherwise (d).

A bond debt for the reason above mentioned may be tacked as against the executor seeking to redeem, where the mortgage is for a term of years; for the equity of redemption is assets for the payment of debts (e); and that whether the creditor was originally the mortgagee or has obtained the mortgage by assignment, and whether the mortgage was prior or subsequent to his debt (f): but the right to tack is never allowed as against creditors of higher or even equal degree; if a creditor of the testator bring a bill to redeem a mortgage, he is only bound to pay the debt due on the mortgage. The mortgagee of a leasehold estate cannot tack against a purchaser of the equity of redemption from the executor, any more than he can from the purchaser from the heir or devisee, in the case of real estate (g); in each case the purchaser has a complete title, and the creditor cannot follow the specific assets: even where the executor seeks to redeem, and there has been a bill filed by creditors and a decree for

(a) *V. supra*, pp. 313, 319.

(b) *Heams v. Bance*, 3 Atk. 630; *Price v. Fastnedge*, Amb. 686; *Hamerton v. Rogers*, 1 Ves. J. 513; *Louthian v. Hasel*, 3 Bro. 162.

(c) Lord Hardwicke, *Anon.* (*Jackson v. Langford*), 2 Ves. 663.

(d) *Morret v. Paske*, 2 Atk. 54.

(e) *Anon.* 2 Vern. p. 177; *Demandray v. Metcalf*, Pr. Ch. 419; *Coleman v. Winch*, 1 P. W. 776; 1 Eq. Abr. 324, § 3: or even a debt by simple contract: Pr. Ch. 18, 19, &c.

(f) *Halliley v. Kirtland*, 2 Ch. Rep. 162.

(g) *Coleman v. Winch*, 1 P. W. 777; dict. Lord Thurlow, *Vanderzee v. Willis*, 3 Bro. 23; *Louthian v. Hasel*, 3 Bro. 162.

them to come in, the fund being under the administration of the court, the mortgagee cannot tack, at least as against the creditors (a).

The doctrine of doing equity has been extended, as before noticed, to the case of a person holding two mortgages from the same person : it has been established as a general rule (b), that, if a mortgagor execute two mortgages of two distinct estates to the same person to secure separate debts, and they become absolute at law, the one cannot be redeemed by the mortgagor without his redeeming the other ; and the more modern authorities have established that the purchaser of the equity of redemption of one estate, though without notice of the mortgage on the other estate, must equally redeem both (c) : so that if the estate conveyed by the one be deficient in value to secure the mortgage-money or turn out to be of no value, and the value of the other estate is more than sufficient to pay its own mortgage, the mortgagee obtains the benefit of the surplus value of the latter to make up the deficiency in the former (d) : but this rule does not apply where the mortgagor comes to foreclose, the mortgagee may redeem the one and be foreclosed as to the other (e). In the case of a bill for redemption both estates must be redeemed whether there was an agreement or not that the additional mortgage should be a security for the first advance (f) ; but the transaction must be between the same parties or those claiming under them (g). The principle does not apply where the equity of redemption originally belonged to different persons (h) :

(a) *Supra*, p. 724 ; Sir Wm. Grant, *Adams v. Claxton*, 6 Ves. 229 ; *Troughton v. Troughton*, 1 Ves. 86 ; *Vanderzee v. Willis*, *ubi sup.*, and other cases there cited ; *Bayly v. Robson*, Prec. Ch. 89 ; S. C. 2 Eq. Abr. 594, § 1 ; *Coleman v. Winch*, 1 P. W. 775 ; Prec. Ch. 511. Mr. Blunt, in his note to *Price v. Fastnedge*, Amb. p. 686, has collected, I believe, all the cases prior to 1828, in regard to the question in what cases a bond debt can or cannot be tacked, to which I would refer the practitioner ; those which have been cited are sufficient to show the principle.

(b) See, on this subject, Jarm. Convey. by Sweet, p. 436, *et seq.*, and *supra*, p. 666-7.

(c) See *Jones v. Smith*, 2 Ves. J. 377, and the cases there cited ; *Ireson v. Denn*, 2 Cox, 425 ; but see *Willie v. Lugg*, 2 Eden, 80, and the cases in Lord Henley's note.

(d) Lord Alvanley, *Jones v. Smith*, 2 Ves. J. 376-7. The decision in that case, namely, that the creditor might redeem the personal securities without discharging what was due on a mortgage, it being considered as a dis-

tinct transaction, was reversed, *ibid.* p. 380, note ; *Pope v. Onslow*, 2 Vern. 286. In *Margrave v. Le Hooke*, 2 Vern. 207, the estate comprised in one mortgage was entailed, the heir was compelled to pay the mortgage-money due on both ; *Ex parte Carter*, Amb. 733 ; *Ireson v. Denn*, *ubi supra*.

(e) *V. infra*.

(f) See Coote on Mortgages, 489 ; and see, on this subject, *Titley v. Jenyns*, in the note to *Bugden v. Bignold*, 2 Yo. & Coll. C. C. 399, and Serjt. Hill's MS. note there cited.

(g) Coote, 490 ; *Jones v. Smith*, 2 Ves. J. 376, there cited.

(h) *White v. Hillacre*, 3 Yo. & Coll. 609. The facts were these :—In 1800 J. Hillacre mortgaged an estate, called Madgeon, to one Chave, for a term ; in 1808 Chave, Hillacre joining, assigned the mortgage to Clarke. J. Hillacre devised Madgeon, subject to the mortgage, to T. Hillacre : T. Hillacre was entitled to an estate called Westhay ; in 1812 he mortgaged this estate to Clitsome for years ; in 1815 T. Hillacre died, he devised the equity

and where a mortgagee applies in bankruptcy (a) for a sale of distinct estates mortgaged for separate debts, he cannot have the surplus proceeds of the one estate applied to make good the deficiency of the other (b).

We now proceed to the consideration of the circumstances by means of which the usual order in which equitable securities are ranked may be disturbed, so as to give priority to a subsequent incumbrance; and particularly where this is effected by the right on the part of an incumbrancer to tack a subsequent incumbrance to one of prior date.

It is to be observed that several persons may have an interest in or lien on an estate in succession, as creditors by mortgage and by judgment; but every mortgage or incumbrance made or obtained subsequent to the first by which the legal estate is conveyed, necessarily can confer no more than an equitable lien or interest to be enforced in the Court of Chancery only.

It has already been stated that the general rule, though not without exceptions as will presently appear, is, that statutes, judgments and recognizances, at law and in equity, and equitable charges of every kind, in equity, all rank according to their dates: therefore in the absence of particular circumstances, the successive periods of their execution or attainment constitute the order in which they will be directed to be satisfied (c): in fact the mortgagor has no more to pledge, and the subsequent creditor has no more to take, than what shall remain after the prior incumbrances are satisfied.

The possession of the legal estate has always, for the reason adverted to in a subsequent page, had an important effect as to the rank or order of securities (d). When satisfied terms existed, they were made use of, as has been noticed in the first volume (e), for the protection of mortgagees and purchasers, and for less meritorious pur-

of redemption of Madgeon to one set of devisees, of Westhay to another set: in 1816 Clarke assigned the mortgage on Madgeon to Clitsome, then for the first time the two mortgages were united in the same person; it will have been observed that at no time were the two mortgages vested in Clitsome when the same person was interested in the equity of redemption. Mr. Baron Alderson held that the plaintiff, the representative of Clitsome, could not tack together the two mortgages; there might, he said, have been some ground for the plaintiff's argument if the assignment had been made in the lifetime of Thomas Hillacre.

(a) *V. supra*, p. 677.

(b) *Ex parte Bignold*, 2 Deac. 66.

(c) See *Symmes v. Symonds*, 4 Bro. P. C. 328; *S. C.* under the name of *Bristol v. Hungerford*, 2 Vern. 525; *Bugden v. Bignold*, *infra*; *Allen v. Knight*, 5 Hare, 277.

In Ireland (*Latouche v. Dunsany*, 1 Scho. & Lef. 157; and in America (*Story on Equity*, § 419, note), Tacking is prevented by the effect of the Acts for Registration, and there is now (Mar. 1849) some reason to believe that it will, at no great distance of time, be abolished in this country by the same means.

(d) *Et v. supra*, vol. i. p. 514-516, and *int. alia*, 1 Eq. Abr. 322, pl. 1.

(e) *Supra*, vol. i. pp. 515, 516.

poses. However it not unfrequently happened that the legal estate in the term was from accident or inadvertence left outstanding; and then it often became a question between the successive incumbrancers, who was entitled to have the legal estate transferred to him, and thus to obtain the advantages and priority which its possession would confer. As satisfied terms have been extinguished (*a*), the question, as to who is entitled to call for the legal estate, will not so frequently arise; still it is necessary, in reference to the legal estate in fee, and other legal interests still subsisting, to take a review of the doctrine which was applied to such cases, more especially as it introduces the subject of what is considered as a Better Equity, as between two persons having equitable interests of the same character, which is very material in relation to the subject now under consideration.

Where one of the incumbrancers has a Better Equity than the other, it may be stated generally that he has a right to call for an assignment or conveyance of the legal estate, and that in equity he will be placed in the same situation as if he had actually obtained a conveyance or assignment (*b*). In *Wilkes v. Bodington* (*c*), the purchaser had purchased without notice of an act of bankruptcy; the plaintiffs, the assignees, filed a bill against him and the trustee of an outstanding term, to have it assigned to them; the bill was dismissed, as the court considered that the purchaser had a *better* equity to call for it than the assignees.

As regards the question, which of two contending parties is to be considered as having a Better Equity, it may be observed, that volunteers, amongst themselves, have equal equities; but that a volunteer, though a wife or child, has not equal equity with a *bonâ fide* purchaser for a valuable consideration, even with notice of the claim of the volunteer (*d*): the equity of an heir cannot come in competition with that of a purchaser. It has been held that if a mortgage of land belonging to the wife be made by fine, (it would now be by deed acknowledged, 3 & 4 Will. IV. c. 74, s. 77), thereby giving a good title, and more money be advanced on a mortgage without the proper assurance, so that there is a defective title as to the second mortgage; yet the

(*a*) *Ibid*.

(*b*) See *Digby v. Morgan*, 1 Ch. Rep. 129; *Windham v. Richardson*, 2 Ch. Ca. p. 213; *Wilkes v. Bodington*, 2 Vern. 599; *Collet v. De Gols*, Forrest. 69; *Mansell v. Mansell*, 2 P. Wms. 678; *Brandlyn v. Ord*, 1 Atk. 571; *Snelling v. Squib*, 2 Ch. Ca. 47; *Millard's case*, 2 Freem. 43; *Pomfret v. Windsor*, 2 Ves. 487; *Ex parte Knott*, 11 Ves. 618; 2

Fonbl. 148; Coote on Mortgages, 508; *Medlicott v. O'Donel*, 1 Ball & Be. 171; and see *Frere v. Moore*, *infra*, and additional note, No. 1.

(*c*) 2 Vern. 599.

(*d*) See *Pulvertoft v. Pulvertoft*, 18 Ves. 93; and see *Buckle v. Mitchell*, *ibid*. 110, on the construction of the statute of the 27 Eliz.

mortgagee shall hold till both sums are paid : for the mortgagee has a title at law, and the same equity for the money as the heir of the wife for the land (a); but this rather belongs to a subsequent page.

A person may in some cases acquire a better equity by superior circumspection and care (b). Where the legal estate in a term was outstanding in a trustee, and he had covenanted to stand possessed of it in trust for an incumbrancer, and then another person advanced money even with notice of *that* incumbrance, and afterwards the original mortgagee advanced a further sum without notice of the second incumbrance; the first incumbrancer, not having got in the legal estate, was held not to be entitled to the same advantage as he would if he had actually got it in; there were still only equal equities (c). If the first incumbrancer has a declaration of trust only by the borrower and none by the trustee, and the second incumbrancer has a formal mortgage of the equity of redemption, and the trustee is a party to that deed, and declares himself to be a trustee for the second incumbrancer, the second will, in that case, have a better right to call for the legal estate than the first (d). "A better equity," said Lord Lyndhurst, in advising the House of Lords, in *Foster v. Cockrell*, to affirm Sir John Leach's decision in *Foster v. Blackstone* (e), "is where a second incumbrancer without notice takes a protection against a subsequent incumbrancer, which the prior incumbrancer has neglected to take. Thus a declaration of trust of an outstanding term, accompanied by delivery of deeds creating and continuing the term, gives a better equity than a mere declaration of trust to a prior incumbrancer" (f).

An omission to do an act may give to another a better equity (g); but it is not every act of omission that will have the effect of giving

(a) *Rauson v. Sacheverel*, 2 Ch. Ca. 98; Com. Dig. *Mortgage*, p. 739, 5th edit. This doctrine seems rather questionable, but I have not found it disputed; and see 2 Ventr. 343, *Haymer v. Haymer*. As to Defective Assurances, v. *supra*, p. 639.

(b) This most commonly happens in cases where the subject of the security is a chose in action; see *Foster v. Blackstone*, 1 My. & Keen, 297; *Timson v. Ramsbottom*, 2 Keen, 35; and *Dearle v. Hall*, and *Loveridge v. Cooper*, and the other cases there cited, which are referred to and observed upon hereafter; v. *infra*, Chap. x.

(c) See *Frere v. Moore*, 8 Price, p. 475; as this is an important case, I have set forth an abstract of it in the additional note, No. 1.

(d) Vice-Chancellor Wigram, *Wilmot v.*

Pike, 5 Hare, 22, "A declaration of trust by a trustee in whom the legal estate is, has always been considered of great weight in the determination of equitable rights," *ibid*.

(e) 1 My. & K. 306-7; v. *infra*, Chap. x.

(f) 9 Bli. N. S. 332; 3 Cl. & Fin. 456; in the same report, 9 Bli. 378, the opinion of Mr. Justice Burnett, in *Ryall v. Rowles* (1 Ves. 360), is reported from his note book; and see *Meux v. Bell*, 1 Hare, 84; though the *puisne* incumbrancer may have advanced his money without making any previous inquiry of the trustee, *ibid*. 84-5; *Stanhope v. Earl Verney*, 2 Eden, 81-85. What are better equities as between incumbrancers of choses in action will be considered in Chap. x. *infra*.

(g) V. *infra*, Section viii.

to another a better equity where the subject is real estate, though the omission may in its consequences have been prejudicial to another: if a third incumbrancer give notice of his incumbrance to the first mortgagee, he does not thereby gain any priority over the second who has omitted to give such notice, notwithstanding that giving such notice might have prevented the subsequent mortgagee from lending his money (*a*); a very different rule prevails where the subject is a chose in action, which will be more particularly adverted to hereafter.

A person made a mortgage of an equitable interest in a real estate, in which it was falsely recited that the deed under which the mortgagor derived his title had been deposited with a third person, to secure a debt due to him from the mortgagor; the deed was really in the hands of the mortgagor, and he afterwards deposited it with such third person, to secure an advance he obtained from him, he having at the time no notice of the prior mortgage; the mortgagee does not appear to have made any inquiry whether the recital was true or false.

(*a*) See *Jones v. Jones*, 8 Sim. p. 643, and *Peacock v. Burt*, *ubi sup.* there cited; Sugd. V. and P. p. 1026; *Hiern v. Mill*, 13 Ves. p. 119. "There is a marked distinction between a real estate and a personal chattel; the latter is held by possession, a real estate by title," Lord Eldon, *ibid.*; *Wilmot v. Pike*, 5 Hare, 14, 19; *Gregory v. West*, 2 Beav. 541; and see 14 Sim. 77. Mr. Lewin makes this distinction; he says the doctrine of notice can only apply to real estate where the purchaser is bound to advert to the fact that the legal estate is in a trustee; he observes that it has in no case been decided that the principle of *Dearle v. Hall* and *Loveridge v. Cooper*, *v. infra*, must be confined exclusively to choses in action, and he contends with great force, p. 514, that for the safety of mortgagees of equitable interests it ought not to be so confined. In the case of *Wilmot v. Pike*, above referred to, the Vice-Chancellor Wigram admitted that the reasoning in the cases of *Dearle v. Hall* and *Loveridge v. Cooper*, was applicable in part to equitable interests in lands as much as to equitable interests in pure personal estate; but he said the expressions of Sir T. Plumer only applied to personalty; and it is evident that his Honour considered that the doctrine established by those cases, as to acquiring priority by notice, must be confined exclusively to personal estate, and that the distinction adverted to by Mr. Lewin, however reasonable, does not prevail. The case was shortly this—In 1834 Pike, the owner, mortgaged estate A. to Smith, to secure 700*l.* and interest; in 1826 Pike conveyed estate A. and estate B. to one Flewker in fee, in trust for securing 600*l.* lent to Pike by Sir R. Wilmot;

the trust was that after default Flewker should sell and pay off the 700*l.* secured to Smith, then the 600*l.* to Sir R. Wilmot. In 1835 Pike, in consideration of a further advance of 400*l.* by Sir R. Wilmot's executors (who were the plaintiffs) in effect charged the premises and the proceeds with the 400*l.*; Flewker, the trustee, was not a party to this deed. In 1840 Pike conveyed the premises by way of mortgage to Flewker (the trustee) subject to the trusts of the deed of 1824 and the deed of 1826 (but making no mention of the deed of 1835) to secure 300*l.* advanced to Pike by Flewker: the plaintiffs, the executors of Sir Robert Wilmot, though of course they knew that the legal estate, as to part, was in Flewker, did not give notice to him of their charge of 1835. Flewker alleged that he had inquired of the first mortgagee whether he had notice of any subsequent charge and he had given notice to the first mortgagee of his charge for 300*l.*; the plaintiffs, for any thing that appears, had not done so as to their charge. Flewker claimed priority on account of the negligence of the plaintiffs in omitting to give notice, by reason of which he had lent his money on what he was induced to suppose was a sufficient security, whereas by reason of the further charge it was not: he also claimed priority by reason of his superior diligence in giving notice, relying on *Dearle v. Hall*, and the other cases above cited. The Vice-Chancellor held that he was not in respect of his notice entitled to any priority; but having the legal estate, though only in trust, in estate B., he was allowed, after some hesitation on the part of the Vice-Chancellor (see 5 Hare, 21, 22, 23), priority in respect of that estate.

It was held that as an actual prior charge, if afterwards paid off by the mortgagor, or otherwise avoided, would, according to the general doctrine (a), have given to the second mortgagee the rights of a first mortgagee, the recital of a charge which did not exist could not have the effect of postponing the mortgagee: the Vice-Chancellor Wigram held that the incumbrancers must rank according to the dates of their advances (b).

The following case may here be introduced, in which the Vice-Chancellor Knight Bruce had to adjust the equities between several incumbrancers, under rather peculiar circumstances. One Milbank being seised in fee of a freehold and of a copyhold estate, he, in 1830 and 1832, borrowed various sums of money, amounting in the whole to 4000*l.*, from Bignold, on behalf of the Norwich Union Company, on a mortgage of the freehold estate alone. The company paid off a prior mortgage, and had the legal estate conveyed to a trustee for them. Milbank, in 1832, borrowed 500*l.* more from Bignold on behalf of the company, on the security of the freehold and copyhold estates, the securities being made by distinct instruments, neither of them referring to the other; the copyholds were subject to a mortgage to one Gilson. In 1833 Milbank borrowed of Round and Co. 400*l.*, on mortgage of the freeholds alone, subject to the incumbrances of the Norwich Company thereon, which were recited to amount to 4500*l.* and interest, but which security did not carry with it notice of any charge on the copyholds, nor did it appear that they were aware that there were any copyholds whatever. In 1837 the Norwich Company first had notice of Round's security; in March, 1838, they paid off Gilson's security on the copyholds (1500*l.*), and in 1840 the copyholds were surrendered to certain persons, as trustees for the company. In July, 1838, the Norwich Company sold the freeholds for 5000*l.* In September, 1838, Milbank borrowed 600*l.* from the plaintiff Bugden, and covenanted to surrender the copyhold premises to him as a security, subject to a "certain conditional surrender, made on the day of 183," whereby, as it was stated, the premises were surrendered to Mr. Bignold, on behalf of the company, for securing 1500*l.*, advanced for paying off Gilson's mortgage, and the premises were surrendered accordingly: the plaintiff had no notice of the security of the company of the 23rd April, 1832. In December, Round and Co. required the Norwich Union Company to resort to the copyholds, so as to enable them to make their security available

(a) Vide *supra*, p. 657; *et infra*, in this Section.

(b) *Frazer v. Jones*, 5 Hare, 481, 482.

against the freehold estate. In July, 1839, by arrangement between the two last-named parties, the copyhold estate was sold for 2000*l.* In 1840 the plaintiff caused notice to be given to Mr. Bignold, the agent of the company, of his security; Milbank then took the benefit of the Insolvent Debtors Act. The plaintiff insisted that he was entitled to be paid out of any balance of the proceeds of the copyholds; the defendants, Round and Co. insisted that they were entitled to be paid, in preference to the plaintiff, out of the proceeds, so much as the proceeds of the real estate would not extend to pay, insisting, *inter alia*, that the plaintiff must be taken to have had constructive notice of their security. It was held that the plaintiff was entitled to what he claimed to this extent only, that the 500*l.* being, by the security of 1832, charged on the freeholds and copyholds rateably, it must be thrown proportionally on the freehold and the copyhold. "Whilst on the one hand," said the Vice-Chancellor Knight Bruce, "I cannot view the mortgage of the freehold made to Round and Co. as tantamount to a mortgage of both freehold and copyhold to them; so, on the other hand, I am not convinced that the form of their security is equivalent to a renunciation by them of any benefit derivable from any collateral or other security that the Norwich Company might hold; and strong as the moral justice of the plaintiff's claims may appear to be, it must not be forgotten that, as a general rule—a rule not without exceptions, but certainly a general rule of our jurisprudence—equities take effect according to their priorities in point of time" (a).

No person who takes a security, with Notice of the existence of a prior security, can be said to have an equal equity with such prior incumbrancer; he knew that all the debtor had to give was what remained after satisfying such prior incumbrance (b): and a person by his conduct, amounting to actual or constructive fraud, may give to another a better equity; for instance, if he, being cognizant of a treaty going on for a subsequent advance or purchase on the assumption that the property is unencumbered, stands by and omits to give notice of his incumbrance, he will be postponed (c).

The above may be sufficient to show what is the general rule where the equities are equal, and to give a general idea of what are the circum-

(a) *Bugden v. Bignold*, 2 Yo. & Coll. C. C. 377, 398. The parties, acquiescing in the principle stated by the Vice-Chancellor, settled the suit.

(b) *V. supra*, pp. 195, 727, and *infra*, 733, n. (b). The doctrine as to Notice, as affecting

the questions now under consideration, is treated of *infra*, Sect. viii.

(c) *Berrysford v. Milward*, Barnard. 101; *S. C.* 2 Atk. 49; 2 Pow. on Mortg. by Cov. 438; and see Sugd. V. and P. 1022.

stances which will or will not confer upon a person, standing in other respects in a similar situation with another, a Better Equity. We proceed to consider what is the effect of obtaining the legal estate, or a right to the legal estate, as affecting priorities, as connected with the doctrines above adverted to.

It is a maxim which has long, perhaps always governed the Court of Chancery in deciding upon equitable claims connected with a legal title, that where the equity of two antagonist parties is equal, he who has the legal title shall prevail (*a*); or, as it may perhaps be stated more correctly, the equity of a person who has only a title in equity shall not prevail against one that has an equal title in equity and also a title at law (*b*). Again it is, as has been frequently observed in the preceding pages, a general rule that a purchaser *bonâ fide* for valuable consideration without notice of any preceding claim at law or in equity, will not be prevented by the Court of Chancery from availing himself of any advantage which he has acquired (*c*): a purchase without notice, said Lord Northington, is a bar to the jurisdiction of this court, and it is of no consequence when the legal advantage was acquired, if the purchase was made and the money paid without notice (*d*). The general rule, as before observed, as regards satisfied

(*a*) Francis's Maxims, max. i.

(*b*) Treatise of Equity, by Fonbl. ii. 302. It has been objected that putting the doctrine upon Francis's maxim would not support the title of a third mortgagee, buying in the first mortgage and so getting the legal estate, to claim in preference to the intermediate mortgagee (as to which *v. infra*, in this section); for as regards all equitable claims the rule of equity, conformably to the rule of law, is, that he who is first in time is to be preferred; not that time considered of itself can make any such difference, but because the power over the thing being transferred to another this bars all others from obtaining a title to it afterwards, excepting in so far as the grant to such first transferee may not have exhausted the whole subject of the grant; and accordingly, as before noticed, where the legal estate is standing out, equitable incumbrances are paid according to their priority in time, *v. supra*, 727, and *Brace v. Duchess of Marlborough*, 2 P. W. 495, and the cases in the note; 1 Fonbl. 320, 321, and the cases p. 320: all persons who advance money without notice of any prior claim, in the view of the Court of Chancery, have equal equities, *infra*, p. 737; so that there must be some special reason to alter the order of dates. *V. supra*, p. 729, note (*a*).

(*c*) Lord Nottingham, *Bassett v. Nosworthy*, Rep. temp. Finch, 103, who states that this doctrine was conformable to the common law; the maxims as to descents, discontinuances, &c. having been introduced to protect possession and strengthen the rights of purchasers; and see Sugd. Vend. and P. 1015-6, *et seq.*; *Goleborn v. Alcock*, 2 Sim. p. 559, and other cases there cited; *Willoughby v. Willoughby*, 1 T. R. 763; *Belt's Supp.* to Ves. Sen. 465; *Amb.* 283-4; *supra*, vol. i. p. 515; and *Wallwyn v. Lee*, 9 Ves. 31-34.

This rule appears to have been broken in upon in one or two instances, 2 Fonbl. 147; thus, in *Burgh v. Burgh*, Rep. temp. Finch, 28, where the court interposed to the prejudice of a judgment creditor who had no notice of the plaintiff's equity, treating him as having only the same rights which the debtor had—but there were peculiar circumstances in that case—the judgment can hardly be said to have been *bonâ fide*. In *Williams v. Lambe*, 3 Bro. C. C. 264, Lord Thurlow overruled a plea of a purchase without notice of the marriage, to a bill by a dowress (see Sugd. V. and P. 1071-2), saying the plea did not apply; such a plea being only a bar to an *equitable* not a legal right; and see Lord Henley's note, 2 Ed. 86.

(*d*) *Stanhope v. Earl Verney*, 2 Eden, 85;

terms, was that in order to give a purchaser this advantage the legal estate must be got in (*a*), and the same rule will now apply to terms which are not satisfied, and to an outstanding legal estate in fee: a *bonâ fide* purchaser for valuable consideration without notice cannot even be compelled to discover any matter that might affect his title, or to show that he has missed his object to the extent to which he intended to acquire it (*b*). These principles have a material effect in regard to the question of priority, and in regard to the right to tack as between different incumbrancers.

The Process under the name of tacking to which these principles are applied, is this: if a person who has the legal estate in the land, has also a lien or incumbrance on the land available only in equity, taking advantage of his having the legal estate, by means of which he may keep out at law every other claimant, he requires that all the incumbrancers who hold securities on the estate which can only be available in equity, should either pay off the debts due to him on both, or be foreclosed of all right of redemption; and if he stands in a situation answering all the requisites for establishing his claim that relief is given to him: originally, as will be more particularly adverted to hereafter, he was allowed this advantage only by way of defence; now he may actively enforce it (*c*). The person who so claims to tack must, as against the person against whom the tack is to operate, not only have the legal estate (*d*), but, except as to time, he must have an

and see *Jones v. Powles*, 3 My. & K. 598. Mr. Fonblanque states it as a rule, that although a purchaser for valuable consideration without notice of a fraud committed by him under whom he claims, shall not be prejudiced in equity, 'he shall not be assisted against the party upon whom the fraud was committed, 1 Fonbl. 148.

(*a*) V. *sup.* p. 728., *et inf.* p. 745; and see *Maundrell v. Maundrell*, 10 Ves. 246. As regards a widow, a distinction to her disadvantage in respect of her claim to dower was settled by the case of *Radnor v. Vendebendy*, Show. Par. Ca. 69, which Lord Hardwicke stated thus, —that if a purchaser, having notice of the wife's title to dower, takes in a term precedent to the right of dower, whether it were a satisfied term or whether money was paid for it, it was a bar to the wife's dower: if the term had subsisted at the husband's death the wife might have redeemed it and been entitled to her dower; but if a purchaser come in after the mortgage is paid off and the death of the husband and takes an assignment of the term, that would prevent dower, *Hill v. Adams*, 2 Atk. 209; *Butler's note*, Co. Litt. 203 a, n.

105. This, as affecting the question of notice, has always been considered as an anomaly and not to be carried further than the strict rule established in *Radnor v. Vendebendy*; see *Maundrell v. Maundrell*, *supra*, and 7 Ves. 567; and see *Wynn v. Williams*, 5 Ves. 134; this point, by reason of the late Dower Act, will seldom if ever occur in future.

(*b*) *Wallwyn v. Lee*, *supra*; *Collett v. De Golls*, Forrest. 69; *Lowther v. Carleton*, *ibid.* 187. A summary of the learning as to a plea of purchase for valuable consideration without notice, may be seen, *Redesdale on Pleading*, by Smith, p. 247. But a plea is not the mode in which the doctrine can be insisted upon by a mortgagee, in a case involving a question as to priorities, as whatever may be his rights they are subject to redemption in equity; the mortgagee does not desire to prevent the applicant from obtaining any relief. If the bill were for a discovery of title only, then the plea would be proper and good, 2 Ventr. 337; *Comyn, Dig. Mortgage*, p. 739, last edition.

(*c*) V. *infra*, p. 736, &c.

(*d*) See *Jones v. Smith*, 2 Ves. J. 376.

equal equity, and also, which follows from the last, he must have advanced his money without notice of the other's claim (*a*); and he must have advanced the money on the credit of the land (*b*). We now proceed to a review of the principal authorities illustrative of these general propositions.

The application of these principles to the case of a subsequent mortgagee coming to redeem the first where the first has made subsequent advances is simple and obvious. If a mortgagee after forfeiture of the condition lend a further sum to his mortgagor, and the same be secured to him by another *bonâ fide* mortgage, he having *no notice* of any intermediate incumbrance, the mesne or intervening incumbrancer cannot redeem the first without paying what is due on the second; the legal estate being in the mortgagee, and the subsequent advances being *bonâ fide* due to him he has on his side law and equal equity in the sense above explained (*c*). If the latter advance should have been secured to him by a judgment, which formerly was not a charge upon the land, a statute or recognizance, and the mortgage were absolute at law, the mesne mortgagee must equally in this case pay off both, for the second loan will be taken to have been made on the faith of his having already the title to the land (*d*). But a judgment obtained by the first mortgagee for a previous debt not contracted upon the credit of the land in mortgage will *not* come within the principle; the security must be taken for an actual advance by the party, either expressly or upon a fair presumption in his character of mortgagee (*e*): a bond cannot be tacked against those claiming under the mortgagor or against his creditors when dead, any more than it can against the mortgagor himself (*f*).

But it is not merely between the parties as they originally stood that this doctrine prevails: any incumbrancer in whom all the above-stated requisites are united may equally claim the right to tack; thus

(*a*) Lord Cottenham, *Lacey v. Ingle*, 2 Phillips, 419; *Allen v. Knight*, 5 Hare, 272; *Saunders v. Dehew*, 2 Vern. 271.

(*b*) *V. infra*, *Lacey v. Evans*.

(*c*) *Morret v. Paske*, 2 Atk. 53; *Tenison v. Sweeny*, 1 Jo. & Lat. 710. It may, perhaps, cause some surprise that the mortgagee was not required, as a test of perfect *bona fides*, at least to have inquired of the mortgagor whether there were any intermediate incumbrancers; but the inquiry, if made, does a mortgagee who takes that precaution no service as against one who does not; see *Wilmot v. Pike*, *ubi supra*.

(*d*) *Brace v. Duchess of Marlborough*, 2 P.

Wms. 494; *Blackston v. Moreland*, 2 Ch. Ca. 20; *Shepherd v. Titley*, 2 Atk. 352; *Anon.* 2 Ves. 662; *Ex parte Knott*, 11 Ves. 617; *Baker v. Harris*, 16 Ves. 397; and see 1 Eq. Abr. p. 322, pl. 1: but see *Brierton v. Jones*, *infra*.

(*e*) See *Leuges v. Morgan*, 5 Price, 42, 153, Graham, Baron; *Ex parte Knott*, 11 Ves. 617. How far the stat. 1 & 2 Vict. c. 110, which has made a judgment a charge upon the land (see Sugd. V. and P. p. 436, § 41) will alter the doctrine on these points, has, I believe, to be decided.

(*f*) *Hamerton v. Rogers*, 1 Ves. J. 513; and see *Jarm. Mortgage*, by Sweet, 439.

if the third mortgagee, who had no notice when he paid his money and took his original security, can buy in the first mortgage and thus acquire the legal estate, he has all the advantages of a purchaser for valuable consideration without notice, and those advantages he may enforce against all merely equitable incumbrancers (*a*).

The rule we are now considering, according to the terms in which it is usually laid down, would sufficiently establish the doctrine of tacking in cases where the mortgagor or a subsequent incumbrancer seeks to redeem, that is where the mortgagee is put upon the defensive, and it is most commonly in such cases that the rule comes into operation: the title of a purchaser for valuable consideration without notice, it is said by high authority, is a shield to defend the possession of the purchaser, but not a sword to attack the possession of others (*b*). The rule however requires to be extended beyond the mere purpose of defence; for the use and purpose of a mortgage is that the mortgagee may be enabled to compel payment by means of a bill for a foreclosure; and if he could not insist on all his rights when standing in the character of a plaintiff, he would be deprived of them on the most important occasion on which they might be made available, and accordingly and without infringing on the proper limits of the rule it has been so extended (*c*). Where a third mortgagee has obtained an assignment of a prior mortgage by which the legal estate is conveyed to him, and he files a bill for foreclosure, each party is let in to redeem according to the rank which his security holds (*d*), and it is part of the decree that the plaintiff on being redeemed do convey the estate to the person who redeems him (*e*); so that every party who seeks to redeem becomes an applicant against the plaintiff as regards his first mortgage, and then the rule will apply that he shall not be deprived of any advantage that he has acquired; and the advantage that he has acquired is, that he has the entire legal estate in the premises, and what is considered as an equal equity as regards each of his incumbrances with those who come to redeem; and

(*a*) V. *infra*, Chap. viii. of Notice.

(*b*) Sugd. V. and P. 1071.

(*c*) If Sir James Wigram's doctrine (in *Du Vigier v. Lee*, 2 Hare, 332; *Hanson v. Keating*, 4 Hare, 6, 7, 8; and other cases) be the law, as I presume it is, with some qualifications, (*v. int. al. Neesom v. Clarkson*, 4 Hare, 101; *et v. supra*, p. 477 and p. 485,) the position of the party on the record would not now influence the court in determining what are the rights of a mortgagee as regards tacking; and see Coote on Mortgages, p. 480; but see Mr. Cox's note, there referred to.

(*d*) In *Brace v. Duchess of Marlborough*, the Master of the Rolls said (Moseley, 52), in reference to priority of satisfaction under a decree for payment of incumbrances according to their priority, that he thought it juster to explain it, *of priority in point of satisfaction*, though not of time; so that if a creditor could unite a subsequent with a prior security he would have the benefit of it under the decree: and from that time the point has been settled in cases where the creditor comes in under a decree; *v. infra*.

(*e*) See *int. al.* Seton on Decrees, 158, 161.

accordingly the doctrine has been extended in such case to a plaintiff coming to foreclose (a). If indeed the plaintiff in a foreclosure suit were the only person seeking for the interference of the court, it might seem that he might be met by the rule that he who seeks for equity must do equity, in the sense of admitting and giving effect to the priority of the second mortgagee; but as between two subsequent incumbrancers in such case it has not been allowed, for, as we have seen, the circumstance of priority of time alone does not give a better equity (b); the third mortgagee having innocently lent his money without notice of the existence of the second, has in conscience, as it has been considered, as good a right to receive the whole money he has lent as the second mortgagee has to be paid what he may have advanced; and when, by the assignment of the first mortgage, and the possession of the title deeds, he gets both law and equity on his side, a court of conscience will not interpose to strip him of his protection (c).

It was established at an early period, and more especially by the case of *March v. Lee*, before Lord Keeper North, Lord C. J. Hale, and Mr. Justice Rainsford (d), and that case has ever since been followed, that a third mortgagee may buy in the first mortgage so as to be enabled to tack, he having had no notice of the second when he lent his money, though the first mortgagee has at the time notice of the second (e), and that even after a bill filed by the second mortgagee against the mortgagor and the first and third mortgagees, but before decree (f); the third mortgagee having obtained the law on his side and equal equity he shall thereby squeeze out the second mortgagee; and this the Lord Chief Justice Hale called a plank

(a) Lord Chief Justice, *Holt v. Mill*, 2 Vernon, 278. In that case it was objected that the plaintiff ought to prove the actual payment of his money, that producing an acquittance was not enough, *sed non allocatur*; and see *Du Vigier v. Lee*, *ubi supra*.

(b) See *Brace v. Duchess of Marlborough*, 2 P. W. 491, 1st resolution, *et v. supra*, p. 733, 735.

(c) Lord Northington, *Belchier v. Butler*, 1 Eden, 530, affirmed in Dom. Proc.

(d) 1 Ch. Ca. 162; 2 Ventr. 337.

(e) If the first mortgagee had come under any engagement with the second, so as to become his trustee, the principle of *Saunders v. Dehew*, *infra*, p. 739, would apply.

(f) *Robinson v. Davison*, 1 Bro. 62; *Belchier v. Renforth*, 5 Bro. P. C. 292; S. C. 1 Ed. 523; *Barnett v. Weston*, 12 Ves. 133; *Peacock v. Burt*, Coote, Append. 693; 13 Law J.

35; the judgment of Lord Cottenham, which contains a lucid exposition of the authorities, is stated in Jarman, Mortgage, pp. 447-9; and Coote, p. 696-8. So that the first mortgagee does not stand in the place of the mortgagor, as regards subsequent incumbrances, for he could not, at least so I presume, pay off the first, and give the legal estate to the third, so as to enable him to tack, he having notice of the second: the first mortgagee is a vendor, and "knowledge of the vendor has never been held to bind a purchaser for valuable consideration without notice;" Lord Cottenham, then Master of the Rolls, *ubi sup.* See also *Hawkins v. Taylor*, 2 Vern. 29; *Turner v. Richmond*, *ibid.* 91; *Mattheus v. Cartwright*, 2 Atk. 347; *Robinson v. Davison*, 1 Bro. 63, Cox's note; but see the exception in *Wortley v. Birkhead*, 2 Ves. 571.

gained by the third mortgagee or *tabula in naufragio*, which construction is in favour of purchasers, every mortgagee being such *pro tanto* (a). This may now be considered as fully settled (b), notwithstanding the doubt supposed to have been thrown out by Lord Eldon, in the case of *Mackreth v. Symmons* (b), as to the effect which the fact of the first mortgagee having had notice of the second when he conveyed to the third, might have as affecting the right to tack (c).

As to purchases made *pendente lite*, Lord Northington observed that the rule of equity requires no more than that the third mortgagee should not have had notice of the second at the time of lending his money (d), for it is by lending the money without notice that he becomes an honest creditor, and acquires the right to protect his debt; but he is not compelled to look for this protection till his debt is in danger of being prejudiced; and therefore when that danger is first discovered to him, whether it be by a suit in equity or by any extrajudicial means, as the honesty of his debt is not affected by the discovery, so the right of protecting that debt and the efficacy of such protection, are not prejudiced: on this is founded the rule which permits the subsequent incumbrancer to purchase the legal estate *pendente lite* (e).

Lord Hardwicke had to consider the doctrine of purchases made *pendente lite* in a case where a decree had been made for a sale, and that the Master should inquire into priorities. A mortgagee, by mortgage subsequent in point of date to that of the defendant, after the decree, bought in an incumbrance prior in date to that of the defendant, and thus acquired the legal estate, and he sought under the general rule to tack his original subsequent mortgage to the mortgage he had so got in, so as to obtain priority for his entire debt against the intervening incumbrancers: Lord Hardwicke refused to allow the rule to operate in such a case, as it would lay a foundation for collusion between the parties to exclude each other, which would produce very mischievous consequences (f).

A purchaser or mortgagee cannot avail himself, as against the *cestui que trust*, of a conveyance or assignment of a legal estate which was

(a) *Brace v. Duchess of Marlborough*, 2 P. Wms. 491, 1st resolution.

(b) 15 Ves. 335.

(c) See Powell on Mortgages, by Coventry, i. p. 541; Sugd. V. and P. 1016-17.

(d) As to this, however, v. *infra*, Section viii. *Notiæ*.

(e) Lord Northington, *Belchier v. Butler*, 1 Eden, 530.

(f) *Wortley v. Birkhead*, 2 Ves. p. 575;

S. C. 3 Atk. 811; and see *Earl of Bristol v. Hungerford*, 2 Vern. 525; *Ex parte Knott*, 11 Ves. 619; Redesd. Pl. 168, 3rd edition: a commission has not the same effect as a decree in this respect, 11 Ves. pp. 619-20. His Lordship's judgment in *Wortley v. Birkhead*, is so often referred to, that I have set it forth in an extract in the third of the additional notes to this Section.

obtained from a trustee in whom it was vested on express trusts (a). If a prior mortgagee takes an assignment of a third mortgage as a trustee only for another person, he shall not be allowed to tack the two mortgages together to the prejudice of intervening incumbrancers; if this were permitted, said Lord Hardwicke, a mere stranger purchasing the third mortgage by declaring he bought it for the first mortgagee might tack both together and defeat all the other incumbrancers (b). It has been established that an agent, trustee, heir-at-law or executor buying in a *puisne* incumbrance, as against another incumbrancer, is entitled to no more than what he gave for the incumbrance (c).

But though the rule of equity, that is of the Court of Chancery, giving to the *puisne* incumbrance priority under the circumstances above stated, has been so settled, and has been followed, principally, it would seem, on account of the sanction it obtained from the imposing name of Sir Matthew Hale (d), it has often been reflected on as not without great appearance of hardship; it seems reasonable, it has been frequently said, that each mortgagee should be paid according to his priority, and that leaving the second mortgagee to be defeated by a contrivance between the first mortgagee and the third is acting with great severity (e): the doctrine therefore has not been extended to cases which cannot be brought within the reasons on which the judgment in *March v. Lee* was founded.

If the money was not advanced upon the credit of the land, no case of tacking can arise. This, as Lord Cottenham has observed, is strongly exemplified in the case put in *Brace v. D. of Marlborough* (f), and adopted by Lord Eldon in *Ex parte Knott* (g). "A mere judgment creditor, though he deals originally for a lien, does not get an estate originally in the land; he has neither *jus in re* nor *jus ad rem*: but if there be once a creditor by mortgage, and he afterwards advances money upon a judgment, the court will intend that he makes that advance meaning to take a security upon the land for both (h), and he

(a) *Saunders v. Dehew*, 2 Vern. p. 271; 2 Freem. 123; *Allen v. Knight*, 5 Hare, 278; Sugd. V. and P. 1019.

(b) Lord Hardwicke, *Morret v. Paske*, 2 Atk. 52, 53; but it is not quite obvious that the anticipated consequence would follow.

(c) Lord Hardwicke, *Morret v. Paske*, 2 Atk. 54; *v. supra*, pp. 656-7. It is stated, in Comyn's Digest, *Mortgage*, p. 740, referring to Ch. Rep. p. 409, "That a purchaser of a prior incumbrance shall not have advantage

of it for securing a prior debt, if he had not the mortgage or purchase of the land, without notice, before his purchase of the incumbrance."

(d) See 2 P. W. 492.

(e) *Ibid.* pp. 492-3.

(f) 2 P. W. p. 491; and see *Averall v. Wade*, Llo. & G. temp. Sugd. 262.

(g) 11 Ves. 617.

(h) And see *Mackreth v. Symmons*, 15 Ves. p. 346-7, *et seq.*

may tack; but if he remains a mere judgment creditor, the court says he does not deal upon the faith of the land in this sense, that he does not contract for an interest in the land, and therefore is entitled only as a judgment creditor to an *elegit* and he cannot tack" (a). The cognizee of the judgment, as has been said, is not deceived though the cognizor had before made twenty mortgages of all his real estate; whereas a mortgagee is defrauded or deceived if the mortgagor before that time had mortgaged his estate to another; and it is such a fraud as the legislature (b) has taken notice of and punishes by foreclosing such mortgagor who mortgages his land a second time without giving notice of the first mortgage (c).

There seems to be a difference, therefore, between the case of a third mortgagee buying in a statute or judgment which is the first incumbrance, and where a statute or judgment creditor being the first incumbrancer buys in the third mortgage; in the latter case the statute or judgment creditor, as he did not lend his money on the credit of the land and therefore is not a purchaser, is not permitted to unite the first mortgage to his statute or judgment (d); but in the former case, as the land was in view and contemplation of the lender, and he was therefore a purchaser, he will be allowed to unite the statute or judgment to his third mortgage, and thus obtain priority over the second (e), and that, as it has been held, although there be nothing due upon the judgment or statute (f); and the purchaser will, it

(a) Lord Cottenham, *Lacey v. Ingle*, 2 Phill. 422. But if a first incumbrancer by judgment has likewise a mortgage on the estate, though there is another judgment, prior in time to the mortgage, yet if the mortgagee had no notice of such judgment, the creditor by judgment (who, it is to be observed, did not lend his money on the credit of the land) must pay off both if he seek relief in equity; "for it would be hard," said Lord Hardwicke, "if such a party were to be in a worse situation with a prior incumbrance in his favour, than a mortgagee without notice of a prior judgment would be in this court;" *Sir Hugh Smithson v. Thompson*, 1 Atk. 520.

(b) By stat. 4 & 5 Will. & M. c. 16, § 2, if any person who hath suffered any judgment, statute or recognizance, which may bring a charge on his land, to be entered against him, mortgages his estate, without giving notice of the prior incumbrance, such mortgagor will not be entitled to the benefit of an equity of redemption; and the same punishment applies in case of a second mortgage (unless there is fraud or unfairness in the second mortgagee,) where the fact of a former mortgage is sup-

pressed; though the right to dower is by the act (s. 5) saved to the wife, if she does not join in such conveyances; see *Stafford v. Selby*, 2 Vern. 589-90, where the general doctrine as to the effect of this act may be found. I do not remember a single instance of this statute having been enforced.

(c) *Brace v. Duchess of Marlborough*, 2 P.W. 491-2; 2nd resolution.

(d) Whether, as before noticed, the late statute, 1 Vict. c. 110, which makes a registered judgment a charge on the land, will affect this doctrine has, as I believe, yet to be decided.

(e) In *Edmunds v. Povey*, 1 Vern. p. 187, Lord Keeper North would not allow the point to be disputed: and see *Brace v. Duchess of Marlborough*, 2 P. W. 493; *Moseley*, p. 53; *Morrel v. Paske*, 2 Atk. p. 53; *Anon.* 2 Ves. 662. As to the requisites that must be complied with, in order to make a judgment effectual according to the modern statute law, see vol. i. p. 290; and *supra*, p. 722, note.

(f) See additional note, No. 4; *Edmunds v. Povey*, 1 Vern. 187, that was the case of a satisfied judgment, and the Lord Keeper would not allow the point to be disputed; *March v.*

seems, be entitled to the benefit he has so acquired, though obtained by undue means, as without any consideration or even by fraud (*a*), for the practice, says the author of the Treatise of Equity, is not material to secure a just debt (*b*).

The reason why a mortgagee may be tacked to a judgment, where the judgment is bought in by a mortgagee, is stated to be this—because the judgment creditor by virtue of an *elegit* may bring an ejectment and hold upon the extended value (*c*): now there is an additional reason, for without suing out execution he may obtain, by registering the judgment, an actual charge (*d*). If the purchase be of a precedent statute or judgment (*e*) by a subsequent mortgagee, and he extends the lands, he shall not be brought to account upon this in equity by a prior mortgagee, any otherwise than as he may at common law, by *scire facias ad computandum*, viz., not according to the true value, but upon the extended value (*f*); and this although the extended value was but a third part of the true value (*g*): so that by protecting, says the author of the Treatise of Equity, is meant, making all the ad-

Lee, 1 Ch. Ca. 166, add. note, No. 4; *Stanton v. Sadler*, 2 Vern. 30; there the purchaser appears to have extended the statute after his purchase, though it was satisfied; see 2 Fonbl. 306; and Powell on Mortgages, by Coventry, i. p. 510, note (*p*). Satisfied judgments have not been extinguished as satisfied terms have, but there is a course which the debtor may take to have satisfaction entered, which may be seen by reference to Harrison's Digest: *et v. infra*, p. 742.

(*a*) *Hitchcock v. Sedgwick*, 2 Vern. 158; *Sir John Fagg's case*, cited 2 Vern. p. 58; *Harcourt v. Knowel*, cited 2 Vern. p. 159; *Siddon v. Charnells*, Bunb. 299; though this doctrine has been considered to be doubtful: Powell on Mortgages, by Coventry, 512; Sugd. V. and P. p. 1019. In *Sanders v. Deligne*, 2 Freem. p. 123, the Lords Commissioners said, "That they would not give any relief to a person in such circumstances, but would not prevent him from gaining any advantage he could at law;" see however *Turner v. Buck*, 22 Vin. Abr. 21, Hovenden.

(*b*) 2 Fonbl. 306.

(*c*) Lord Hardwicke, *Morret v. Paske*, 2 Atk. 52. Mr. Coote, on Mortgages, pp. 69, 70, has described the nature of an *elegit* according to the old law; *et v. supra*, p. 724, as to the effect of the stat. 1 & 2 Vict. c. 110.

(*d*) *V. supra*, p. 704.

(*e*) *Godfrey v. Watson*, 3 Atk. 517.

(*f*) *Higgon v. Calamy*, 1 Ch. Ca. 149; 1 Fonbl. 306; 2 Vent. 338; and see *Churchill v. Grove*, 1 Ch. Ca. 37. Mr. Fonblanque adds

a query whether the mortgagee—that is, if he has extended the land under an *elegit*—shall not account for what he has received, if he has received enough to satisfy his whole demand; referring to *Godfrey v. Watson*, *ubi sup.*, *et inf.* p. 742; and *Quarrel v. Beckford*, 1 Mad. 269. (which was a case of a mortgagee in possession holding over, *ibid.* 277-8,) and no doubt he would: see also the dict. by Lord Chief Justice Hale, 2 Vent. 339; and see the next note.

(*g*) *Earl of Huntington v. Greenville*, 1 Vern. 49. "However," said Lord Hardwicke, "if the debtor comes into equity for relief, this court will give it him by obliging the creditor to account for the whole that he has received (and see 2 Vent. pp. 338-9); and as a person who comes for equity must do equity, will direct the debtor to pay interest to the creditor, even though it should exceed the principal; *Godfrey v. Watson*, 3 Atk. 517: though this is apparently at variance with the doctrine that interest will not be allowed beyond the penalty of a bond, at law or in equity, (see *Bromley v. Goodere*, cited 3 Atk. 517; *Tew v. Winterlton*, 3 Bro. 489; *Knight v. Maclean*, *ibid.* 496; *Hughes v. Wynne*, 1 My. & K. 24, 25, except in special cases; *Grant v. Grant*, 3 Simons, 365,) unless this is to be taken as an exception to the rule, that the position of a party on the record shall not vary his rights (*v. supra*, p. 736 n.), which, from the concluding passage of Lord Hardwicke's judgment, 3 Atk. 518 (stated *infra*, next page), it would seem it is not.

vantages of it that the law admits of (a); and Lord Hardwicke even went beyond this, saying that where a mortgagee has tacked a judgment to his mortgage he shall not be confined to the penalty of the judgment, but shall be entitled to interest upon the debt secured by judgment though it exceeds the penalty down to the time the principal is paid off (b).

It is easy to understand that the court should refuse in a doubtful case to entertain an application to get rid in effect of a statute or judgment in equity, when the means of having it vacated are open at law (c), and that the court should refuse to prevent the party from obtaining any advantage which the judgment whilst standing gives him at law (d); but the grounds on which a mortgagee getting in a judgment or statute which is *admitted* to be satisfied, and of which, therefore, no advantage—at least, substantial advantage—could be obtained at law, should be allowed to have a priority over a mesne incumbrancer are not quite so obvious (e). The reason seems to be that, although satisfied, yet, until proceedings have been taken by means of a *scire facias ad computandum*, or *ad redhibendam terram* (f), to vacate the judgment or statute, an *elegit* may be sued out; and an ejectment may be founded upon it: still it must be admitted that, allowing a satisfied judgment, on which nothing remains due, and on which an *elegit* has not been issued (g), so that the party has not even elected to take the land in preference to the person as his security, to give to a mortgagee who purchases such a judgment priority over an incumbrancer having priority in point of time to the purchaser of such judgment, as seems to have been the effect of the decree in *Edmunds v. Povey*, is carrying the doctrine much beyond mere protection; in any sense of that term. That a satisfied term should have afforded such an advantage (h), is perfectly intelligible, because at

(a) 1 Fonbl. 306.

(b) *Godfrey v. Watson*, 3 Atk. 518.

(c) See *Brace v. Duchess of Marlborough*, 2 P. W. 494, 5th resolution.

(d) Which has long been established as a rule; *Hitchcock v. Sedgwick*, 2 Vern. 158, and cases there cited.

(e) It was stated by Mr. Vernon, and agreed by the court, in *Wright v. Pilling*, Prec. Ch. 495, that if a man has confessed twenty judgments or statutes, the conuzee cannot, by buying in the first, hold out all the intervening judgments, because when the debt on the first judgment is paid, that security expires and determines of itself: "the tenancy by *elegit*," says Sir Wm. Blackstone, ii. 161, "is only a conditional estate, defeasible when the debt is

paid."

(f) *V. supra*, and *Marsh v. Lee*, 2 Vent. 338; additional note, No. 4, *infra*; Coote, 498, 499, 500.

(g) It is said, in Bacon's Abridgment, (tit. *Sci. Facias*, C. 2, vol. vi. p. 109; and see 2 Saunders, 72, 5, 6,) that if the conuzor in a statute *after* his land is *extended*, tenders the money to the conuzee, who refuses it, he is put to his *scire facias*, and cannot enter; but in case of an *elegit* on a recognizance at common law, when the conuzee is answered his debt by perception of the certain and usual profits of the land, the debtor may enter, and is not put to his *sci. fa*.

(h) As in *Turner v. Richmond*, 2 Vern. 81, and the cases in the note.

law there were no means whatever of procuring the extinction of an absolute term, though all the purposes for which it was created were at an end, and it might be made use of as against every one, not only to defend but to recover the possession (a).

It has been laid down that where a person who has a first mortgage, which requires no support, without the consent of the mortgagor, purchases in a subsequent judgment (which, as before mentioned, does not of itself affect the land), a *mesne* mortgagee or assignee will not be compelled to pay the money due on both securities, in order to redeem, "because such transaction of the mortgagee was only to load the estate without the consent of the owner, when he had *no prospect of bettering his own security*" (b).

All the points as to the requisites of tacking, are exemplified in the late case of *Lacey v. Ingle* (1847) (c). One Rogers had contracted to purchase four estates; he had paid the purchase-money for one, consisting of 366 acres, and obtained a conveyance, and on the 8th January, 1842, he executed a legal mortgage of this estate to one Brown, for securing 1500*l.* and interest; on the 28th January 1842, he executed a mortgage to one Wilkinson of the same property, to secure 2000*l.*, depositing a forged copy of his purchase deed. On the 21st April, 1842, Rogers contracted with the plaintiff, Mrs. Lacey, to sell to her the estates he had contracted to purchase, free from all incumbrances (d), for 5200*l.*, 1040*l.* to be paid down, the remainder on the completion of the purchase: the 1040*l.* was paid, and on the 28th October, 1842, Mrs. Lacey, at Rogers's request, advanced to him 350*l.* more. Mrs. Lacey had no notice of the mortgage to Brown until November, 1842, or of the mortgage to Wilkinson until December, 1842. On the 2nd July, 1842, the transaction took place on which the question arose: on that day Rogers borrowed 800*l.* of the defendant Inglis, and as a security for it he executed a deed, by which, after reciting Mrs. Lacey's agreement for purchase, Rogers assigned, as stated in the deed, the sum of 5000*l.*, agreed to be paid to Rogers as the balance of the price for the premises contracted to be sold, with power to sue for and recover it; and in the event of the recited contract going off, Rogers cove-

(a) *Brereton v. Jones*, 1 Eq. Ab. 326, § 11; *et v. int. al.* Ambl. 284.

(b) This doctrine seems to have something of reason for its foundation, but it is not consistent with the decisions above referred to, and it has been disputed by a modern author, eminently conversant with this subject; Coote, p. 515. By the same case it was decided that a judgment obtained after the equity

of redemption has been assigned, cannot be tacked by the judgment creditor against the assignee of the equity of redemption to a mortgage afterwards got in by him, when the judgment creditor had notice of the assignment of the equity of redemption before he purchased the mortgage.

(c) 2 Phillips, 413.

(d) 2 Phillips, 420.

nanted to execute a mortgage of the premises to the defendant. The solicitors of Brown were the solicitors of the defendant, and it was agreed that the deeds in their possession, as solicitors of Brown the mortgagee, should, as between Rogers and the defendant, be held by them for his security; the defendant gave no notice of this security to the plaintiff, Mrs. Lacey, previously to her advance in October, 1842, or afterwards. On the 11th December, 1843, Mrs. Lacey purchased Wilkinson's equitable incumbrance for 1500*l.*, but keeping it alive, as a subsisting charge, for her benefit. The 1500*l.* paid by Mrs. Lacey to Wilkinson, with the sums previously paid, and agreed to be paid, on account of the purchase-money, and the 1500*l.* due on Brown's mortgage, exceeded the gross sum payable by Mrs. Lacey, so that nothing was left for payment of the 800*l.* advanced by the defendant Ingle on the security of the 2nd July, 1842 (*a*). Ingle, in order to better his security, paid off Brown, and took from him an assignment of the legal estate; he then claimed to tack the 800*l.* to his mortgage as against Mrs. Lacey, who sought to redeem Brown's mortgage; the question was, whether he was entitled to do so. On the original hearing, the Vice-Chancellor Knight Bruce, treating the question as one between Mrs. Lacey, as assignee of Wilkinson's equitable mortgage, and the defendant, as holder of the legal estate, with a subsequent claim under the security of the 2nd July, 1842 (*b*): held that the defendant was entitled to tack the 800*l.* Lord Cottenham took a different view of the case, and reversed the Vice-Chancellor's decree. His Lordship held, first, that in the events that had happened, Ingle could not be considered as having advanced his money on the security of the estate, but only of the purchase-money, therefore no case of tacking could arise (*c*); and secondly, that he had not equal equity, for he lent his money with notice of the plaintiff's contract (*d*), and therefore with full knowledge that the plaintiff had a right to apply her purchase-money in the discharge of all incumbrances affecting the estate: this was clear as between her and Rogers, and the defendant taking under Rogers could have no larger right than Rogers, his assignor (*e*): he had dealt for a security on a supposed balance; he was contending for a security on the nominal purchase-money. The defendant had indeed been defrauded by Rogers having suppressed some of the incumbrances, but the plaintiff was no party to the fraud; the decree

(*a*) This security is, by mistake, in two instances, stated in the report, to be of the 21st April.

(*b*) 2 Phillips, 422.

(*c*) 2 Phillips, 421.

(*d*) *V. supra*, p. 732.

(*e*) 2 Phill. pp. 422-3.

deprived the plaintiff of what she had contracted for, namely, the estate free from incumbrances, for the purchase-money agreed upon; and gave the defendant, what he had not contracted for, a lien for the money he advanced upon the land in the hands of the purchaser. If the plaintiff had been guilty of neglect, in advancing so much of the purchase-money before the title was made clear, the defendant had been guilty of greater neglect, in not giving notice of his security; the agreement as to the deeds, gave him no better security, for it was inconsistent with his written agreement that he should have any security on the estate, unless (which had not happened) the purchase should go off. The Lord Chancellor considered that the fact of Mrs. Lacey having taken an assignment of Wilkinson's security, neither improved her position any more than if she had simply paid off the debt, nor could it prejudice her; and his Lordship ordered that, as the whole of the litigation had arisen from the defendant's claim, he must pay the Costs of the suit up to and including the hearing.

It appears that an act of bankruptcy by the mortgagor prior to the lending will not prevent tacking (*a*).

It is to be borne in mind that, as a general rule depending on the very essence of the doctrine now under consideration, unless the party who seeks to tack has acquired the legal title, or the dominion over it, a right to tack can never attach (*b*); if a fourth mortgagee buys in the second without notice of the third, he cannot tack, and he gains no priority (*c*): where the legal estate is outstanding, and no party has a preferable right to get it in (*d*), the several incumbrancers must be paid according to their priority of time, *Qui prior est in tempore potior est in jure* (*e*), and if a person holds a mortgage in one character and has the legal estate in another, for instance, the mortgage in his individual character and the legal estate as executor, or *vice versá*, he will not be permitted to tack (*f*).

A mortgagee who purchases the equity of redemption is bound to pay a judgment obtained subsequently to his mortgage of which he

(*a*) Coote, p. 513.

(*b*) Lord Hardwicke, *Clarke v. Abbot*, Barnardist. 462-3; "especially without bringing the trustee of that mortgage before the court;" *et v. supra*, p. 728, 734.

(*c*) *Clarke v. Abbot*, 2 Eq. Ab. p. 606, S. C. Barnardist. 457; 2 P. W. p. 496, 7th resolution.

(*d*) *Earl Pomfret v. Lord Windsor*, 2 Ves. p. 486.

(*e*) *Brace v. Duchess of Marlborough*, 2

P. W. 493, 7th resolution; *Frere v. Moore*, 8 Price, p. 475; *Parry v. Wright*, 1 Sim. & St. 369; *et v. supra*, p. 727; and see *Frere v. Moore*, 8 Price, 475, as stated Sugd. V. and P. 1018, and the additional note, No. 1.

(*f*) *Barnett v. Weston*, 12 Ves. 134. This was a mortgage of a leasehold; the two interests in different rights were united in the executor: and see *Saunders v. Dehew*, *ubi supra*: as to perfecting defective securities in favour of mortgagees, *v. supra*, p. 639.

has notice before the purchase ; but it seems he is not bound to pay a judgment of which he had no notice, though it had been docketed or registered (a) ; the doctrine of purchaser for valuable consideration protects him, at least in equity.

The Extinction and Merger of incumbrances is so material in reference to the question as to priorities, that it will be proper here to advert to the general doctrines on that subject.

If a mortgagor pays off a prior charge the extinguishment of the charge will enure to the benefit of a subsequent mortgagee ; so also if a person have a charge, and that charge has been avoided as being illegal or on any other ground, either by the act of the mortgagor or by the act of a subsequent mortgagee—the principle of the decisions on this subject is that the mortgage as between mortgagor and mortgagee, is a mortgage of the mortgagor's entire interest, saving only the rights of prior incumbrancers (b). Generally speaking, a purchaser of an equity of redemption, with notice of subsequent incumbrances, stands in the same situation as regards such subsequent incumbrances as if he had himself been the mortgagor ; he can neither set up against such subsequent incumbrances a prior mortgage of his own, nor consequently a mortgage which he or the mortgagor may have got in (c) ; he is not permitted to say there was a time when there was a charge upon the estate prior to the second incumbrance, and therefore that as between him, the purchaser, and the second incumbrancer, that charge shall be considered as still subsisting ; and it is all the same whether he have constructive or actual notice at the time of his purchase (d) : if he have no notice he may then take advantage of the general rule in favour of purchasers without notice ; and where a first mortgagee purchases the equity of redemption with notice, he may keep his charge on foot as against subsequent incumbrancers equally as may a devisee (e). On the principle above stated, where a second equitable mortgagee, who becomes such without notice of the first equitable mortgage, afterwards with notice of the first incumbrance, obtains the legal estate from the mortgagor, he holds the legal estate subject to the first incumbrance (f) ; he can only hold the legal

(a) *Greswold v. Marsham*, 2 Ch. Ca. 170, cited by Sir Wm. Grant, in *Toulmin v. Steere*, 3 Meriv. 224 ; *Churchill v. Grove*, 1 Ch. Ca. p. 35 ; and see Sugd. V. and P. p. 1048 and p. 965 ; and *infra*, Sect. viii. Notice.

(b) Vice-Chancellor Wigram, 5 Hare, 481 ; and see *Fraser v. Jones*, 5 Hare, p. 482 ; et v. *supra*, p. 657, n. (f).

(c) *Toulmin v. Steere*, 3 Meriv. p. 224 ;

Greswold v. Marsham, 2 Ch. Ca. p. 170 ; and *Mocatta v. Murgatroyd*, 1 P. W. 393, there cited.

(d) *Toulmin v. Steere*, 3 Meriv. 224.

(e) *Forbes v. Moffatt*, 18 Ves. 384 ; Jarm. Mortgage, by Sweet, 455 ; v. *infra*, p. 748 ; and see a Treatise on this subject in the Jurist, vol. xi. No. 558, pt. ii. p. 377.

(f) *Allen v. Knight*, 5 Hare, 272 ; *Parry*

estate precisely as the mortgagor held it (a). This doctrine is of great importance as regards priorities as between subsequent incumbrancers.

An estate was purchased by one Madocks, subject to a first mortgage to Sir Thos. Mostyn, and a second mortgage to the plaintiff. Madocks was to retain 5000*l.* to pay off the incumbrances; in 1810 Sir T. Mostyn, by the direction of Madocks, conveyed the premises to one Girdlestone in fee, and it was declared that the trustee of an outstanding term should hold it to attend the inheritance; the 3200*l.* paid to Mostyn was the money of one Wright and was paid to him by Wright's agent; by a deed of the same date Madocks granted a rent-charge to Wright to be issuing out of the lands, and Girdlestone demised the lands to Berkeley as trustee for 500*l.* to secure the rent-charge. Wright had constructive notice of the plaintiff's charge; the question was whether Wright, to the extent of the money paid to Mostyn was entitled to priority, or whether Wright under the circumstances was to be considered as the first incumbrancer. It was held that he was: Wright, by accepting the term from Girdlestone, admitted that he held the fee in trust for Madocks. Sir T. Mostyn's security had not been kept up, and the parties having failed to do so the court could not give effect to their instruments contrary to their own clear intention (b). In a late case one Holman made an equitable mortgage to the defendant, and afterwards entered into an agreement to grant a lease of the same premises to the defendant; the property was sold subject to the plaintiff's claim under the agreement, under an order of the Court of Review, and the defendant became the purchaser; it was held on the principles above stated that the plaintiff had a clear right to have the lease he contracted for as against the defendant, on the ground that the defendant by becoming the purchaser had united his interest as equitable mortgagee with that of owner of the equity of redemption (c).

The principle of law is that a term merges by union with the inheritance, whether the interest in the reversion be absolute, or only for a limited period (d): but upon this subject the Court of Chancery is not guided by the rules of law: it will sometimes hold a charge

v. *Wright*, on appeal, 5 Russ. p. 142; S. C. 1 Sim. & St. 369, 379; stated *infra*, *Brown v. Stead*, 5 Sim. 535; *Smith v. Phillips*, 1 Keen, 694.

(a) *Allen v. Knight*, *ubi sup.*; on the principle of *Saunders v. Dehew*, 2 Vern. 271; *Beckett v. Cordley*, 1 Bro. 353.

(b) *Parry v. Wright*, 1 Sim. & St. p. 379; affirmed, 5 Russ. 142; and see, on this subject, *Medley v. Horton*, 14 Sim. p. 229, where

(p. 228) the leading cases are cited; *Garnett v. Armstrong*, 2 Conn. & L. p. 458; *Smith v. Phillips*, 1 Keen, 694, 699, *infra*; and see *Earl of Clarendon v. Barham*, 1 Yo. & Coll. C. C. p. 702; and *Hood v. Phillips*, 3 Beav. p. 517.

(c) *Smith v. Phillips*, 1 Keen, 694: *Brown v. Stead*, 5 Sim. p. 535, appears to have been determined on the terms of the deed.

(d) *Stephens v. Bridges*, 6 Mad. 66.

to be extinguished where it would subsist at law; and sometimes preserve it, where at law it would be merged. The question where volunteers only are concerned is upon the intention, actual or presumed, of the person in whom the interests are united (*a*). In most instances it is, with reference to the party himself, of no sort of use to have a charge upon his own estate, and where that is the case, it will be held to sink, unless something shall have been done by him to keep it on foot (*b*). The entry of a devisee, having a mortgage, will be presumed to be as devisee, if no trace appears of any of the steps usually taken by a mortgagee to get into possession (*c*). A purchaser must cause the mortgage to be assigned to a trustee for himself, and declare the purpose, or he will not be able to take advantage of it as against other incumbrancers (*d*).

It will be remembered that if tenant for life, who is only bound to keep down the interest of the incumbrances, pays off an incumbrance, *primâ facie*, it will be kept alive and not merged for the benefit of the inheritance (*e*); where it is paid off by tenant in tail, the presumption is that it is done in favour of the inheritance, which he may at any time acquire; but the reason ceases and with it the presumption where the money of an infant tenant in tail is applied in discharge of an incumbrance (*f*). Satisfaction of the debt due upon a mortgage will extinguish all the interest of the mortgagee in the mortgage, and an assignee of the mortgagee will not be in any better condition after such extinguishment of the debt than the mortgagee. This is very important as regards sureties; the surety can only stand in the place of the creditor (*g*). If the debt is paid the mortgage is, from the very nature of it, satisfied by that act; if the incumbrancer wishes to keep aliye such securities for his benefit, the payment must assume the shape of a transfer; it must be done artificially (*h*).

(*a*) See *Hood v. Phillips*, 3 Beav. p. 517; and see *Earl of Clarendon v. Barham*, 1 Yo. & Coll. C. C. 698, cases cited in the argument, p. 698, and in the judgment, p. 702, *et seq.*

(*b*) *Forbes v. Moffat*, 18 Ves. 391-3; and see *Stephens v. Bridges*, 6 Mad. 66.

(*c*) *Forbes v. Moffat*, 18 Ves. 391.

(*d*) See Jarm. Mortgage, by Sweet, 454, 455; Jarm. on Convey. vol. ix. pp. 209, 213, note (*a*), 3rd edit., where all the leading cases on the subject are collected, and some valuable practical directions are given, but the reference to Sugd. V. and P. is incorrect. "The difference between the rule which obtains where a mortgagee acquires the equity of redemption as a vendee, and where he acquires it by devise, does not appear to rest on very solid grounds, but must, it is conceived, be

considered as settled by authority." Jarman, Mortgage, p. 455.

(*e*) *Faulkner v. Daniel*, 3 Hare, 217; *Jones v. Morgan*, 1 Bro. 218; *Countess of Shrewsbury v. Earl of Shrewsbury*, 3 Bro. 120; 1 Ves. J. 227; *St. Paul v. Viscount Dudley and Ward*, 15 Ves. 173; *Astley v. Milles*, 1 Sim. 298; *Lord Selsey v. Lord Lake*, 1 Beav. 146; *Tyler v. Lake*, 4 Sim. 358; *Hood v. Phillips*, 3 Beav. 517; and see *Lord Clarendon v. Barham*, 1 Yo. & Coll. C. C. 688.

(*f*) *V. supra*, pp. 308, 345.

(*g*) See *Copis v. Middleton*, 1 T. & R. 224; *Jones v. Davids*, 4 Russ. 277; *Hodgson v. Shaw*, 3 My. & K. 183.

(*h*) See the judgment of Baron Parke, *Wilkinson v. Simson*, 2 Moore, Priv. Co. R. 275, 287.

If a mortgagee cancels a mortgage, and it is found so in his possession on his death, it is as much a release as cancelling a bond; but it does not convey or revest the estate in the mortgagor, for that must be done by some deed (a): the legal estate would descend upon the heir; but in such case, there being no debt at law or in equity, at least upon the mortgage, the Court would hold the heir to be a trustee for the mortgagor: but as to the fact of cancellation—that is, whether or not it was cancelled by the mortgagee—that is a proper case for an issue, if any doubt be raised (b).

If the mortgagee to whom a mortgage and bond are given makes a *parol gift* of the mortgage to the mortgagor, that will discharge the mortgage, notwithstanding the Statute of Frauds, and be an answer to a bill for a foreclosure, there being a difference both in law and equity between absolute estates in fee or for a term of years, and conditional estates for securing the payment of a sum of money. In the case of absolute estates, it cannot be admitted that parol evidence of the gift of deeds shall convey the land itself; but where a mortgage is made of an estate that is only considered as a security for money due, the land is the accident attending upon the other; and when the debt is discharged, the interest in the land follows of course. If, said the Lord Chancellor, an obligee delivers up a bond with an intention to discharge the debt, the debt will certainly be thereby discharged, and if the bond is discharged the mortgage will be discharged with it (c).

(a) Lord Hardwicke, *Harrison v. Owen*, West. Rep. 528.

(b) *Ibid.* p. 528, note.

(c) Lord Talbot, *Richards v. Syme*, Barn. 90, 93. Whether the mortgagee could file a

bill to have the legal estate conveyed to him on the ground of such a gift, is another question, *ibid.* 91; but it seems the decision would have been the same, 92.

ADDITIONAL NOTE, No. I.—V. *supra*, p. 728, 729.

Frere v. Moore, 8 Price, 475.—*Effect of Covenant by Trustee to stand possessed of Legal Estate, as regards Priorities.*

In October, 1786, a moiety of the prebend and premises in question, held on lease, was assigned to Bird, to secure to Cooke 1000*l.* and interest; he afterwards took renewals of the leases: it was admitted that Cooke was the first incumbrancer.

The defendant Moore having become entitled to a moiety of the prebend and premises, in right of his wife, and being also entitled to the other moiety, charged with 1000*l.*, due to Cooke on his mortgage, dated in 1786; on the 12th October, 1806, (in the report, 1816,) Bird, who was trustee of a term of years in the property in

trust for Moore and wife, and Moore and wife assigned the moiety of the prebend and premises, subject to Cooke's mortgage, to A. Frere, for securing 1460*l.* and interest, whereby Frere obtained the legal estate in a moiety. On the 14th May, 1813, (the legal estate having got back again to Bird on some renewal,) by deed, to which Moore and wife, Frere and Bird, were parties, Bird covenanted with Anthony Frere and Moore and wife, to stand possessed of the premises; first, for securing 1400*l.* before due, and 1500*l.* then advanced by A. Frere; and then, as Moore and wife should appoint: Moore covenanted to pay the 2900*l.* on the 14th November then next. On the 14th February, 1817, a deed was executed, under which Bird was to stand possessed of the premises, to secure 4877*l.* due to the plaintiff Frere (representative of A. Frere), including the original mortgage and moneys due to himself on bond and otherwise, not affecting the estate, with power to sell if the sum due were not paid by 14th August then next. On the 30th December, 1816, Moore and his wife (Bird, though a party, not having executed,) had appointed that Bird should stand possessed of the premises, subject as to a moiety to Cooke's mortgage for 1000*l.*, and subject as to the entirety to the sum of (amount left in blank), due to the representatives of Frere, in trust, for securing 1200*l.* to Hudson and Fallows. The plaintiff sought not only to have his security of the 14th May, 1813, but that of 14th February, 1817, paid, in preference to Hudson and Fallows. There was no proof that Frere, in 1817, had notice of the security to Hudson and Fallows. The plaintiff insisted that Bird was to be considered as holding the lease for the protection of all the estates, according to their priority (p. 479); and the legal estate being in him, it was the same as if it were in the plaintiff, the first incumbrancer; citing Lord Eldon's judgment, *Ex parte Knott*, 11 Ves. p. 618, which, however, seems rather to support the Lord Chief Baron's decision. But the Lord Chief Baron Richards held that the plaintiff and the defendants had each of them *equal equity*; the defendants were not bound, in December, 1816, to give notice to Frere of their having made the advance; and as neither had actually the legal estate, their securities must rank according to their dates. Then, as to the effect of the covenant by Bird to stand seised of the legal estate, in trust for Frere, as Frere had not got it in, notice of that covenant to the subsequent incumbrancers was not equivalent to its having been got in; they had only notice that it was held by Bird, in trust to secure 2900*l.*: but his Lordship added, that if Frere had been *purchaser*, it would have been conclusive; and his Lordship held that each party was entitled to the benefit of the legal estate according to their priorities: *Frere v. Moore*, 8 Price, pp. 482-491. It is evident, from the reasoning, that the case would have been decided in the same way, had the last sum been advanced by A. Frere, or T. Frere, expressly on the security of the land. It is to be observed that the defendants took their security without requiring Bird to execute, so that on inquiry from Bird, Frere would not have acquired any notice of the defendant's security: there seems to have been some negligence in this omission. It is not easy to collect the precise facts of this case, but the above statement is, I believe, in substance, correct, so far as regards the present purpose.

ADDITIONAL NOTE.—No. II.

Ingram v. Pelham, Amb., before Lord Hardwicke.

“Scriveners and bankers,” said Lord Hardwicke in *Ingram v. Pelham*, Amb. 153, “who lend large sums of money on securities, and then give derivative securities on declarations of trust, may as well be trusted to their personal credit, because it is in their power to defeat all their equitable creditors by conveying the legal estate to another.” In the case before Lord Hardwicke, a person seised of an estate subject to several equitable incumbrances, sold it to another and conveyed the legal estate to him subject to certain of the incumbrances which were specified, but without notice of the others: it was held that the purchaser was a trustee for these specified incumbrances, though subsequent in date to the others, so that the former got the priority: *et v. Greswold v. Marsham*, 2 Ch. Ca. 170, which Lord Hardwicke followed.

ADDITIONAL NOTE.—No. III.

Extract from the Judgment of Lord Hardwicke, in *Wortley v. Birkhead*, v. sup. p. 738.

“As to the equity of this court, that a third incumbrancer having taken his security or mortgage without notice of the second incumbrance, and then, being *puisny*, taking in the first incumbrance, shall squeeze out and have satisfaction before the second, that equity is certainly established in general; and was so in *Marsh v. Lee* (1), by a very solemn determination by Lord Hale, who gave it the term of the creditor’s *tabula in naufragio*. That is the leading case: perhaps it might be going a good way at first; but it has been followed ever since, and I believe, was rightly settled; but rightly settled only on this foundation, by the particular constitution of the law of this country. It could not happen in any other country but this (2), because the jurisdiction of law and equity is administered here in different courts, and creates different kinds of rights in estates, and therefore as courts of equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and therefore where there is a legal title and equity of one side, this court never thought fit, that by reason of a prior equity against a man, who had a legal title, that man should be hurt; and this by reason of that force this court necessarily and rightly allows to the common law and to legal titles. But if this had happened in any other country, it could never have made a question; for if the law and equity are administered by the same jurisdiction, the rule, *Qui prior est tempore potior est jure*, must hold. This has gone so far, (and the original case was) that if a *puisny* incumbrancer took in the first incumbrance *pendente lite*, still he should have the same benefit; for in *March v. Lee* there was a *lis pendens*, yet was not the party affected with it; and so, I take it, in general it would be notwithstanding a *lis*

(1) See additional note, No. 4, *infra*.

(2) The effect of the Registration Act in Ireland precludes it in that country, 6 Anne, c. 2;

Latouche v. Dunsany, 1 Scho. & Lef. p. 157; *Bond v. Hopkins*, 1 Scho. & Lef. 430; but see *Tenison v. Sweeny*, 1 Jones & Lat. 710.

pendens; because the principle, upon which all these cases depend, is this, that a man's having notice of a second incumbrance at the time of taking in the first does not hurt; it is the very occasion that shows the necessity of it. It is only notice at the time of taking in the third that will affect him; for then no act, he can do, will help him. Then a *lis pendens* is nothing but notice, and actual notice is certainly as good as that by a *lis pendens*; one notice is in consideration of this court as strong as another: nay, actual notice is stronger than that implied by a *lis pendens*; it will not therefore affect him. That was *March v. Lee*, and the other cases, which I agree to; but no case is cited wherein a *puisny* incumbrancer, a party in a cause, and a decree made in that cause for satisfaction of incumbrancers, according to their respective priorities, has taken in a prior to tack to his *puisny* incumbrance; that he shall be allowed to make use of that in any other shape than that original incumbrance would be. I am of the same opinion, as Lord Cowper was in the *Earl of Bristol v. Hungerford* in general, and do think it would be most mischievous and pernicious, if the court should allow that doctrine of tacking to be carried to that extent."—*Wortley v. Birkhead*, 2 Ves. 573, *et seq.*; and see the remainder of the judgment.

ADDITIONAL NOTE.—No. IV.

March v. Lee, 2 Ventr.—*Of Purchasing in Securities*.—*Supra*, p. 737, 741.

If a man mortgages lands to A. and afterwards makes a subsequent mortgage to B. without notice at the time of making the mortgage, and B. purchases in a precedent mortgage which stands out at law, though nothing on it be due in equity, or a statute, whereon money is due which he extends, he shall hold the land till he is satisfied what is due on both securities, though he had notice of A.'s mortgage, before his second purchase of the prior security; because having at first innocently lent his money, he may do what he can to secure that money from being lost; and when he hath purchased on the prior incumbrance, he hath a title at law, and being equally on a valuable consideration with the mean incumbrancer, it is but just that equity should leave it in the same manner that it stood at law; for there is no room for equity to interpose, to take away the security the law had given, where the person that has the security comes into the title without any corruption at all; and it were partiality and not equity to interpose, where the security gives the fair lender a good and legal title; and it is all as one, whether such third lender or purchaser, takes in a mortgage, that is an interest vested, or a statute that is only a charge, for both are real liens, and sufficient to overthrow the title of the *mesne* incumbrancer, or whether money be due on the first incumbrance or not, since that does not alter the legal title. *March v. Lee*, 2 Vent. 337, 338; 1 Ch. Ca. 162, 163; 1 Eq. Ab. 322, pl. 1.

SECT. VIII.—Of Notice, *Express and Constructive—and of Fraud and Negligence, as affecting Priorities.*

Express Notice.

Constructive Notice.

Effect, as regards the Principal, of the Notice which a Solicitor or Agent may have.

Fuller v. Bennett, 2 Hare.

Notice by Operation of the Registry Acts.

Distinction as to giving Notice in the case of taking an Equitable Incumbrance on Real Estate, and obtaining an Assignment of a Chose in Action as affecting Priorities.

Suppression of Facts, and Omission to do Acts, as affecting Priorities.

Mortgagee not taking or keeping the Title Deeds.

THE equity of a subsequent mortgagee buying in a prior security to tack such subsequent mortgage, is founded, as has been observed in the last section, not merely on his being a purchaser for valuable consideration, but on his being such without notice of the mesne incumbrances at the time of his purchase: if such mortgagee can be affected either with actual or with constructive notice, before payment of the purchase money, though the conveyance may have been executed, or before the execution of the conveyance though the purchase money may have been paid (a), his claim will not prevail (b): for this, and other reasons connected with this subject, it becomes necessary here to introduce the general doctrines of the Court in regard to Notice.

Actual notice hardly requires explanation (c); but it is proper to observe that to constitute a binding notice, where, at least, it depends on oral communication only, it must be given by a person interested in the property, and in the course of the treaty; vague rumours from persons not interested in the treaty will not affect the purchaser, nor will he be bound by notice in a previous transaction which he may have forgotten (d): the same principle applies to any notice which his solicitor or agent may have had (e).

(a) *Jones v. Stanley*, 2 Eq. Abr. 685, § 9; *Story v. Lord Windsor*, 2 Atk. 630; *Hardingham v. Nicholls*, 3 Atk. 304; *Wigg v. Wigg*, 1 Atk. 384; *Tourville v. Naish*, 3 P. W. 307; *Sugd. V. and P.* 1036, § 17.

(b) 2 Fonbl. 303, and 149, where Mr. Fonblanque refers to a case in the Exchequer (12 May, 1801) apparently opposed to *Wigg v.*

Wigg; et v. Saunders v. Dehew, supra.

(c) See *Sugd. Vend. and Pur.* p. 1040, as to some points connected with actual notice; indeed the whole subject is very fully treated of in that very valuable work.

(d) See *Sugd. V. and P.* 1040.

(e) See the rule and the cases, *ibid.* 1043.

Constructive notice (*a*) assumes that no proof is given that the party had actual notice of the fact itself; but that he is affected with notice of the fact by construction of law: the court does not proceed upon the principle, that the facts proved must be taken as showing that the party actually had notice; there may be conclusive evidence that he had not; yet if his want of knowledge arises from negligence he will be equally affected as if he had actually had notice (*b*). It is scarcely possible to declare *à priori* what shall be deemed constructive notice; from its very nature it depends upon a consideration of the facts and circumstances of each particular case; and that which would not affect a man standing in one situation may abundantly affect a man standing in another (*c*): but some general rules have been established which it will be my endeavour to present to the reader, referring him for more ample information to Sir Edward Sugden's work, in which he will find a full statement of the cases, and such comments as will enable him to put a just value on the authorities usually referred to on this subject, which to some extent are conflicting, and some of which are of doubtful authority (*d*).

The first branch of the subject which is now to be considered comprises those cases in which the party is fixed with having himself had notice of a particular fact, from the facts of which he is proved to have had knowledge, or the circumstances in which he was placed: another branch is where a person is considered as bound by the knowledge which his attorney or agent may have acquired; this will be separately considered in a future page.

As regards that branch of the subject which is now under consi-

(*a*) See Sugd. V. and P. p. 1041, *et seq.*

(*b*) The judgment in *Jones v. Smith*, 1 Phill. 253, *supra*, 656; *infra*, 758, may appear to bear against this proposition. Lord Lyndhurst was satisfied with the fact being established that the mortgagee acting *bond fide* had not actual notice of the contents of the deed of which she had notice, being induced, by the interested representations of the person with whom she was dealing, to believe that the settlement made on the marriage of the intended mortgagor (which would not necessarily embrace the property intended to be mortgaged,) did not include the mortgaged premises. This doctrine might exclude the consideration of negligence in the mortgagee in not inquiring into the contents of a deed of which he has notice. Lord Lyndhurst however, in that case, considered that the omitting to require an inspection of the deed, looking to the excuses made, was only omit-

ting to do what a prudent, wary and cautious person would have done: and see *Hodgson v. Dean*, 2 Sim. & St. p. 225; and *infra*, Sect. x. I had hoped that the judgment of Lord Cottenham, in *Penny v. Watts*, heard 3rd April, 1849, on appeal from the Vice-Chancellor Knight Bruce's decision, 10th August, 1848, *supra*, p. 658, would have settled this point. Sir E. Sugden, it may be observed, appears to approve of *Jones v. Smith*, V. and P. p. 1054, note.

(*c*) See *Jones v. Smith*, 1 Hare, 55.

(*d*) The Vice-Chancellor Wigram has lately examined into this subject with his usual ability, research and care; his decisions are all referred to in the last edition of Sir E. Sugden's Treatise; and some of them are referred to in the following pages. Mr. Lewis promises a Treatise on the same subject, which, judging from his work on Perpetuities, will be a valuable acquisition.

deration, it has been stated that constructive notice is in its nature no more than evidence of notice, the presumption of which is so violent that the court will not allow of its being controverted (a).

There may be such a degree of Negligence, in not obtaining the knowledge of facts which would convey actual notice, as will have all the consequences of notice actually obtained. A difficulty may sometimes arise in drawing the line between the degree of Negligence which shall be sufficient to charge a purchaser, and the mere want of Caution which in the absence of fraud will excuse him (b); but, as the Vice-Chancellor Wigram lately observed (c), the distinction is founded on principle, and the difficulty is one which (upon the very question of gross negligence) courts of justice are daily in the habit of grappling with; and the difficulty in principle is not distinguishable from that which occurs in every other case in which antagonist principles come into immediate conflict with each other.

Negligence, in the legal sense of the term, supposes a disregard of some fact known to a purchaser, which at least indicated the existence of that fact notice of which the court imputes to the purchaser (d): extreme caution may lead a person to inquire after a mere possibility, the existence of which he had no ground to surmise; but the omission to exercise such caution is not negligence in the legal sense of the term or indeed in any sense (e).

There may be a degree of negligence so gross that a court of equity will treat it as evidence of fraud—impute a fraudulent motive to it—and visit it with the consequences of fraud, although morally speaking the party charged may be perfectly innocent (f); but gross negligence is not in all cases to be treated as fraud, they are not to be treated as the same thing (g).

The Vice-Chancellor Wigram, in one of the cases before referred to, said in reference to the subject now under consideration, “I believe I may with sufficient accuracy for my present purpose, and without danger, assert, that the cases in which constructive notice has been established resolve themselves into two classes: First, cases in which

(a) *Plumb v. Fluit*, 2 Anst. p. 432, Eyre, C. B.; *Kennedy v. Green*, 3 My. & K. 719; *Jones v. Smith*, 1 Phill. 251.

(b) Sugd. V. and P. 1054, § 56; *Jones v. Smith*, 1 Phill. 256-7.

(c) *West v. Reid*, 2 Hare, 259.

(d) *Ibid*.

(e) *West v. Reid*, *ubi sup.*; and see *Jones v. Smith*, before Lord Lyndhurst, *sup.* p. 754,

note (b).

(f) *Jones v. Smith*, 1 Hare, 71; *Goodman v. Harvey*, 4 Ad. & El. 870; *Uther v. Rich*, 10 Ad. & El. 791; *West v. Reid*, 2 Hare, 258; *Kennedy v. Green*, 3 My. & K. 715; *Moore v. Bennett*, 2 Ch. Ca. 246; *Bovey v. Smith*, 1 Vern. 149; *Ferrars v. Cherry*, 2 Vern. 384.

(g) *V. supra*, vol. i. p. 425; *West v. Reid*, 2 Hare, 258.

the party charged has had actual notice that the property in dispute was in fact charged incumbered or in some way affected, and the court has therefore bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry into the charge incumbrance or other circumstance affecting the property of which he had actual notice; and Secondly, cases in which the court has been satisfied, from the evidence before it, that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice" (a). The proposition of law, added his Honour, upon which the former class of cases proceeds, is not that the party charged had notice of a fact or instrument, which, in truth, related to the subject in dispute without his knowing that such was the case, but that he had actual notice that it did so relate. The proposition of law, upon which the second class of cases proceeds, is not that the party charged had incautiously neglected to make inquiries, but that he had designedly abstained from such inquiries, for the purpose of avoiding knowledge,—a purpose which, if proved, would clearly show that he had a suspicion of the truth, and a fraudulent determination

(a) *Jones v. Smith*, 1 Hare, 55. The Vice-Chancellor proceeds to examine the cases of *Ferrars v. Cherry*, 2 Vern. 384; *Jackson v. Rowe*, 2 Sim. & S. 472; *Kennedy v. Green*, 3 My. & K. 699; *Taylor v. Baker*, 5 Price, 306; *Coppin v. Fernyhough*, 2 Bro. 291; *Davies v. Thomas*, 2 Yo. & Coll. 234; *Eyre v. Dolphin*, 2 Ball & B. 290; *Malpas v. Ackland*, 3 Russ. p. 273; *Bisco v. Earl of Banbury*, 1 Ch. Ca. 291; *Allen v. Anthony*, 1 Meriv. 282; *Daniels v. Davison*, 17 Ves. p. 433, (a case that has always been considered to have gone a great way, and which ought not to be carried farther, Sugd. V. and P. 1053, § 51); *Taylor v. Stibbert*, 2 Ves. J. 437; *Anon.* 2 Freem. 137; *Hiern v. Mill*, 13 Ves. p. 114: in which the purchaser was held bound by constructive notice. The Vice-Chancellor then proceeds to examine the authorities and dicta establishing under what circumstances the obligation to inquire into the fact, with the knowledge of which it is sought to fix the purchaser, does not arise, viz.: *Miles v. Langley*, 1 Russ. & M. 39; *Hanbury v. Litchfield*, 2 My. & K. 633; *Hine v. Dodd*, 2 Atk. p. 275; dict. of Lord Hardwicke, *Attorney-General v. Backhouse*, 17 Ves. 293; the dict. of Sir E. Sugd. V. and P. vol. iii. p. 473, § 55, 10th edit., p. 1055, § 61, 11th edit.: that notice of tenancy is not constructive notice of the lessor's title, *Oxwith v. Plummer*, 2 Vern. p. 636; *Plumb v. Fluitt*, 2 Anst. 432; *Eeans v. Bicknell*, 6 Ves. 173 (hereafter particularly adverted to); *Cothay v. Sydenham*, 2 Bro. 391 (and

see 1 Phill. 256); *Kenny v. Browne*, 3 Ridgw. P. C. 512; Sir E. Sugd. V. and P. iii. p. 476, 10th edit., p. 1058, § 71, 11th edit. (many of which are cited hereafter); showing that those cases established the principle laid down by him, as stated in the text. *Whitbread v. Jordan*, 1 Yo. & Coll. 303—an important case, where a purchaser of a copyhold public-house was held to have constructive notice of a deposit of the court rolls with the brewer—is separately examined, pp. 64-5. Sir E. Sugden, it is to be observed, considered that case as involving an extension of the rule, which we should be cautious how we act upon in practice; V. and P. p. 1054, § 56. The Vice-Chancellor decided, in the case itself, that where a party, before advancing his money on a mortgage, inquired of the mortgagor and his wife whether any settlement had been made upon their marriage, and was informed that a settlement had been made of the wife's fortune only, and that it did not include the husband's estate, which had been proposed as the security; the mortgagee was not affected with constructive notice of the contents of the settlement, or of the fact that the settlement comprised the husband's estate: that decision was confirmed by Lord Lyndhurst, 1 Phill. 244; and see *West v. Reid*, 2 Hare, p. 257, where the Vice-Chancellor Wigram adverts to the misapprehensions which had been entertained as to the expressions he had used in his judgment in *Jones v. Smith*.

not to learn it. If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser,—there the doctrine of constructive notice will not apply; there the purchaser will, in equity, be considered, as in fact he is, a *bonâ fide* purchaser, without notice: “This is clearly,” said the Vice-Chancellor Wigram, “Sir Edward Sugden’s opinion (a); and with that sanction, I have no hesitation in saying it is mine also.”

It is a well established principle that whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is also notice of every thing to which it is afterwards found that such inquiry might have led, although all was unknown for want of the investigation (b); that is, where a person has sufficient information to lead him to a fact he shall be deemed conuzant of it (c).

A purchaser—and, as before observed, a mortgagee is a purchaser *pro tanto*—who has actual notice of one instrument affecting the estate, has constructive notice of all other instruments to which an examination of the first could have led him, and if he do not examine into them his conduct amounts to that degree of negligence which will charge him with all the consequences of notice (d). In all cases where a person cannot make out a title, but by a deed which leads to another fact, whether by description of the parties, recital or otherwise, he will be deemed cognizant of it; for it was *crassa negligentia* that he sought not after it, and for the same reason if a purchaser has notice of a deed, he is presumed to have notice of the whole contents of it (e). Where a party is told of a deed, which from its nature *must* affect the property, or is told at the time that it *does* affect the property, he is considered to have notice of the contents of that deed,

(a) Citing Vend. and Pur. vol. iii. pp. 471, 472, 10th edit.

(b) Lord Brougham, *Kennedy v. Green*, 3 My. & K. 719, 721, 722; the case itself was one of wilful blindness, as that expression is used in the cases, 1 Hare, 57; *Smith v. Low*, 1 Atk. 490; *Mertins v. Jolliffe*, Ambl. 313; *Howorth v. Deem*, 1 Eden, 351.

(c) Sugd. V. and P. 1052; and see *Taylor v. Baker*, 5 Price, 310; but see *Jones v. Smith*, *supra*, p. 754; and p. 658, and *inf.* p. 759, n.

(d) *Coppin v. Fernyhough*, 2 Bro. p. 291; *Davies v. Thomas*, 2 Yo. & Coll. p. 234; *Malpas v. Ackland*, 3 Russ. p. 273; *Bisco v. Ban-*

bury, 1 Ch. Ca. 287; *Bovey v. Smith*, 1 Vern. p. 144; *Dunch v. Kent*, 1 Vern. p. 319; *Drapers' Company v. Yardley*, 2 Vern. 662; *Mirtins v. Jolliffe*, Ambl. 313; *Howorth v. Deem*, 1 Eden, p. 351; *Taylor v. Stibbert*, 2 Ves. J. 437; *Hiern v. Mill*, 13 Ves. 114; *Hall v. Smith*, 14 Ves. 426.

(e) Sugd. V. and P. 1056, § 63, where the principal cases are cited; *West v. Reid*, 2 Hare, 261; *Jackson v. Rowe*, 2 Sim. & S. pp. 472-5, affirmed, 4 Russ. p. 514; but see *Jones v. Smith*, *supra et inf.*; *Neesom v. Clarkson*, 2 Hare, 173; *Davies v. Thomas*, 2 Yo. & Coll. 234; and see Sugd. V. and P. 879, §§ 15, 16.

and of all other deeds to which it refers (*a*): but where a party has notice of a deed which does not necessarily—which may or may not affect the property, and the party acts fairly in the transaction, and believes the representation to be true, there is no decision that goes the length of saying that if he is misled he is fixed with notice of the contents of the instruments (*b*). It has been held that it is not sufficient that a prudent, cautious person would have inquired further: the want of that prudence, caution and wariness is not sufficient according to the decisions (*c*), and the principles which have hitherto been acted upon to affect the party with notice (*d*). Notice of a lease is notice of the covenants contained in the lease; and a person who takes an under-lease is bound to inform himself of the covenants contained in the original lease (*e*). Where the notice is not of a deed, but only of an intention to execute a deed, that is not sufficient to fix the party with notice of the contents of the deed as executed: “There is no case or reasoning,” said Lord Thurlow, “which goes so far as to say that a purchaser shall be affected by notice of a deed in contemplation” (*f*).

There is a difference between notice of a will, which imports the disposition of the whole of a man’s property, and of a settlement; for there is no legal or equitable presumption that a man makes a settlement of the whole of his landed estate at his marriage: if the testator has been long dead, and the heir had been long in possession, and the other circumstances of the case are such as to leave the purchaser in credit for perfect good faith, a court of equity would not interfere against the legal title, only because the purchaser had notice even of a will, respecting which he was misled (*g*).

The circumstances attending a transaction may be so unusual as that they ought to have raised a suspicion leading to inquiry; and if, in such case, no inquiry is made, the party will be charged, on the ground of gross negligence, with notice of the facts to which inquiry would have led (*h*).

So, if a purchaser has actual notice of a fact, by which the property

(*a*) Lord Lyndhurst, *Jones v. Smith*, 1 Phill. 253, 254; *v. supra*, p. 754.

(*b*) Lord Lyndhurst, *Jones v. Smith*, 1 Phill. 254; *West v. Reid*, 2 Hare, p. 261.

(*c*) *V. int. alia*, referring to *Plumb v. Fluitt*, 2 Anst. 440; *supra* and *infra*.

(*d*) *Jones v. Smith*, on appeal, 1 Phill. 257.

(*e*) *Hall v. Smith*, 14 Ves. 426; *Walter*

v. Maunde, 1 Jac. & W. 181; *Cosser v. Collinge*, 3 My. & K. 283; *Pope v. Garland*, 4 Yo. & Coll. 394; and see 1 Hare, 62, *Jones v. Smith*.

(*f*) *Cothay v. Sydenham*, 2 Bro. 391, 393.

(*g*) Vice-Chancellor Wigram, *Jones v. Smith*, 1 Hare, 60.

(*h*) Lord Brougham, *Kennedy v. Green*, 3 My. & K. 719; Sugd. V. and P. 1052.

may be affected, as that another person than the person with whom he is treating is in possession, which, it has been said, for this purpose, is *primâ facie* evidence of a seisin in fee, he is bound to ascertain the truth (a). If a tenant is in possession under a lease, with an agreement in his pocket to become the purchaser, these circumstances, said Lord Eldon, altogether give him an equity, repelling the claim of a subsequent purchaser, who made no inquiry as to the nature of his possession (b); but whether possession of a tenant under a lease is notice of an agreement which he has entered into to purchase a reversionary interest, to which his possession cannot be referred, is a matter of doubt (c). If at the time of the purchase the tenant in possession is not the original lessee, but merely holds under a derivative lease, and has no knowledge of the covenants contained in the original lease, it has never been considered that it was want of due diligence in the purchaser, which is to fix him with constructive notice, if he do not pursue his inquiries through every derivative lease, which could alone convey to him information of the covenants (d). A purchaser *bonâ fide* without notice will not be affected by the mere circumstance of the vendor having been out of possession for many years (e).

Notice of a tenancy will not, it seems, affect a purchaser with constructive notice of the lessor's title (f).

Lord Hardwicke took a distinction between notice and suspicion of notice (g), which distinction is borne out by subsequent cases (h).

A purchaser is not bound to take notice of an equity arising out of

(a) *Allen v. Anthony*, 1 Meriv. 282; *Daniels v. Davison*, 17 Ves. 433, which, however, has been considered as an extreme case, 2 Russ. & M. 629; 1 Hare, p. 62; *et v. supra*, p. 756, note (a); *Taylor v. Stibbert*, 2 Ves. J. 437: as to notice that the legal estate is in a third person, see *Anon.* 2 Freem. 137, pl. 171; and that the title-deeds are in the possession of another, see *Hiern v. Mill*, 13 Ves. 114, *inf.*; 1 Hare, 60, 61. But a purchaser of an estate described as late the residence of another person, does not put the purchaser to inquire as to the circumstances of his possession, *Miles v. Langley*, 1 Russ. & M. p. 39; affirmed, 2 Russ. & M. 626, (1 Hare, p. 62). This is a strong case; for the plaintiff, at the time of Langley's purchase, was in possession of part of the premises comprised in the College lease, and if the purchaser had looked at the College lease, under which he purchased, he would have seen, by the parcels, that that part was comprised in the College lease: Sir J. Leach was induced to hold that Langley was ignorant of the fact that the plaintiff occupied any part of the land comprised in the College lease,

by reason that the exchanged land made up the quantity described in the College lease. As to notice from possession, see *Allen v. Anthony*, 1 Meriv. p. 282; Sugd. V. and P. 1052, § 50; *et v. supra*, 758, additional note, *Penny v. Watts*; and see the next Section.

(b) Lord Eldon, *Daniels v. Davison*, 16 Ves. 254, *v. supra*, n. (a); *Taylor v. Stibbert*, 2 Ves. J. p. 437. Lord Rosslyn.

(c) *Penny v. Watts*, *supra*, p. 658, this case is not reported on the hearing before the Vice-Chancellor.

(d) Sir J. Leach, *Hanbury v. Litchfield*, 2 My. & K. 632; Sugd. V. and P. 1053, § 52; Sir J. Wigram, 1 Hare, 62, draws some larger conclusions from *Hanbury v. Litchfield*.

(e) *Oxwith v. Plummer*, Bacon's Abr. tit. *Mortgage*, E. § 3, vol. v. p. 43; Sugd. V. and P. 1055, § 61 (1 Hare, 63).

(f) *Attorney-General v. Backhouse*, 17 Ves. 293 (1 Hare, 63); Sugd. V. and P. p. 1055, § 59, § 61.

(g) *Hine v. Dodd*, 2 Atk. 275.

(h) See 1 Hare, 63-4.

the mere construction of words that are uncertain (*a*); but if circumstances which would defeat a lease, as a breach of trust, appear clearly upon the lease itself, a purchaser of such a lease cannot hold it (*b*).

The omission of a *puisne* incumbrancer to make inquiry where such inquiry may be deemed necessary, cannot be material where inquiry into the circumstances of the case could not have led to a knowledge of the prior incumbrance (*c*).

A person may be fixed with notice by reason of his Attorney or Agent having notice.

The following rules on this subject are well settled as general propositions (*d*):—That notice to the solicitor is notice to the client;—that where the purchaser employs the same solicitor as the vendor, he is affected with notice of whatever that solicitor had notice in his capacity of solicitor for either vendor or purchaser, in the transaction in which he is so employed;—and that the kind of notice to the solicitor which alone will bind the client, must be, generally speaking, notice in that transaction in which the client employs him (*e*).

The policy and safety of the public forbids a person to deny knowledge, while he is so dealing as to keep himself ignorant, or so as that he may keep himself ignorant, and all the while let his agent know, and himself perhaps profit by that knowledge (*f*). In such a case, as it has been observed, it would be most iniquitous and most dangerous, and give shelter and encouragement to all kinds of fraud, were the law not to consider the knowledge of one as the knowledge of both, whether it be so in fact or not (*g*); but the rule is not confined to cases where there is a suspicion or a possibility of fraud—the rule is general.

It is not a question of memory merely irrespective of the circumstances. Cases may easily be suggested, in which it would be impossible that a solicitor should have forgotten (*h*) a fact recently under

(*a*) *Cordwell v. Mackrill*, 2 Eden, 347.

(*b*) *Attorney-General v. Pargeter*, 6 Beav. p. 156.

(*c*) Vice-Chancellor Wigram, *Meux v. Bell*, 1 Hare, 86; see *Langton v. Horton*, 1 Hare, 561, 562; and Lord Lyndhurst's opinion, *Foster v. Cockerell*, 9 Bli. 375.

(*d*) Lord Brougham, *Kennedy v. Green*, 3 My. & K. 720; *Mountford v. Scott*, 3 Mad. 34; *Hiern v. Mill*, 13 Ves. 114; *Toulmin v. Steere*, 3 Meriv. p. 222; in that case the doctrine was applied to a purchase made under the direction of the court. "The Court of Chancery employs its officer to investigate the

titles of estates, but does not warrant them;" Sir Wm. Grant, *ibid.* 223; *Sheldon v. Cox*, 2 Ed. 224; and on the subject of the effect of notice to an agent, &c., see Sugd. V. and P. p. 1041, *et seq.*; and see *Kendall v. Halls*, xi. Jur. 864.

(*e*) See *Fuller v. Benett*, 2 Hare, 402.

(*f*) *Kennedy v. Green*, 3 My. & K. 719.

(*g*) Lord Brougham, *Kennedy v. Green*, 3 My. & K. 719.

(*h*) As to this, see *Tylee v. Webb*, 6 Beav. 556; *Fuller v. Benett*, 2 Hare, p. 403; and *Winter v. Lord Anson*, 3 Russ. 488; *Mountford v. Scott*, T. & R. p. 274; *Hargreaves v.*

view, with notice of which however it would be impossible to affect his client, unless the circumstance of his being solicitor for two parties be introduced into the case; where the solicitor is concerned for *both* parties, the rule is not, as an universal proposition, to be confined in all cases to the knowledge which the solicitor acquired after the retainer; where he is concerned for one party only it seems that it is; but the point is not definitively settled: where the transaction is of recent date, the rule that notice to the client is notice to the solicitor is, it seems, not to be restricted to the same transaction (a).

Where the mortgagor has at different times employed the same solicitor in effecting different incumbrances upon the same estate, and the incumbrancers have employed the mortgagor's solicitor in the several transactions in which they have been respectively concerned, each of the puisne incumbrancers is affected with notice of the prior incumbrances (b); and it cannot in such case be contended that the solicitor *might have forgotten* the prior transaction, else the solicitor himself might take a subsequent mortgage and insist he had not notice, which he is not allowed to do (c).

In February, 1831, the defendant, Benett, entered into a treaty with Sir J. Dillon, for the purchase, from him, of a moiety of an estate, called "The Hatch," subject to a mortgage to one Mottan: Sir J. Dillon signed an agreement for the sale. November, 1831, Sir J. Dillon agreed, in writing, to give a mortgage of the estate to Mr. Chitty; in 1832, Chitty assigned this security to Messrs. Fuller, the plaintiffs; the plaintiffs served notice of the assignment on Messrs. Farrer and Co., the solicitors of Benett. The performance of the contract was delayed by a suit, instituted against Sir J. Dillon and Benett (*Parker v. Dillon*); on its dismissal, Sir J. Dillon sought to have the contract with Benett performed: he died in February, 1837. After the death of Sir J. Dillon, an agreement was entered into between his devisee (Henrietta Dillon) and Benett, under which the latter agreed to purchase the estate, at a reduced sum; in October, 1837, it was conveyed to Benett: the purchase-money was applied in part in payment of the mortgage to Mottan, but no notice was taken of the claim of the plaintiffs, under the agreement of November, 1831. In June, 1839, Benett mortgaged the estate to Mr. Majoribanks. In 1840 the

Rothwell, 1 Keen, 154; *Brotherton v. Hatt*, 2 Vern. 574, there cited.

(a) Vice-Chancellor Wigram, *Fuller v. Benett*, 2 Hare, 404; and see Sugd. V. and P. 1043, § 17, & 1044; and the cases in the preceding note; *et v. supra*, p. 760.

(b) *Brotherton v. Hatt*, 2 Vern. p. 574; *Winter v. Lord Anson*, 3 Russ. 488; *Mountford v. Scott*, T. & R. p. 274; *Hargreaves v. Rothwell*, 1 Keen, 154 (2 Hare, 405).

(c) *Perkins v. Bradley*, 1 Hare, 219.

plaintiffs filed a bill against Benett and Henrietta Dillon, the assignees of Chitty, and Mr. Majoribanks, to enforce that security. Farrer and Co. were the solicitors of Benett in the treaty with Sir J. Dillon, in February, 1831, and in the cause of *Parker v. Dillon*, in which Benett insisted on the contract. They continued to act for him till Sir J. Dillon's death, and afterwards in the treaty with Henrietta Dillon, and down to June, 1839; and Messrs. Majoribanks also employed Messrs. Farrer in the transaction of the mortgage to them. The defendants insisted that the purchase from Henrietta Dillon was a new transaction, and that notice to the solicitor in one transaction was not notice in another; but as Messrs. Farrer had notice in March, 1832, as the solicitors of Benett, and the notices in fact came out of their possession, Mr. Benett, under the circumstances, was held bound by the notice, and Mr. Majoribanks, his mortgagee, was also bound, not because abstractedly he was to be bound by facts which came to the knowledge of his solicitor in other transactions, but because the solicitor he employed in the business of the mortgage had notice of the plaintiff's interest, as the solicitor of the mortgagor, in the very transaction in which the mortgagee employed him (a).

If a person has been himself concerned in or the party guilty of a fraud, and then becomes the attorney of a purchaser, that is not such notice as ought to affect the purchaser (b).

It is the present disposition of the Court of Chancery not to extend the doctrine of constructive notice (c).

Where a purchaser of an equitable right inquires of the trustee of the legal estate whether he knows of any incumbrance, and he answers in the negative, if it turn out that he had in fact notice of any charge he will be answerable to the purchaser, although he plead forgetfulness as an excuse (d).

There is an important difference between actual notice, and the operation of the Register Acts: actual notice may bind the conscience of the party, the operation of the acts may bind his title but not his conscience (e). The mere registration of a conveyance is not considered as constructive notice to subsequent purchasers: the Irish Statute which is binding, has this effect by the plain words of the act, without having recourse to the forced construction of the registry being notice (f).

(a) *Fuller v. Benett*, 2 Hare, 394, 407.

(b) *Kennedy v. Green*, on appeal, 3 My. & K. 720 (1 Phill. 256); Sugd. V. and P. 1044, § 20.

(c) See *Jones v. Smith*, on appeal, 1 Phill.

p. 254.

(d) Sugd. V. and P. 1023, § 33.

(e) Lord Redesdale, *Underwood v. Lord Courtown*, 2 Scho. & L. 66.

(f) *Underwood v. Lord Courtown*, 2 Scho.

Nor will a deed registered with notice, have priority over an unregistered deed (*a*). It has been held that the Register Acts in England avoid only prior charges not registered, but do not give subsequent conveyances any further force against prior ones registered than they had before: and where a person had advanced 800*l.* on mortgage of premises in Yorkshire, then another person lent a sum of money on a judgment which was registered, and then the original mortgagee, without actual notice of the judgment, advanced a further sum on the security of the estate, it was held that he might tack as against the judgment creditor; that to affect the first mortgagee the judgment creditor ought to have given express notice to the first mortgagee when he advanced his money, which he might have done as the first mortgage was on the register (*b*). If a man search the register, he will be deemed to have notice, but a limited search in the registry will exclude the presumption of a general search (*c*).

It has been much doubted whether courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance (*d*); but they have said, "We cannot permit fraud to prevail; and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be affected" (*e*): it is only by actual notice clearly proved that a registered conveyance can be postponed, even a *lis pendens* was not considered notice for that purpose (*f*).

The doctrine of constructive notice by the Pendency of a Suit was formerly the subject of much discussion, it has however been put upon a satisfactory footing by the statute 2 Vict. c. 11, by which it is enacted, that no purchaser shall be bound by the doctrine of *lis pendens* without express notice of the pendency of the suit, unless the fact of the pendency of the suit shall be registered according to the provisions of that act (*g*).

Though an immediate or first purchaser with notice of an equitable

& L. 64; where the terms of the Irish statute are set forth; and see 1 Scho. & L. 157, where Lord Redesdale gives some strong reasons against registration being considered as constructive notice.

(*a*) *Hodgson v. Dean*, 2 Sim & St. 224.

(*b*) *Wrightson v. Hudson*, 2 Eq. Ab. 609, § 7; same point decided, *Caton v. Cooley*, 7 June, 1785, 1 Cox, 182, as to lands in Middlesex; *Wiseman v. Westland*, 1 Y. & J. 117;

Wyatt v. Barwell, 19 Ves. 439; *Jolland v. Stainbridge*, 3 Ves. 485-6; *et v. infra*, 785.

(*c*) Sugd. V. and P. 1048, § 36.

(*d*) See particularly, *Hine v. Dodd*, 2 Atk. 275.

(*e*) Sir Wm. Grant, *Wyatt v. Barwell*, 19 Ves. p. 439; *Jolland v. Stainbridge*, 3 Ves. 486.

(*f*) *Ibid*.

(*g*) See Sugd. V. and P. 673.

claim in another, shall certainly not be allowed to protect himself from such equitable claim, yet if a person having notice of an equitable claim in another, purchase from one who had not notice of such claim, he may protect himself by want of notice in his vendor; for if not, the *bonâ fide* purchaser would be fettered in the sale of the property, and would not have all the benefit which the rule for the protection of *bonâ fide* purchasers without notice professes to give to him (a); and a *bonâ fide* purchaser without notice of any incumbrance, from one who had notice, is entitled to be protected (b).

It has been made a question whether an incumbrancer has acquired a better equity, or, which is the same thing, priority, by *giving* notice of his security to the person having the legal estate or interest in the thing mortgaged or pledged. It follows from the interest of the *cestui que trust* in *land* being considered as an Estate (c), that the doctrines as to notice which are applicable in determining the priority of charges on choses in action, does not prevail as to equitable estates in land; so that a mortgagee of an equitable interest in real estate has no occasion to give notice to the trustee, either to complete his title as against his mortgagor, or to secure to himself his priority against subsequent incumbrancers (d); but it is advisable that he should give notice to the first mortgagee (if he have, as is almost always the case, the legal estate) or judgment creditor, as it will prevent such mortgagee or judgment creditor from tacking in respect of any subsequent advance (e).

In order to obtain a good title to a reversionary interest in a sum of stock, either by way of mortgage or sale, it does not appear to be an essential part of the title of the purchaser or mortgagee to show that notice has been given to the trustees of the fund; such notice is important, in order to prevent a subsequent purchaser or incumbrancer from obtaining priority; but if no other purchaser or incumbrancer has given notice, then, it does not appear to be material that

(a) *Harrison v. Forth*, Prec. Ch. 51; 1 Eq. Abr. 331, pl. 5; *Brandlyn v. Ord*, 1 Atk. 571; West, 510; *Sweet v. Southcote*, 2 Bro. 66; 2 Fonbl. 148; Sugd. V. and P. 1037.

(b) *Ferrars v. Cherry*, 2 Vern. 384; Ambl. 313.

(c) *V. infra*, Chap. ix. et vol. i. p. 499.

(d) *Wilnot v. Pike*, 5 Hare, 14, 19, 20. The doctrine as to a priority as affecting charges on choses in action was borrowed entirely from the decisions in bankruptcy, *ibid*: see the authorities collected, and reviewed, Jarman, Convey. by Sweet, v. p. 471, et seq., et vide

supra, p. 41. The subject of notice as regards the transfer of Choses in Action will be considered in a subsequent chapter.

(e) Jarman, Mortgage, by Sweet, 442-3, et seq. where the question whether in case the first mortgage covers subsequent advances such notice would prevent the first mortgagee from insisting upon priority in respect of such subsequent advances is considered. Interest cannot be turned into principal after notice, unless the mortgage extends to further advances, for it is in fact a further loan, *Digby v. Craygs*, 2 Eden, 200; v. *ibid*. p. 201: v. *sup*. Sect. vii.

the purchaser or mortgagee has given no such notice of his deed. The object of notice is to exclude a subsequent purchaser and incumbrancer on the fund; and if it can be shown that no subsequent party has come in, then the fact that notice has not been given would not, as it seems, be an essential blot on the title (a).

A person may, as has been mentioned in the preceding Section, lose the advantage of a priority, or be prevented from acquiring a priority by other acts, of commission or of omission, which have a fraudulent character in the view of the Court of Chancery, besides those above adverted to.

If a man by suppression of the truth which he was bound to communicate (b), or by the wilful suggestion of a falsehood, be the cause of prejudice to another, who had a right to a full and correct representation of the fact, it is certainly agreeable to the dictates of good conscience that his claim should be postponed to that of the person whose confidence was induced by his representation, and upon that principle many cases have been decided (c); nor will infancy, if the person be old or cunning enough to contrive a fraud, or coverture, be an excuse in such case (d).

(a) *Hobson v. Bell*, 2 Beav. 23.

(b) 1 Fonbl. 164; *Fox v. Mackreth*, 2 Bro. 420. In *Dyer v. Dyer*, 2 Ch. Ca. 108, Lord Chancellor Nottingham held that the defendant's ignorance of his title materially differed the case: but in *Teasdale v. Teasdale*, Sel. Ca. Ch. 59, and in some of the cases cited in the next note, that circumstance was considered to be immaterial, when with ordinary diligence he might have known it; and see *Pearson v. Morgan*, 2 Bro. 389, Buller, J.

(c) *Hobbs v. Norton*, 1 Vern. 136. There Sir Geo. Norton had encouraged a purchase, he having at the time a title which enabled him to render it null; but there was no proof of his actual knowledge of his title; *Hunsden v. Cheyney*, 2 Vern. 150, is a similar case; and see *Clare v. Earl of Bedford*, there cited, p. 150, where the only act was witnessing a deed; *Mocatta v. Murgatroyd*, 1 P. W. 393, is to the same effect, but Lord Thurlow did not approve of that case so far as it affected a mere witness with concealment, for a witness in practice is not privy to the contents of a deed; *Raw v. Pote*, 2 Vern. 239, there the party knew his title; *Draper v. Bortale*, 2 Vern. 369, a similar case; and see *Berrixford v. Milward*, 2 Atk. 49; *Watts v. Creswell*, 2 Eq. Abr. 515; *S. C.* 9 Vin. Abr. 415, pl. 24; *Savage v. Foster*, 9 Mod. 36; *Ibbotson v. Rhodes*, 2 Vern. 554, there a mortgagee who had not disclosed his

incumbrance was postponed; *Arnot v. Biscoe*, 1 Ves. 95, there an agent for both parties not making the disclosure was held liable to his principal; *Berrixford v. Milward*, 2 Atk. 49; *S. C.* Barnardist. p. 101; 2 Fonbl. 164: the other cases there cited, *East India Company v. Vincent*, 2 Atk. 83; *Jackson v. Cator*, 5 Ves. 688; *Stiles v. Cowper*, 3 Atk. p. 693; *Anon.* Bunn. 53; *Huning v. Ferrers*, Gilb. Eq. R. 85, relate to the implied assent which a person gives by standing by and seeing acts done by his tenant, or the like, without objecting. A person who knowingly makes a false representation will be liable for the consequences, though he gain nothing by it, *Seddon v. Connell*, 10 Sim. 86. Where the remedy for the misrepresentation is to be compensated by damages, the party injured must proceed at law, not here, *Sainsbury v. Jones*, 2 Beav. 465; *S. C.* on appeal, 5 My. & Cr. p. 1. In *Govett v. Richmond*, 7 Sim. 2, the Vice-Chancellor of England laid down that where a person having a claim on property which is the subject of a reference (to which he is no party) knows that the arbitration is going on, but does not bring forward his claim, he is bound by the award. See, on this subject, *Sugd. Vend. and Pur.* 1026, *et v. sup.* p. 762.

(d) *Watts v. Creswell*, 2 Eq. Abr. 515; *Clare v. Duke of Bedford*, cited *ubi supra*, and in *Savage v. Foster*, 9 Mod. 36, and in

But where the party to whom the fraud is imputed was not conuzant of the treaty in which the fraud is alleged to have been practised, nor in any manner or for any fraudulent purpose confederating with the party practising the fraud, the above principle does not apply; so that simply stating what is false in answer to a question as to a person's title, if the person answering is not informed that the question is put with a view to some transaction relating to the property, will not prevent the person who so answers falsely from asserting a title at variance with his declaration (a).

As regards what shall be construed a Concealment; it is to be observed that in the case of *Mocatta v. Murgatroyd* (b), Lord Chancellor Cowper held, that where a first mortgagee is a witness to the second mortgage, though there be no actual proof of his knowing the contents thereof, yet, since the presumption is that he might have known them, it shall postpone him: but none of the cases seem to come up to this point (c); and in *Beckett v. Cordley* (d), Lord Chancellor Thurlow, referring to this case, observes, that "he did not leave it as a case, which he should determine in the same manner, for a witness in practice is not privy to the contents of the deed" (e).

It has also been laid down as "an established rule in equity, that a second mortgagee, who has the title deeds, without notice of any prior incumbrance, shall be preferred; because, if a mortgagee lend money, without taking the title-deeds, he enables the mortgagor to commit a fraud" (f). "The fraud imputed to the first mortgagee by this supposed rule of equity is, the enabling of the mortgagor to practise a fraud upon a third person, by leaving him in possession of what furnishes the best evidence of his title: and there are cases to which this rule might wisely and equitably be applied; but to lay it down as applicable to every case, in which the mortgagor appears in

Beckett v. Cordley, 1 Bro. 357; *Evroy v. Nicholas*, 2 Eq. Abr. 489; *Cory v. Gertcken*, 2 Mad. 46; *Overton v. Banister*, 3 Hare, 506; Sugd. V. and P. 1022. The subject, how far an infant may be affected on the ground of a fraud practised by him, was carefully investigated by the Vice-Chancellor K. Bruce, in the case of *Stikeman v. Dawson*, xi. Jurist, 214; 1 De G. & Sm. 90, to which I beg to refer the reader; and see *Howard v. Prince*, 10 Beav. 296.

(a) *Ibbotson v. Rhodes*, 2 Vern. 554; *Merevether v. Shaw*, 2 Cox, 124; see *Pasley v. Freeman*, 3 T. R. 51, where the effect of this distinction is fully investigated, 1 Fonbl. 165, note. In *Evans v. Bicknell*, 6 Ves. 184, Lord

Eldon distinguishes between the nature of proceedings at law and in this court in such cases.

(b) 1 P. W. 393.

(c) See Mr. Cox's note to this case, *ibid.* Mr. Cox's conclusion is that fraud or actual notice of the second mortgage must be proved in order to postpone a mortgagee.

(d) 1 Bro. 353.

(e) And see Sugd. V. and P. 1060, § 77; see also Dig. lib. 13, t. 7, 39; Domat's Civil Law, b. iii. t. 1, s. 15, p. 365, where the point is fully considered; *et v. supra*, p. 765, note.

(f) *Per Buller, J., Goodtitle v. Morgan*, 1 Term Rep. 762; *v. inf.* Sect. x.

possession of the deeds at the time of the second mortgage, were not only to break in upon the authority of many decisions, but also, under some circumstances, to endanger the equity which it professes to promote. It would postpone the first mortgagee of an estate held in joint-tenancy, or in common, the joint-tenants being equally entitled to possession of the deeds (a): the whole of the premises contained in the deeds must be in mortgage, though the intent of the parties might extend to only a particular part of them; or the mortgagee of the part must retain the possession of the deeds which respect the whole. These considerations have induced courts of equity to look to the circumstances under which the mortgagor obtained, or was allowed to retain, the title-deeds; and therefore, in the case of *Peter v. Russel* (b), it appearing that the mortgagor obtained possession of the title-deeds from the first mortgagee upon a reasonable pretence, Lord Cowper dismissed the bill brought by the second mortgagee to postpone the first. So in *Penner v. Jemmett*, MS. 28th June, 1785, when it appeared that the first mortgagee had required and was assured by the mortgagor that he had delivered to him all the title-deeds, Lord Chancellor Thurlow held, that there must be a voluntary leaving of the deeds, to entitle the second mortgagee to gain the priority. So in *Tourle v. Rand* (c), which was the mortgage of a reversion, Lord Thurlow, C., decreed for the first mortgagee. And in *Plumb v. Fluit* (d) the Court of Exchequer, in a very solemn and most able judgment, held, upon the general question, that the mere leaving of the title-deeds in the possession of the mortgagor was not of itself a sufficient ground to postpone the first mortgagee (e). “The rule laid down by Lord Thurlow, C., may, therefore,” said Mr. Fonblanque, “be now considered as the rule of equity; viz. that nothing but a voluntary, distinct, and unjustifiable concurrence on the part of the first mortgagee to the mortgagor’s retaining the title-deeds, shall be a reason for postponing his priority” (f).

But though the Court of Chancery may not, on the mere ground of the title-deeds being left with the mortgagor, postpone the first mortgagee, yet, if the deeds have been delivered to the second mortgagee without

(a) On this subject, see Section x. *infra*.

(b) 1 Eq. Ca. Ab. 321, pl. 7; 2 Vern. 726; Gilb. Rep. 122.

(c) 2 Bro. Ch. R. 650.

(d) 2 Anstr. 432, 3rd Feb. 1791; 1 Fonbl. 165, 167. See, as to this case, Sect. x. *infra*.

(e) See also *Tourle v. Rand*, 2 Bro. 652; *Evans v. Bicknell*, 6 Ves. 174; *Barnett v. Weston*, 12 Ves. 133; and see *Martinez v.*

Cooper, 2 Russ. 198, and *Stevens v. Stevens*, ix. Jur. 984; 2 Coll. 24, 28, 29.

(f) The text is taken almost verbatim from Mr. Fonblanque’s note, 1 Treat. of Eq. 165-7; Lord Eldon highly commended that note, 6 Ves. 191; and see *Farrow v. Rees*, 4 Beav. 19; *Allen v. Knight*, x. Jurist, 943; 5 Hare, 279, L. C. 9 June, 1847: but see further on this subject, *infra*, Sect. x.

notice, the court will not take them from him, unless the first mortgagee pay him his money (a). The relief founded on the omission to disclose facts is extended only to jointures, mortgages, and such as come in upon a consideration, and not to a voluntary devisee (b).

(a) *Head v. Egerton*, 3 P. Wms. 279-80; *Walwyn v. Lee*, 9 Ves. 34. This subject will again be considered in Section x.; see *Worth-*

ington v. Morgan, there stated; v. *inf.* p. 789.

(b) *Raw and Uxor v. Pote*, 2 Vern. 239; Prec. Ch. 35, affirmed in Dom. Proc.

SECTION. IX—*Of the Relief in Equity in case of Mortgages of Stock and other Personal Chattels—Pledges of Personal Chattels.*

Mortgages of Stock in the Public Funds, East India Stock, &c.

Pledges of Personal Chattels.

Nicholson v. Hooper, 4 My. & Cr.

Tacking as applied to Pledges.

Pledges by Factors.

4 Geo. IV. c. 83; 6 Geo. IV. c. 94.

Pledges, &c., not avoidable by the Crown.

Mortgages of Ships.

of Freight.

of Cargo.

Mortgage of Property to be afterwards acquired.

WHERE a sum of stock in the funds is mortgaged (*a*), and so in the case of a mortgage of Exchequer annuities, East India stock, and of other personal chattels (*b*), if accompanied by a transfer, the mortgagee may sell; and it seems the same kind of relief would be given by the court in the case of a simple assignment of a policy of assurance by way of security (*c*). The mortgagee must account for what he receives upon the sale, beyond the amount of his debt; unless he has been allowed to remain in possession, and to treat the stock as his own for so long a period as to constitute a bar to redemption (*d*): where the stock has not been transferred, the mortgagee may bring a bill here for an account of what is due, and to have the stock transferred to him (*e*).

It has been laid down that if the mortgage be of a reversionary interest in stock, where of course there cannot be an immediate transfer, the mortgagee, by his bill, must pray that the money may be paid, or

(*a*) *V. supra*, p. 637; *Dyson v. Morris*, 1 Hare, 422; 2 Fonbl. 261, note; and on this subject, see Coote on Mortgages, 362, 607; Powell on Mortgages, by Coventry, ii. 1066. The general subject of the Assignment of Choses in Action, by sale, mortgage, and gift, will be treated of in Chapters ix. and x.

(*b*) *Kemp v. Westbrook*, Belt's Supplement to Vesey, Sen., p. 149; 1 Ves. p. 278; *Tucker v. Wilson*, on appeal, 1 P. W. 261; 5 Bro. P. C. 193.

(*c*) *Dyson v. Morris*, *ubi sup.*, *sed. v. inf.* 770.

(*d*) *Harrison v. Hart*, Com. 393; Jarman,

Mortgage, by Sweet, 300: In *Lockwood v. Ewer*, 2 Atk. 303, it was the representative of the mortgagor who sought to redeem the stock, and he was held to be barred by length of time; the depositor himself might have redeemed the stock remaining in specie (*Kemp v. Westbrook*, *supra*, p. 637), at least if a mortgage of stock stands on the same footing as a pledge of other personal chattels, and unless the fixing the 2nd July following as the time when the mortgagee was to retransfer if paid, would make a difference.

(*e*) *Kemp v. Westbrook*, *ubi supra*.

that a sale shall be made, and then the court will make the usual decree, as in other mortgages, for payment of the mortgage money; and if the money is not paid as directed, a sale takes place (a). But it has been held that there may be a foreclosure of a mortgage of stock (b), whether the interest be immediate or reversionary (c).

On a sale of stock standing in the names of trustees, by the mortgagee, if no other person has given notice of an assignment of the stock, it is not an essential blot on the title that the mortgagee had not given notice of his mortgage to the trustees; such notice is only necessary to exclude a subsequent purchaser (d).

Where a policy of insurance on the life of a debtor is assigned by way of collateral security (e), the assignee will be entitled to bring an action for the recovery of the insurance money, in the name of the assured (f); so that, generally speaking, there is no necessity for resorting to the Court of Chancery in such case for a sale (g).

In the case of a mortgagee whose security is composed of land and of stock or personal chattels, or a policy simply assigned as a security, the proper relief is, as it seems, first to direct that the collateral securities be realized, and then to foreclose the real estate if the deficiency be not paid (h).

Where there is an assignment of a policy to a trustee, in trust to receive the moneys on the death of the assured, and out of them to pay the debt, and concurrently a common mortgage is executed to the debtor; the mortgagee may have a foreclosure, and retain the benefit of the trust of the moneys to be recovered on the policy, but at the risk of having the foreclosure opened if he should resort to it (i).

(a) *Ponten v. Page*, before Vice-Chancellor Plumer, 7 Nov. 1816, 1 Mad. Pr. and P. 664.

(b) *Tancered v. Potts*, Rolls, June 20, 1749, 2 Fonbl. 261 (Lord Hardwicke, in *Lockwood v. Ewer*, *ubi supra*, said it was not necessary); this case was not called to the attention of the Vice-Chancellor Wigram, in *Slade v. Rigg*, *infra*.

(c) *Slade v. Rigg*, 3 Hare, 38. It was insisted, on the authority of *Ponten v. Page*, 1 Mad. Pr. and P. 664, 3rd edit. *supra*, that the mortgagee was only entitled to a decree for a sale.

(d) *Hobson v. Bell*, 2 Beav. p. 24; in this case a question was raised whether the conditions of sale were of such a depreciating character as to amount to a breach of trust, or to constitute an objection to the title. A lender of stock, on condition that it be replaced, is entitled to a bonus declared in the interim; *Vaughan v. Wood*, 1 My. & K. 403. As to

the right of a person whose stock has been improperly sold out, to take an equal sum of stock afterwards purchased by the same person, see *Vulliamy v. Noble*, 3 Meriv. 615.

(e) A summary of the law in regard to Policies of Insurance, may be found in Jarman, Mortgage, by Sweet, 302, *et seq.*; and some useful practical observations as to securities taken through the medium of policies of insurance, either effected by the creditor or taken by way of assignment, are there given. Fire policies are not assignable, *ibid.*

(f) *Ashley v. Ashley*, 3 Sim. 19, the reference to *Brown v. Carter*, 5 Ves. 865, seems to be a mistake.

(g) *Sed v. sup.* p. 769; see further, on this subject, *infra*, Chaps. ix. and x.

(h) Vice-Chancellor Wigram, *Dyson v. Morris*, 1 Hare, 423.

(i) *Dyson v. Morris*, 1 Hare, 424-7; but *quære*, if he should have sold the estate, would

In regard to Pledges of personal chattels: a material distinction has been drawn at law between a mortgage, and a pawn or pledge: a mortgagee, it is said, has an absolute interest in the land, whereas the pawnee has but a special property in the goods to detain them for his security; the delivery, it is added, is nothing but the bare custody, and is not like to a mortgage, for there he that hath the interest ought to have the money; but in case of a pledge, it is only a special property in him that takes it, and the general property (a) continues in the first owner; upon tender of the money secured by the pawn by the pawnor, the property, notwithstanding the refusal, is reduced constantly [instantly] to the pawnor without claim (b). "A mortgage," said Lord Alvanley, "is a pledge, and more, for it is an absolute pledge to become an absolute interest if not redeemed at a certain time; a pledge is a deposit of personal effects not to be taken back but on payment of a certain sum, by express stipulation or the course of trade, to be a lien upon them" (c): still however the pledgor, though not having the property in the thing pledged, is enabled to sell. Lord Chief Justice Gibbs (d), after laying down, as a general proposition, that a right of *lien* gives no right to sell the goods, said, "but when goods are deposited by way of security, to indemnify a party against a loan of money, it is more than a pledge; the lender's rights are more extensive than such as accrue upon an ordinary lien in the way of trade." "These goods," said his Lordship, speaking of the case before him, "were deposited to secure a loan; it may be inferred therefore that the contract was this:—If I, the borrower, repay the money, you must re-deliver the goods; but if I fail to repay you, you must use the security I have left to repay yourself; I think therefore the defendant had a right to sell: but where there is no time fixed for redemption, the pledgee must give notice to the pledgor to redeem before he is at liberty to sell" (e).

In a late case, one Nicholson, the plaintiff, borrowed of one Hooper 48,000*l.*, on a pledge of some tea warrants; Hooper pledged the war-

he then be restrained from resorting to the policy moneys? see *Lockhart v. Hardy*, *supra*, p. 682.

(a) As in case of the Roman *pignus* and *hypotheca*, *supra*, vol. i. p. 599; Lord Hardwicke, 1 Atk. 166, distinguishes an English pawn from the Roman *pignus*, citing Cod. Just. iv. 54, l. 2 and l. 7.

(b) Lord Hardwicke, *Ryall v. Rolle*, 1 Atk. 167; Yelverton, 178; 2 Bulst. 30; Noy, 137; Cro. Ja. 245. The law on the subject of Pawns is fully entered into in *Cortilyon v. Lansing*, 2 Caine's Cases in Error, U. S. p.

201, and *Garlick v. James*, 12 Johnson's Rep. U. S. p. 146; and see Story on Equity, §§ 1030-1033.

(c) Lord Alvanley, *Jones v. Smith*, 2 Ves. J. 372.

(d) *Pothonier v. Dawson*, Holt, N. P. Rep. 383.

(e) In *Garlick v. James*, *ubi sup.*, it is stated that there is no case to be found where the deposit was for an indefinite time, that the sale of the pledge by the pawnee, without first calling on the pawnor to redeem, has been held good.

rants with Messrs. Hitchens, who were defendants, and who had in fact advanced the 48,000*l.*: the plaintiff was aware of this fact in June, 1835: the defendants, with the plaintiff's knowledge, abstained from selling, at the solicitation of Hooper, but he then raised no objection to their title: the Lord Chancellor without deciding whether the court would have given to Messrs. Hitchens any aid to give effect to their title so acquired, was clearly of opinion that, as the plaintiff had been privy to the fact of the defendants dealing with the property pledged as their own, the court ought not to interfere to prevent the defendants from selling, and dissolved the injunction which had been granted (*a*).

If no time be fixed for the redemption, the pawnor as before stated has his whole life to redeem the pledge, therefore time will not begin to run against him or those claiming under him during his life (*b*).

The pawn does not in any way extinguish the debt, for if the thing pawned be lost without the default of the pawnee, he may still bring an action against the pawnor (*c*).

The pledgor of goods may file a bill to redeem (*d*); and there may be other cases where it may be proper for the pledgor, or those who represent, him to come into the Court of Chancery: thus, where a question of Tacking arises.

The doctrine of Tacking is applied to pledges of goods as against the party making the pledge, more extensively than it is as against a mortgagor of real estate; the presumption as against the pledgor will be that if the pawnee advance any further sums of money to the pawnor, the property pledged is not to be redeemed without payment of the whole of the advances. In the case of *Demandray v. Metcalf* (*e*), a person made a pledge of jewels, to secure a sum borrowed; the pledgor afterwards borrowed from the same person other sums upon a general account, and he insisted upon his right of redeeming the jewels upon payment of the first sum only; the Lord Chancellor said (in the absence of precedents) that it was reasonable and just to suppose that the pawnee would not have lent the further sums

(*a*) *Nicholson v. Hooper*, 4 My. & Cr. 186. As the bill did not offer to redeem the defendants, Messrs. Hitchens, but disputed their title, the Lord Chancellor would not even continue the injunction on payment of what was claimed by the defendants into court.

(*b*) Lord Hardwicke, *Kemp v. Westbrook*, citing 1 Bulst. 36, *supra*, p. 769.

(*c*) 2 Salk. 523; 2 Foulb. 279.

(*d*) Amongst the forms collected by the late Sir H. Seton (pp. 181, 182), is one of a de-

cree in a suit for the redemption of goods, which contains the ordinary direction that in default of payment by the plaintiff to the defendant of the amount found due, the plaintiff's bill is to stand dismissed with costs, which operates as a foreclosure (3 Hare, 37).

(*e*) Prec. Ch. 419; 2 Vern. 691; so where bonds, bills, or other securities are pledged; *Vanderzee v. Willis*, 3 Bro. C. C. 21; see Sir W. Grant's observations on this case, 6 Ves. 230.

but on the credit of the pledge he had in his hands, and therefore held that the pledgor must pay the whole. But the right to tack cannot be set up against an assignee of the equity of redemption, or against creditor's bringing a bill; and in case of a bankruptcy the pledge can be retained only for the first sum, and the pledgee must come in under the commission for the remainder (a): but it has been held that where a pledge is made to secure a loan, and afterwards the pledgor borrows a further sum, for which a third person becomes security, such third person, having paid the second debt, will be entitled to have the surplus proceeds of the entire property pledged applied in reduction of the second debt, even against the assignees of the pledgor (b). If a pawnee of chattels takes a security by specialty, as a *bond*, for his subsequent debt, it will be presumed, it has been said, that he did not intend to rely on the pledge (c).

A bill may also be filed where a discovery is necessary, as where the pawnor has become bankrupt. Lord Hardwicke held that the assignees might file a bill to redeem, for it was necessary for them to know the exact sum due, before they could make such a tender as would enable them to bring an action of trover (d). So it is a case for the interference of the Court of Chancery, where the legal right to possession is transferred, as by indorsement and delivery of a bill of lading, and there are equitable claims upon the proceeds (e). The same principle will apply in all cases where the remedy in the Court of Chancery is more certain and efficacious than that which can be obtained at law: and where a specific time limited for the redemption has passed, so as to exclude a remedy at law, probably the Court of Chancery, on its general principles, would entertain a bill for redemption, the pledge remaining *in specie*, if applied to within a reasonable time (f).

As to the right of Factors to pledge (g):—As a general proposition

(a) *Demandray v. Metcalf, Vanderzee v. Willis, ubi supra; Adams v. Claxton*, 6 Ves. 229; 1 Jac. & W. 244.

(b) *Praed v. Gardiner*, 2 Cox, 86.

(c) *Dict. Demandray v. Metcalf*, Pr. Ch. 421, v. *infra*, p. 804.

(d) *Kemp v. Westbrook*, 1 Ves. 278.

(e) *Spalding v. Ruding*, 6 Beav. 376, 380.

(f) See *Jarm. Mortg.* by Sweet, 300.

(g) As to the law as to pledges by Factors, as settled by the stat. 4 Geo. IV. c. 83, 6 Geo. IV. c. 94, see *Jarm. Convey.* by Sweet, 291. A *Lien* is different from a pawn and a pledge; a lien at common law is a right in one man to retain that which is in his possession belong-

ing to another, till certain demands of him, the person in possession, are satisfied, *per* Grose, J., 2 East, 235; and that possession may have been acquired without reference to security for money; the lien of a carrier on goods committed to him, and of a solicitor on his client's papers, are instances; as to which see *Bozon v. Bolland*, 4 My. & Cr. 354; *Perkins v. Bradley*, 1 Hare, 231. There are also liens without possession, as the vendor's lien in equity for his purchase-money, which will be treated of under the head of Specific performance of contracts. A short abstract of the law on this subject, in *Miller on Equitable Mortgages*, pp. 4 to 13, may be referred to with

a right of lien in a factor gives no right to sell the goods (*a*), nor at common law had he any right to pledge; but this right has been conferred upon factors, under certain circumstances, by the 4 Geo. IV. c. 83, amended by the 6 Geo. IV. c. 94. A factor who has made advances to his principal has no authority to sell without reference to the interests of his employer, and contrary to his directions, though notice has been given by the factor (*b*). Where goods come into the possession of a person under a special contract, he cannot in respect of his character of factor or otherwise claim to retain them for his general balance (*c*). Lord Hardwicke extended the doctrine of tacking to the lien of a factor, even against the assignees of his principal (*d*).

If a testator gives a cup or personal estate of any description, which is in pawn or in mortgage or charged in any way, it is a full gift, and the executor is bound to redeem it out of the general assets of the testator; if that be not done the legatee is entitled to stand in the same situation as if the duty of the executor had been performed (*e*).

If a person absolutely transfer his shares in a company to another by way of mortgage, and the mortgagee as registered owner becomes liable for calls or other payments, he cannot compel his mortgagor to indemnify him unless he come to redeem (*f*).

The crown cannot avoid an equitable mortgage, or the lien of a factor or of a wharfinger or a *bonâ fide* assignment in trust for creditors, or any similar assignment or charge; because they are created when the debtor has legal power to create them, and they all act upon the property before the interest of the crown accrues, and the crown can only take the property subject to such liabilities as the debtor has legally created (*g*).

Mortgages of ships, as they are subject to the provisions of the navigation laws, seem to require particular notice. The stringency of those laws has been observed upon in a preceding chapter; merely equitable titles, generally speaking, are, as has been there observed, excluded by those laws (*h*). The mortgagor, it is to be noticed, does not now

advantage. The whole law of lien is elaborately discussed in the 1st chapter of Jarm. Convey. by Sweet, vol. v.; and see xi. Jurist, No. 558, and *infra*, sect. x. of this chapter.

(*a*) C. J. Gibbs, Holt's N. P. Ca. 383.

(*b*) *Smart v. Sanders*, C. P. x. Jurist, 841, 844.

(*c*) *Spalding v. Ruding*, vii. Jurist, 733; 6 Beavan, 380-1.

(*d*) *Ex parte Deeze*, 1 Atk. 228; there is an useful note on this subject by Mr. Raithby, p. 230; and see *Ex parte Ockenden*, *ibid.* 236.

(*e*) Lord Thurlow, *Ashburner v. M'Guire*,

2 Bro. 113; Sir J. Leach, *Knight v. Davis*, 3 My. & K. 358, 361; and see *Marshall v. Holloway*, 5 Sim. 196, 203; *Stewart v. Denton*, 4 Dougl. 219. This rule was adopted from the civil law; see Swinburne, pt. 7, sect. 20, p. 548.

(*f*) *Phene v. Gillan*, 5 Hare, 10.

(*g*) *Giles v. Grover*, opinion of Mr. Justice Patteson, 6 Bli. 292; 1 Phill. 733; v. *inf.* 786.

(*h*) V. *supra*, p. 221: see, on this subject, Jarman, Mortgage, by Sweet, where the provisions of the stat. 3 & 4 Will. IV. c. 55, are set out; *et v.* pp. 320, 321, where the autho-

cease to be owner; so that if the mortgagee merely insures his own interest in the ship, he can only recover to the amount of the debt due to him (a).

In *Langton v. Horton* (b), Lord Langdale said it might well be doubted whether under the provisions of the act 3 & 4 Will. IV. c. 55, ss. 35, 42, 43, there can be any valid mortgage in any case in which the parties do not secure to themselves the protection which the statute gives by the mode of proceeding which is therein directed. Where by the omission of the creditors to perfect a mortgage security upon a ship according to the exigences of the statute, the benefit of the creditor's security is lost, the surety is discharged to the extent of the value of such security (c).

The mortgagee of a ship is entitled to the accruing freight from the time he takes possession (d); but where he does not take possession he is not entitled to the freight (e).

Although Freight which has to be earned cannot be assigned according to the rules of law (f), such an assignment, by way of mortgage or otherwise, is good in equity (g): and a security valid in equity may be given upon a cargo to be acquired in the course of a voyage (h). If a person has done all in his power to obtain possession or quasi possession of the cargo assigned to him, by giving notice to all those who as far as his knowledge extends ought to have notice, he will not be defeated of his priority by the circumstance of a subsequent incumbrancer having afterwards been enabled to give a prior notice to

rities are collected; and Coote, p. 327, *et seq.*: and see *Langton v. Horton*, 5 Beav. 18, 19; and *Ridgway v. Roberts*, 4 Hare, 106. Those who may require more particular information will resort to the new edition of Abbott's Law of Shipping. Of Liens on Ships, and their Cargoes, v. *infra*, Section x. I do not enter into the subject of bottomry bonds; but in *Glascock v. Lang*, 2 Phillips, p. 310, there will be found a discussion as to the circumstances which will or will not invalidate a bottomry bond. Whilst I am writing, the Navigation Laws appear to have received a death-blow.

(a) *Irving v. Richardson*, 2 Barn. & Adol. p. 196. This case was decided on the stat. 6 Geo. IV. c. 110, § 45.

(b) *Langton v. Horton*, 5 Beav. 19.

(c) *Capel v. Butler*, 2 Sim. & St. 457.

(d) *Kersuill v. Bishop*, 2 Crompt. & J. 529. The mortgage was by assignment of the ship and tackle, &c., with a power of sale; and see *Dean v. McGhie*, 12 J. B. Moore, 185; *S. C.* 4 Bing. 45 (2 Cr. & J. 540, Bayley, B.).

(e) *Chinnery v. Blackburne*, 1 H. Bl. 117,

in *notd*; *S. C.* 3 Doug. 394 (2 Cr. & J. 539). Lord Langdale's expressions in *Langton v. Horton*, 5 Beav. 19, as reported, are, "It is admitted that, independently of special contract, the sale or mortgage of a ship will carry freight accruing due at the time of the sale or after possession is taken by a mortgagee," *et v. ib.* p. 20; but the counsel did not put his title higher than in the event of his taking possession before the conclusion of the voyage, *ibid.* p. 15.

(f) *Robinson v. Macdonnell*, 5 Maule & S. 228, 236.

(g) *Douglas v. Russell*, 4 Sim. 535, affirmed 1 My. & K. 488, the leading cases are there cited, *et v. infra*, Chapter x., Assignment of Choses in Action. Freight earned under a charter-party executed after the date of the testator's will, and which did not become due till after the testator's death, will not it seems pass to a specific legatee of the ship, *Stephenson v. Dawson*, 3 Beav. 342.

(h) *Langton v. Horton*, 1 Hare, 555-6-7.

a person to whom the cargo has been consigned by the mortgagors unknown to the first mortgagee: the mortgagee of a cargo on board a ship at sea is not bound to send letters to meet the master wherever the ship may possibly come (a). Upon a sale, and therefore upon a mortgage of a ship with its appurtenances independently of special contract, "appurtenances" include every thing belonging to the owners which is on board the ship for the accomplishment of the object of the adventure; but the cargo is not an appurtenance: a cargo of whale oil cannot be considered as freight incident to the employment of the ship, so that it does not pass by an assignment of the ship (b).

Where the property is of a fluctuating nature, as the stock of a publican, it seems that wines and the like, to be after acquired, may be mortgaged at law, but the terms of the mortgage must be special (c). An assignment, by way of mortgage, of a legacy in anticipation will be good in equity (d): an assignment of a legacy charged on lands in a register county does not require registration (e).

(a) *Feltham v. Clark*, 1 De G. & Sm. 307, 313; *Langton v. Horton*, 1 Hare, 557-561, and the cases there cited; and of the notice requisite for the completion of the title to a chose in action, which depends upon analogous principles, *v. infra*, Chaps. ix. and x. Some of the most important cases on the subject are collected by Mr. Daniell in his report of *Taylor v. Blake*, Dan. R. 70.

(b) Lord Langdale, *Langton v. Horton*,

(1842,) 5 Beav. 20, 21, 22.

(c) *Tapfield v. Hillman*, C. P. vii. Jur. 771, 772-3, *et v. supra*.

(d) *Bennett v. Cooper*, 9 Beav. 252; the assignment was accompanied by a power of attorney, *ib.* 254; though it seems such an interest cannot be given. See *Meek v. Kettlewell*, *infra*, Chaps. ix. and x.

(e) *Malcolm v. Charlesworth*, 1 Keen, 73.

ADDITIONAL NOTE.—No. I.

Effect of Sects. 19 & 21, of Stat. 7 & 8 Vict. c. 96, on an Assignment and Delivery of Personal Chattels, on the Insolvency of the Assignor.

In a late case, (*Parrott v. Congreve*, xiii. Jur. 398,) the Vice-Chancellor of England held, on the construction of the act referred to, that where a bill of sale of personal chattels as a security, with a power to sell, had been made one year before the insolvent petitioned for protection, but possession of the goods had not been taken till one month before the presenting of the petition, the holder of the bill of sale could not sell, and that he could only come in under the insolvency; and see *Squire v. Huetson*, 1 Q. B. Rep. 308.

ADDITIONAL NOTE.—No. II.

Pawnbrokers Act—Usury Laws.

In the late case of *Fitch v. Rochfort*, xiii. Jur. 314, before the Vice-Chancellor of England, the effect of the Pawnbrokers Act, 39 Geo. III. c. 99, as to the right to the surplus proceeds, and of the 2 & 3 Vict. c. 37, § 1, in regard to taking interest for loans of money above 10*l.* in amount in reference to the Pawnbrokers Acts, is discussed.

SECTION X.—Of Equitable Mortgages and Liens, and of Liens generally.

§ 1.—Of Securities under written Instruments.

§ 2.—Of Securities by the Deposit of Deeds, with or without Writing.

§ 3.—Of Liens.

§ 1.—Of Securities under written Instruments.

Security by written Agreement or Directions, on Land or other Property.

Charge by Agreement on Property to be subsequently acquired.

Direction by a Party that his Creditor be paid out of a particular Fund.

A SECURITY, equivalent, in equity, to an actual mortgage by deed, or to a pledge, may be acquired under a written agreement, or through the medium of written directions (a). Any instrument in writing, which shows that it was the intention of the creditor, in executing it, to make his land or other property a security for the debt, as the assignment of the rent secured by a lease, will amount in equity to an actual security (b). Lord Kenyon was inclined to think that a parol direction to assign personal property to a creditor, without any deposit, was sufficient to give an equitable security on the property (c).

A promise in writing to give a security by mortgage of lands when called upon, does not, on the death of the debtor, affect any lands of which the debtor may have been seised during his life (d); but if the agreement be to settle on a certain day lands of a certain value, it will create a lien on the lands of which the party is seised on that day (e).

(a) I need scarcely inform the reader that the subject of this chapter has been treated of by Mr. Samuel Miller, in a distinct Treatise, to which learned work I would refer the student and the practitioner.

(b) *Ex parte Wills*, 1 Ves. J. 162; 2 Cox, 233; *Card v. Jaffray*, 2 Scho. & L. 379; see *Jarm. Mortgage*, by Sweet, 109; and *Miller on Equit. Mortgages*, p. 2, *et seq.*; and see *Brown v. Heathcote*, 1 Atk. 162, on the efficacy of an equitable assignment of personal property as against assignees.

(c) *Hankey v. Vernon*, 2 Cox, 14, case of a ship.

(d) *Williams v. Lucas*, 2 Cox, 160; following *Freemoult v. Dedire*, 1 P. W. 429.

(e) *V. supra*, p. 254; *Roundell v. Breary*, 2 Vern. 482. See Lord Cottenham's obser-

ventions on *Freemoult v. Dedire*, *ubi sup.*, and *Roundell v. Breary*, 2 Vern. 482, and *Deacon v. Smith*, 3 Atk. 327, in the case of *Wellesley v. Wellesley*, 4 My. & Cr. p. 581, as to the effect of a covenant where it is to charge lands generally, and where it refers to a particular time or value. The case of *Ravenshaw v. Hollier*, 7 Sim. 3, affirmed by Lord Lyndhurst, affords an instance where a covenant to settle a fee-simple estate, of a certain value, was held not to create a lien on the estates in the covenantor's possession, partly as tenant in tail and partly in fee. And on the difference between an agreement that amounts to a personal undertaking, and one that creates a lien on real estate, see *Berrington v. Evans*, 3 Yo. & Coll. 384, 392.

It is now fully established that contracts to charge property subsequently acquired may be enforced in equity (a); but a verbal promise to deposit a future lease when obtained cannot be enforced as giving a lien (b).

A direction in writing by a debtor to a third person, who holds an estate at the debtor's disposal—for instance, to a vendor who has not conveyed to the debtor who has purchased the estate—to convey the estate to a creditor as a security for his debt is irrevocable, and will constitute, in equity, a mortgage: and if the conveyance has been made, under such directions, to a person standing in the character of creditor at the time, that is in itself sufficient to rebut the presumption that the conveyance was intended to be made to him as a mere trustee (c). In one case, a general agreement to assign all the debtor's lands in a particular place, was held not to be confined to his freehold lands only, but to extend to copyholds also, upon the recital in the instrument (d). The case of *Buckle v. Mitchell* (e) is a direct authority for the proposition that an equitable interest in land entitles the purchaser by contract to clothe it with the legal estate (f).

Where a trader gave to one of his creditors a direction in writing addressed to the executor of his debtor, to pay the debt due to him to the creditor, when there should be funds of the testator (the debtor) applicable to the payment of debts of that class, and the executor retained the order, and the trader afterwards became bankrupt; it was held that the creditor of the trader was entitled to receive the amount of the debt (g). So where express directions were given

(a) Lord Cottenham, *Wellesley v. Wellesley*, 4 My. & Cr. 579; *Lyde v. Mynn*, 4 Sim. p. 595; 1 My. & K. 683; *Metcalfe v. Archbishop of York*, 6 Sim. 224; affirmed by Lord Cottenham, on appeal, 1 My. & Cr. p. 547: that was the case of an agreement by a vicar, before the passing of the 57 Geo. III. c. 99, to charge any benefice to which he might be promoted (as to the statutes affecting charges on Ecclesiastical benefices, see 1 My. & Cr. 553); *Robinson v. Maedonnell*, 5 M. & S. 228; *Curtis v. Auber*, 1 Jac. & W. p. 526; *Douglas v. Russell*, 4 Sim. 524; (1 My. & K. 488); *Alexander v. Duke of Wellington*, 2 Russ. & M. 35 (1 My. & Cr. 556): one point raised in the first-cited case was that the covenant was to execute a *legal charge* which had become illegal before any attempt was made to enforce it; but Lord Cottenham held that there was an *equitable charge*, independently of the covenant to execute a *legal charge* (*ibid.* 557); and see *Lewis v. Madocks*, 17 Vesey, p. 48, a case which arose on a contract to settle fu-

ture personal estate; *et v. supra*, p. 776.

(b) *Ex parte Coombe*, 4 Mad. p. 249, 251; and see *Ex parte Hooper*, 1 Meriv. 7.

(c) Lord Redesdale, *Card v. Jaffray*, 2 Scho. & L. 384.

(d) *Ex parte Glyn*, iv. Jur. 395.

(e) 18 Ves. 100.

(f) Vice-Chancellor Wigram, *Lister v. Turner*, x. Jur. 752; 5 Hare, 291; and such an interest will therefore defeat a voluntary conveyance; *ibid.*: and limitations to collaterals being strangers to a contract, *Stacpoole v. Stacpoole*, 2 Conn. & L. 508.

(g) *Ex parte South*, 3 Swanst. 392; Lord Eldon there observes upon the doctrine at law, that the party receiving the order should come under a contract, in order to make the transfer or lien available; (as to which, *v. int. alia*, *Williams v. Everett*, 14 East, p. 582; *Burns v. Carnalho*, 4 My. & Cr. p. 690; and see the Vice-Chancellor of England's observations on that case, 2 Sim. 342; and *Scott v. Poreher*, 3 Meriv. 652;) that that was not the doctrine

by a receiver of an estate in Jamaica to the consignees in England, to keep down the plaintiff's annuity, which had been directed to be paid out of the first proceeds of the estate in a suit instituted in Jamaica, and the consignees for a time acted upon it, but afterwards endeavoured to apply the consignments to another purpose; the plaintiff was held to be entitled to the proceeds in the hands of the consignees (a).

In a case before Lord Keeper Wright, a person entered into a contract for the purchase of an estate; the lands purchased were subject to mortgages and judgments: the purchaser, according to agreement between him and the vendor, placed the purchase-money in the hands of a third person, to be paid in discharge of the incumbrances when the amount should be ascertained; but before this was done, the purchaser died, not leaving assets to pay his debts on bond. The question was, whether the money deposited was to be considered as assets of the purchaser, and to be applied in payment of his debts: or whether it was bound to the specific purpose of the deposit, and to be applied in payment of the incumbrances according to the agreement: in the one case the general creditors would be left without any funds for payment of their debts; in the other, the mortgagees might have been paid by proceeding to enforce their securities: it was held that the money was bound by the agreement, and must be applied in payment of the incumbrances (b).

In order to constitute an equitable assignment of, or lien upon, a chose in action, there must be an engagement to pay out of the particular fund (c): if the order be given for a valuable consideration on the part of the holder—for instance, as an inducement to the party to supply goods, and he does so on the faith of it—it does not appear to be necessary that the holder of the chose in action should accept the order (d): but this rather belongs to Chapter IX., on the Assignment of Choses in Action, in this volume.

We now proceed to consider the cases in which a lien or charge may be created without writing—namely, by Deposit.

of this court, see *Wright v. Ward*, 4 Russ. 220, by Lord Eldon, overruling the decision of the Vice-Chancellor; and see 1 H. Bl. 243: and *Bailey v. Culverwell*, 8 Barn. & C. 448; *Alexander v. Duke of Wellington*, 2 Russ. & M. 46, assignment of prize-money, and *Cotesworth v. Stephens*, 4 Hare, 185.

(a) *Fitzgerald v. Stewart*, 2 Sim. p. 333;

affirmed, 2 Russ. & M. 457.

(b) *Farr v. Middleton*, Prec. Ch. 174.

(c) Sir J. Leach, *Watson v. Duke of Wellington*, 1 R. & M. 605.

(d) *Lett v. Morris*, 4 Sim. p. 607, is an instance of such an assignment being held to be good; there was no acceptance of the order in that case.

§ 2.—*Of Securities by the Deposit of Deeds, with or without Writing.**Lien by Deposit of Deeds.**General Doctrines on this Subject.**Subsequent Advances.**Debt to new Firm.**Deposit of a Portion of the Deeds only.**Deeds delivered to Solicitor for the purpose of preparing a Mortgage.**Lien as against Third Persons.**Object of Deposit may be explained by Evidence.**Deposit in the hands of a Third Person.**Register not Notice.**Deposit of Agreement—Of Court Rolls.**Deposit by Accountant to the Crown.**Deposit, and subsequent Conveyance in contemplation of Bankruptcy.**Depositary of Lease not liable to the Landlord on the Covenants it contains.**Deposit of Lease, with Covenant not to assign.**Lord Rosslyn's General Order in Bankruptcy.**Costs of procuring a Sale in Bankruptcy.**From what Time the Deposittee is entitled to the Rents.**Deposit of Deeds by Mortgagor, Prior Mortgagee having omitted to obtain them.**Plum v. Fluitt, 2 Anst.**Worthington v. Morgan, xiii. Jur. before Vice-Chancellor of England.**Observations in that Case.**Deposittee takes such Interest only as the Depositor had.**Remedies of the Deposittee in the Court of Chancery.**Dicta of Lord Cottenham on this subject.**Equitable Charge has Preference to a Judgment.**Whitworth v. Gaugain, 1 Phillips.*

It has been determined by a series of authorities that a lien on land may be obtained by a mere deposit of the deeds relating to the land, notwithstanding the Statute of Frauds. This subject has been a fertile source of litigation. Whether the lien obtained by a simple deposit is, as it is generally called, an equitable mortgage, or whether it amounts only to a charge, is left in some obscurity; the balance of authority appears to incline in favour of the latter view.

The question, as is more particularly adverted to hereafter, depends upon this: Is the deposit of the deeds all that is intended to be done, or is it to be gathered from the act of deposit that something further—namely, a formal security, such as is usually given on an advance of money on the security of land—is to be given? If the former only, then the deposit amounts to a simple charge, and the

remedy to enforce the charge will be the same as is given in other cases where money is charged upon land—namely, by sale. If the latter, then the remedy would appear to be, first, to compel the completion of the contract, and then to give the ordinary remedies which a mortgagee is entitled to; or, if the money is required to be paid, to assume that what ought to have been done is done, and, instead of mere foreclosure on default, to order a conveyance of the legal estate.

We shall first proceed to a consideration of the authorities in reference to the general doctrine.

It has been decided (*a*) that a mere deposit of title deeds relating to real estate upon an advance of money, without a word passing, gives an equitable lien (*b*), and it will prevail against a subsequent purchaser with notice (*c*). This doctrine has been considered to be difficult to be maintained, either upon principle or on grounds of public policy (*d*); but it is firmly established, though latterly a disposition has been evinced not to extend its operation (*e*). A deposit of deeds till the debt is paid, said the Vice-Chancellor Knight Bruce in a late case, accompanied by an agreement to that effect, gives an equitable lien on the property, not on the deeds only, but *primâ facie* on all the property contained in them (*f*). The deposit will cover subsequent advances, if it clearly appear by evidence that they were made upon the faith of that security (*g*), or that the original deposit was continued with an agreement for a further advance (*h*). Lord Eldon, adverting to *Ex parte Langston*, above cited, said, "In the cases alluded to, I went the length of stating that when the deposit originally was for a particular purpose, that purpose may be enlarged by a subsequent parol agreement; and this distinction appeared to me

(*a*) Lord Abinger took some pains in the case of *Keys v. Williams*, 3 Y. & C. p. 61, to vindicate the Court of Chancery from having violated the Statute of Frauds, 29 Car. II. c. 3, § 4, (*v. supra*, vol. i. pp. 497-8, 555, 646,) in establishing this doctrine.

(*b*) *Ex parte Mountfort*, 14 Ves. p. 606; *Ex parte Langston*, 17 Ves. 227, 230; *Russel v. Russel*, 1 Bro. C. C. 269, which was the first case that established these equitable liens or mortgages, has been frequently lamented: *Edge v. Worthington*, 1 Cox, p. 212; *Ex parte Hooper*, 19 Ves. 478-9; and see Belt's note to 1 Bro. 269; and Lord Henley's note, p. 270, n. (*a*).

(*c*) *Hiern v. Mill*, 13 Ves. p. 114: whether or not it will prevail against a purchaser without notice, is discussed in a future page:

see *Worthington v. Morgan*, xiii. Jur. p. 316, and the other cases, *infra*, p. 789.

(*d*) See 11 Ves. 403; 12 Ves. 196; 14 Ves. 606; *Ex parte Hooper*, 1 Mer. 9; *S. C.* 19 Ves. 477; *Ex parte Warner*, 19 Ves. 203; and *Keys v. Williams*, *supra*.

(*e*) *Ex parte Kensington*, 2 Ves. & B. 33; *Ex parte Coombe*, 17 Ves. p. 369; *Ex parte Hooper*, 1 Meriv. 9; *Ex parte Whitbread*, 19 Ves. 209; *Norris v. Wilkinson*, 12 Ves. 192.

(*f*) *Ashton v. Dalton*, x. Jur. 451; 2 Coll. 565, 567; *et v. Hockley v. Bantock*, 1 Russ. 145; *sed v. infra*, p. 785, n. (*k*).

(*g*) *Ex parte Langston*, 17 Ves. p. 227; 1 Rose, 26; *Ex parte Whitbread*, 19 Ves. 210.

(*h*) *Ex parte Hooper*, 19 Ves. 479; *S. C.* 1 Mer. p. 7; and see *Ex parte Whitbread*, 19 Ves. 209; *S. C.* 1 Rose, 299.

to be too thin, that you should not have the benefit of such an agreement, unless you added to the terms of that agreement the fact that the deeds were put back into the hands of the owner, and a re-delivery of them required, on which fact there is no doubt that the deposit would amount to an equitable lien within the principle of these cases" (a). In the case before him, Lord Eldon, on the principle of the last-mentioned case, decided, on the affidavits and examinations taken together, aided by the extreme probability of the intention, that he could collect that what was originally deposited to secure the balance due to the banking company then subsisting should be extended, though by parol, to secure the demand of the house consisting of additional partners (b). If it appear upon the evidence that the deeds were deposited with the creditor, not for the purpose of being applied as a security for money already advanced, but for the purpose of obtaining future credit, it will be confined to that purpose (c).

Where there is a legal mortgage, parol evidence cannot be admitted to make the estate liable for a subsequent debt (d).

It was decided in one case by Sir J. Leach, that where there was only a deposit of one deed, when there was a promise to deposit all, it did not give an equitable security; but that decision was reversed (e). Where there is a deposit of a portion only of the deeds, whether an equitable mortgage is created would seem to depend upon the circumstances of each case: Lord Eldon appears to have thought that in the absence of writing or a contemporaneous loan, the question will depend upon whether, looking to the deeds actually deposited, an agreement or intention to charge the estate is to be inferred (f): if money passed at the time, probably that would be sufficient; a written engagement or other writing, stating the purpose to be to give a security on the estate (g), or even on the deeds, though it be accompanied only by a deposit of an useless deed, certainly will (h). Where part of the title-deeds were deposited with A. and part with

(a) *Ex parte Kensington*, 2 Ves. & B. 84; and see *Ex parte Lloyd*, 1 Gl. & Jam. 389.

(b) *Ex parte Kensington*, *ubi supra*.

(c) *Mountford v. Scott*, Turn. & R. p. 280, Lord Eldon, who there said the doctrine was not to be carried further than it had been carried.

(d) *Ex parte Hooper*, 1 Mer. 7.

(e) *In re Nicholson*, *coram* Leach, V. C., 23 March, 1820, Mad. MS. Pr. and P. i. 674; but Mr. Maddock afterwards (p. 675) says, he had been informed that Lord Eldon re-

versed this dictum, and that Sir S. Romilly admitted that it could not be supported; Mr. Maddock does not state who were the opposing parties: and see *Ex parte Pearce*, 1 Buck, 525; but that was a peculiar case.

(f) *Ex parte Wetherell*, 11 Ves. 401.

(g) *Ex parte Wright*, 19 Ves. 257.

(h) *Ex parte Arkwright*, on rehearing, 3 Mont. D. & D. 129, 132; the original decision, as regards the policies of insurance, was reversed, for want of notice having been given; as to which, *v. infra*, Chap. ix. and x.

B., it was held by Lord Eldon, on the petition of A. in bankruptcy, that neither of them had an equitable lien (*a*); but in a subsequent case where the conveyance of the estate had been deposited with A., and other title-deeds with B., Sir J. Leach held that A.'s lien was good, and could not be defeated by the subsequent fraudulent deposit of the other title-deeds with B. (*b*).

Lord Thurlow and Sir Wm. Grant were of opinion that where deeds were delivered by the debtor to the creditor or to a solicitor, not specifically by way of pledge, but in order that a mortgage might be prepared (no money passing at the time), and before the mortgage was executed the debtor died or became bankrupt, the transaction must be considered as incomplete and that it did not create a lien on the estate (*c*): but Lord Eldon appears to have thought that such a deposit would clearly constitute an equitable mortgage (not a lien only) even for an antecedent debt (*d*); and Lord Eldon's doctrine has been followed in subsequent cases (*e*).

Although the deposit may constitute a lien as against the depositor, yet in a question with a subsequent purchaser who is a stranger, the lien will not prevail where the possession can be accounted for in some other manner, unless the stranger has notice, express or constructive, of the particular purpose for which the deposit was made; hence, if an attorney who, in the ordinary course of business usually has the custody of his client's deeds, holds them under an agreement in a character different from that of attorney, he must, it seems, in order to render the deposit available against strangers, at least give notice to all persons in the visible ownership of the property (*f*).

(*a*) *Ex parte Jones in re Price*, before Lord Chancellor Eldon, 21st March, 1821, Mad. MS., Pr. and P. i. p. 679.

(*b*) *Ex parte Kelland re Melhuish*, 17th March, 1821, Mad. MS., Pr. and P. i. 679; nothing is stated as to these cases but what is set forth in the text.

(*c*) Lord Thurlow, *Ex parte Bulleel*, 2 Cox, 243; Sir Wm. Grant, *Norris v. Wilkinson*, 12 Ves. p. 192, following *Brizick v. Mannors*, 9 Mod. 284; cited 12 Ves. 199; Powell on Mortgages, ii. p. 1056; see *Hiern v. Mill*, 12 Ves. 122; and *Ex parte Harvey*, 1 Mont. & Ch. 241.

(*d*) *Ex parte Bruce*, 1 Rose, p. 374; Lord Eldon there said, "If they are deposited for the express purpose of preparing the security of a legal mortgage, is not that stronger than an implied intention?" No authorities were cited (these cases are observed upon by Miller on Eq. Mortgages, p. 43; and see *Ex parte Wright*, 19 Ves. p. 257). In *Edge v. Worthington*, 1 Cox, 212, which had not been

reported when *Norris v. Wilkinson* was decided, Lord Kenyon had expressed himself to the same effect (and see 3 Yo. & Coll. 59); his Lordship held it to be clear that the deeds could not be got back without payment of the money; and see *Pye v. Daubuz*, 2 Dick. 759.

(*e*) *Hockley v. Bantock*, 1 Russ. p. 141; *Keys v. Williams*, 3 Yo. & Coll. p. 62. "The agreement and the delivery of the deeds," said Lord Gifford, in the first-cited case, constitute a mortgage in equity;" but it is to be observed, that where the deposit is held to be a lien only, the provisions of the Statute of Frauds are only so far affected that the lien on the deeds is transferred to the land; to decide on parol evidence that the depositor shall convey the estate, seems to be contrary to principle; the decree only declared that the plaintiffs had an equitable lien: *v. infra*, in this section, as to the Remedies of the deposittee.

(*f*) *Boron v. Williams*, 3 Yo. & J. 150; but see *Hiern v. Mill*, 13 Ves. 114; 3 My. & Cr. 673.

The meaning and object of the deposit has been allowed to be explained by parol evidence, a circumstance that has often been lamented (*a*); where the deposit is made to secure a floating balance to a firm, it may be extended, by the effect of the course of dealing, to a new firm without any express acknowledgment on the part of the debtor (*b*). "There is nothing," said Lord Eldon, "that requires to be watched with more jealousy than this doctrine of lien by the deposit of deeds, especially when the inference contradicts a written instrument" (*c*), as may be the case, as before stated, where the security is given to an existing firm and is extended to a subsequent firm consisting of other members, or to secure further advances where the memorandum extends only to a specific sum (*d*). If there are false and contradictory accounts as to what was the nature of the deposit, it cannot be held to give a lien (*e*). In the late case of *Ede v. Knowles*, before the Vice-Chancellor K. Bruce, there was an agreement distinctly proved by a letter signed, that there should be an advance of 4000*l.* to Mr. Knowles, who had become bankrupt, or to the house of which he was a partner, upon the security of certain reversionary property belonging to Knowles; afterwards the deeds were deposited, part of the money being then paid: further sums were advanced at different times, between that day (16th April) and the 26th of the same month, to the extent of 4000*l.*, of which sum 159*l.* only was repaid, leaving more than 4000*l.* due. It was contended that the written evidence which came into existence from time to time, in the course of executing the original agreement, precluded the parol evidence, which was addressed to the subsequent advances, from being received; but his Honour was clearly of opinion that it might be received (*f*).

In all cases where there is anything equivocal in the circumstances, the intention and object of the deposit may clearly be examined into (*g*). Where the deeds are delivered to a third person, by a person not being the party whose estate is sought to be charged, and no money passes at the time, before such a delivery can be considered as constituting an equitable mortgage there must be evidence of the circum-

(*a*) *Ex parte Hay*, 15 Ves. 4; *Norris v. Wilkinson*, *ubi infra*.

(*b*) *Ex parte Oakes*, v. Jur. 757, Court of Review.

(*c*) *Ex parte Coombe*, 17 Ves. p. 370. In this case the reporter has not stated the material fact, that the deposit was *after* the act of bankruptcy; see Montague on Lien, p. 72, n. (*m*); and see 1 Rose, p. 269, and *Ex parte Hooper*, 1 Meriv. 9; 19 Ves. 477.

(*d*) See *Ex parte Kensington*, *ubi supra*; *Ex parte Nettleship*, v. Jur. p. 733; 2 Mont. D. & D. 124.

(*e*) *Anon. MS.*, 1 Mad. Pr. and P. p. 675; but contradictory statements may be the subject of inquiry; *Ex parte Mountfort*, 14 Ves. p. 607.

(*f*) *Ede v. Knowles*, 2 Y. & Coll. C. C. pp. 179-80.

(*g*) *Casberd v. Attorney-General*, 6 Price,

stances under which, and for what purpose, the deposit was made, and that it was made on behalf of the parties interested (*a*); for the fact of the delivery creating an equitable charge depends wholly on these circumstances (*b*): but, as we have seen, a deposit by the party himself, without a word passing, will constitute an equitable lien if money be advanced at the time (*c*). Although a deposit in the hands of a third person may be considered as a deposit for the creditor, provided such be clearly proved to have been the intention, such third person being a stranger, and not having himself made any advance (*d*), it is different where the deposit remains in the hands of the mortgagor himself; and Lord Eldon doubted whether a mere memorandum, kept by the debtor in his own possession, and not parted with to the man in whose favour it was expressed, would confer any title; and he held that where deeds were put into the hands of the wife of the debtor, that would not be sufficient (*e*).

A subsequent incumbrancer by deposit of the deeds relating to the freehold without notice, is entitled to retain the deeds against a mortgagee of a term, though registered, for the registry of the original mortgage does not of itself amount to notice (*f*). The deposit of a mere agreement gives an equitable lien (*g*), and so does the deposit of copies of court rolls (*h*). Where a mortgage and bond are deposited as a security by a person who afterwards becomes bankrupt, though without notice to the mortgagor, his assignees will be compelled to execute an assignment (*i*). A written memorandum purporting to give a security on the estate, accompanied by a deposit of a deed conveying the estate and the furniture in the mansion upon it, does not give a security on the furniture (*k*).

An equitable mortgage by deposit of title-deeds by an accountant

411, 459; *Ex parte Mountfort*, 14 Ves. 607; and see *Lucas v. Commerford*, 3 Bro. p. 166; 1 Ves. J. p. 235; *Norris v. Wilkinson*, 12 Ves. 192; *et v. supra*.

(*a*) The Lords Commissioners, when *Russel v. Russel*, *supra*, was before them, said it was open to explanation on what terms the lease was delivered and an issue was directed, 1 Bro. 269: and see *Ex parte Wetherell*, 11 Ves. 401, where Lord Eldon says, generally the possession of deeds, where no other purpose is shown, is evidence of an agreement to bind the estate.

(*b*) *Williams v. Medlicot*, 6 Pri. 495-501; and see *Ex parte Wetherell*, *ubi supra*.

(*c*) *Ex parte Langston*, *supra*; 17 Ves. 230.

(*d*) See *Ex parte Coming*, 9 Ves. p. 117; *Ex parte Whitbread*, 19 Ves. 212.

(*e*) *Ex parte Coming*, *ubi supra*; there, it

is to be observed, the deposit with the wife seems to have been made without any communication with the creditor.

(*f*) *Wiseman v. Westland*, 1 Yo. & J. 117, 121, *et v. supra*, p. 763. It was in this case that the Lord Chief Baron (Alexander) said, "It was not usual, in such cases, without any agreement for the purpose, that the court should order the delivery of the deeds in a decree for foreclosure."

(*g*) Argument in *Ex parte Warner*, 19 Ves. 203.

(*h*) *Ibid.* 202; *Whitbread v. Jordan*, 1 Yo. & Coll. 303; a doubtful case, as regards notice, see 4 Y. & Coll. 563, and *sup.* Sect. viii.; *Winter v. Lord Anson*, 3 Russ. 493.

(*i*) *Jones v. Gibbons*, 9 Ves. 411.

(*k*) *Ex parte Hunt*, iv. Jur. 342; *v. sup.* 781.

of the crown, in the hands of one who has an opportunity of knowing that the depositor is, or may become, a debtor of the crown, is not available against an extent; and it has been doubted whether a deposit by the king's debtor is good, in any case, against the crown, but it seems it is (a).

If the debtor makes a deposit, and afterwards, in contemplation of bankruptcy, conveys the legal estate, the legal title cannot be impeached (b); if the legal mortgage is made after the bankruptcy the mortgage is invalid, but the equitable lien revives (c). In a case, where an assignee bought the bankrupt's estate, and out of the consideration-money paid off an equitable mortgagee in part, who on such payment delivered up the deeds; the estate having afterwards been resold at an advanced price which the assignee carried to the account of the estate, it was held that the equitable mortgagee had a lien for the residue of his debt on the additional price so obtained (d).

It was formerly held that where a lease was deposited to secure a debt, the depositary was liable at the instance of the lessor to take an assignment, and to perform the covenants; and it was held he could not abandon the deposit, for being, as it was said, entitled to a legal conveyance, he was considered as having it (e): thus the principle that "what is agreed to be done is considered as done" was extended to third persons; not, however, to all intents and purposes; for where there was a covenant not to assign a lease without the license of the landlord, and the lease was deposited as a security for the debt, Lord Eldon held the deposit was not a forfeiture, but that he could not order the estate to be sold without the consent of the landlord (f). However in the late case of *Moore v. Choat*, the Vice-Chancellor of England considered that these cases proceeded upon an erroneous application of the principle above referred to; for that it was contrary

(a) *Broughton v. Davis*, 1 Pri. 216, 222-3. "According to my MS. note of *Rex v. Benson*, in the Exchequer, 1804," says Mr. Madock, Pr. and P. i. 677, "it was held that a deposit of deeds as a security prior to the fiat of an extent, is good against the crown; and that if one under marriage articles agrees to settle a particular estate, the crown cannot take the estate;" see *Casberd v. Attorney-General*, 6 Pri. 411, and cases cited; and *Giles v. Grover*, 6 Bli. N. S. 292; 1 Phill. 733; *et v. supra*, Sect. ix. p. 774.

(b) *Hiern v. Mill*, 13 Ves. 122.

(c) *Ex parte Harvey*, 1 Mont. & Ch. 261.

(d) *Ex parte Morgan*, 12 Ves. p. 6, Lord

Erskine; and see 2 Conn. & L. 117.

(e) *Lucas v. Commerford*, 1 Ves. J. 235; S. C. 3 Bro. C. C. p. 166; but as to this case, see *Flight v. Bentley*, 7 Sim. p. 149. It has been held that an action of covenant lies against an assignee of a lease to whom an assignment is actually made by way of mortgage security, although he has never entered or taken actual possession; *Williams v. Bosanquet*, 3 Moore, 500; *Eaton v. Jaques*, Dougl. 455, *contra*, was overruled; as to the maxim that what ought to be done is considered as done, *v. supra*, Chap. vi. Sect. iv.

(f) *Ex parte Abdy*, 13 April, 1813, mentioned 2 Christ. B. L. 335; Mad. Pr. and P.

to the established principles of the court to hold that, if a lessee contracted to sell his lease and another contracted to buy it, thereupon any right or equity arose to the landlord to compel the purchaser to take an assignment of the lease or to compel the vendor to assign it; that the depositary of a lease for securing a debt has a right to file a bill for foreclosure and to have the lease assigned to him, or if he has an agreement for a sale he may file a bill for specific performance; but that he is not bound to do either: and that until he has exercised his option, or taken possession of the tenements comprised in the lease, he stands to all intents and purposes in the character of an entire stranger to the tenancy; and the law is settled in conformity (a); excepting that it has since been held by Lord Cottenham that it makes no difference whether the equitable mortgagee is in possession or not (b).

A deposit of a lease by a bankrupt gives an equitable lien against his assignees, although there be a covenant not to assign without license, because such covenant does not bind the assignees (c); and it does not create an objection to the usual order being made (d).

If the depositor, having at the time of the deposit a title to the equity of redemption only, afterwards pays off the mortgage, and then becomes bankrupt, the discharge of the mortgage will enure to the benefit of the depositee (e).

It has been lately laid down by the Vice-Chancellor Wigram, on the authority of the cases cited below, that a person who purchases without obtaining the title-deeds is not affected with notice of an equitable mortgage (f); however none of the cases to which his Honour refers, excepting *Plumb v. Fluitt*, relate to the case of the mortgagee having omitted to obtain the title-deeds. The case of *Plumb v. Fluitt* (g), was to this effect: a person having an equitable mortgage by deposit over one estate, obtained, for the better securing his debt a legal mortgage of that estate, and of another estate, the title-deeds of which, unknown to the mortgagee, had been deposited as a security to another;

(a) *Moores v. Choat*, 8 Sim. p. 508 (as to which case, see 2 Phill. p. 724); *Robinson v. Rosher*, 1 Yo. & Coll. C. C. 7.

(b) *Moore v. Greg*, 2 Phill. pp. 717, 722, 725.

(c) *Ex parte Sherman in re Champness*, 23rd March, 1820, Mad. MS., Pr. and P. 679: and see *Doe dem. Cheere v. Smith*, 1 Marsh. 359; 5 Taunt. 795; 1 Rose, 280; but these assigns were not mentioned: see also *Ex parte Cocks*, 2 Deac. 14; but see *Ex parte Abdy*,

cited *supra*, 786.

(d) *Doe v. Hogg*, 4 Dowl. & Ry. p. 226; *Ex parte Drake*, 1 Mont. D. & D. 539.

(e) *Ex parte Bisdee*, 1 Mont. D. & D. 333, 388; et *v. Frazer v. Jones*, 5 Hare, 475, *supra*.

(f) *West v. Reid*, 2 Hare, 259, referring to *Plumb v. Fluitt*, 2 Anst. 432, *Evans v. Bicknell*, 6 Ves. 174, and *Cathay v. Sydenham* 2 Bro. 393; *v. supra*, Sect. viii. p. 766-7.

(g) 2 Anst. 432.

he inquired for the deeds, and the mortgagor promised to deliver them to him, which promise was evaded on various pretences (a); and as the mortgage was to secure an antecedent debt, not for a present advance, it was natural that he should not propose that any delay should take place on that account. The question was whether the absence of the deeds was constructive notice of the previous deposit, or whether the mortgagee, the defendant, could be affected by constructive fraud or negligence amounting to fraud, in not persisting in obtaining the deeds; both questions were decided in the negative (b). But the question, whether a person purchasing advancing money on mortgage, and omitting to obtain or to make any inquiry as to the title-deeds, can set up the legal estate which he has obtained against a prior equitable mortgagee remains in some degree of doubt. Sir E. Sugden states it as his clear opinion that under such circumstances the equitable mortgagee cannot prevail against the legal estate; that both parties have acted without prudence, the one in not obtaining a conveyance, and the other in not requiring the production of the deeds, and therefore the legal estate must prevail (c). This doctrine is a serious blow to the efficacy of equitable deposits. However, the Vice-Chancellor of England does not appear to be inclined to hold to this doctrine.

By agreement, 1839, Duncan contracted to sell an estate to Corbett for 1400*l.*, Corbett was let into possession; but the purchase money was not then paid: in 1839, Duncan died leaving his real and personal estate to the plaintiffs as trustees: in 1840, Corbett paid 400*l.* part of the purchase money to the plaintiffs, and thereupon they conveyed the estate to Corbett: a receipt for the whole 1400*l.* was indorsed on the deed; but it was agreed that Corbett should give the plaintiffs a mortgage for 1000*l.* the remainder of the purchase money, and that in the mean time the conveyance should be retained by the plaintiffs. In April, 1842, Corbett not having the purchase deed, or, as it would appear, any of the deeds in his possession, conveyed the estate to Morgan to secure 400*l.* and interest, thereby giving him the legal estate. In June, 1842, the plaintiffs filed a bill against Corbett for a specific performance of the agreement to execute a mortgage, which

(a) See 2 Anst. 434, 435, 437.

(b) On the authority of *Beckett v. Cordley*, 1 Bro. 352; but there the question arose between two equitable incumbrancers, and had nothing to do with the possession of the deeds: *Penner v. Jemmat*, 2 Bro. 652, n.; but that was the case of an assignment of personal estate and a reversion in fee, so that no question

as to the delivery of deeds could arise; and *Tourle v. Rand*, 2 Bro. p. 651; but that also was the case of a mortgage of a reversion.

(c) Sugd. V. and P. vol. iii. p. 472, 10th edit., p. 1054, § 56, 11th edit.; and see *Plumb v. Fluit*, 2 Anstr. p. 439, which however Sir E. Sugden does not refer to; and see *Harlington v. Price*, *ubi infra*.

was decreed. In 1848, the plaintiffs having heard of the mortgage to Morgan filed their bill against Morgan, charging that he had notice that the purchase money remained unpaid; this was denied by Morgan, and he relied on having the legal estate and equal equity: the plaintiffs insisted on their lien and the agreement, and that Morgan had constructive notice of it from the fact of the purchase deed not having been produced by Morgan's mortgagor: the Vice-Chancellor of England held, that as the mortgagee had omitted to call for the title deeds, the lien of the plaintiffs ought to have priority; Lands in this country, said his Honour, being held by title (a), it was the duty of the person who was purchaser to ask for all the deeds (b). It is to be observed that the Vice-Chancellor did not put the case expressly on the ground of constructive notice, or the omission to make such inquiry as must have led to actual notice; though the ground on which he did found his judgment may possibly amount to the same in substance in reference to this point. I am unwilling to offer any opinion of my own as to a point on which there seems to be a conflict of opinion between such distinguished persons; but I may perhaps be permitted to observe that the case before the Vice-Chancellor of

(a) See Lord Erskine's dictum below.

(b) *Worthington v. Morgan*, xiii. Jur. 316: a MS. case, *Hutton v. Hayley*, before the Vice-Chancellor of England, Feb. 27, 1849, to the same effect, and *Allen v. Knight*, xi. Jur. p. 527, were cited; but neither *Plumb v. Fluit*, 2 Anst. p. 432, or the dicta in *West v. Reid*, or *Jones v. Smith*, 1 Hare, 63-4, or in Sir E. Sugden's work, v. *supra*, were cited or adverted to. According to this case, if a person deposits the title-deeds by way of equitable mortgage, and then grants a legal mortgage, not producing the deeds, the equitable mortgagee will have priority; a doctrine much in favour of such securities. The cases, such as *Tourle v. Rand*, *sup.* p. 788; *Harper v. Fauldor*, 4 Mad. 129; and *Ex parte Hardy*, 2 D. & Ch. 394; where the mortgagee could not, in the particular instance, call for the deeds, and those where a reason for the non-production has been given, as in *Penner v. Jematt*, (*sup.* 767,) seem to support the Vice-Chancellor's doctrine: and see *Farrow v. Rees*, 4 Bear. 21. In *Hiern v. Mill*, 13 Ves. p. 122, the purchaser had notice that the deeds were in the hands of another; but if the taking a mortgage without the deeds being produced is alone sufficient, the inquiry as to whether the purchaser had notice would seem to have been superfluous: but it is to be observed that Lord Erskine, in that case, says, that possession of an estate is not even

prima facie evidence of title, as it is in the case of goods, (but see 1 Hare, 60, and the cases there cited, and *sup.* 759). The case of *Allen v. Knight*, 5 Hare, 272, xi. Jur. 528, on appeal, is a case where the mortgagees had actually obtained the deeds on the granting of the mortgage, but in some manner, which was unexplained, one of the mortgagors had got them back and then made the farther charge, no charge of fraud or collusion being made against the mortgagees; Lord Cottenham affirmed the Vice-Chancellor Wigram's decision, on the ground that the mere fact of the possession of the title-deeds by the mortgagor is not conclusive against the mortgagee. *Whitbread v. Jordan*, 1 Y. & Coll. 303 (1 Hare, 65-6), was decided on the special circumstances, which were considered to give constructive notice, though Sir E. Sugden does not seem to approve of that case, *ibid.* There is no doubt that the purchaser may recover the deeds, by means of an action at law; *Harrington v. Price*, 3 Barn. & Adol. 170; mere negligence, not amounting to fraud, is not a sufficient answer to him, *ibid.* p. 174; but the Court of Chancery will not aid a mortgagee to recover the deeds from a third person, with whom they have been deposited by the mortgagee, when he has left the deeds in the hands of the mortgagor, *Head v. Egerton*, 3 P. W. 281; *supra*, p. 768; and see *Ex parte Meux*, 1 Gl. & J. 116, *ib.* 241.

England differs from *Plumb v. Fluitt*, the only decision which as I believe has a direct bearing on the point, in two particulars: in *Plumb v. Fluitt* the debt was already due, the purchaser had to take what he could get; in the case before the Vice-Chancellor the mortgagee had the option whether he would advance his money on the security offered or not: in the former case the purchaser was not liable to the imputation of having omitted to require any evidence of title on the part of vendor, he had required it and been deceived; in the case before the Vice-Chancellor the mortgagee, so far as appears, made no inquiry at all: whether these circumstances, together with the aid of Lord Erskine's dictum in *Hiern v. Mill* in the preceding note, and the analogy which seems to flow from the decision in the late case of *Whitworth v. Gaugain (a)*, are sufficient to sustain the Vice-Chancellor's judgment, which has not, as I understand, met with universal approval in the profession, I leave to the judgment of the reader.

Generally speaking, a person having an equitable lien by deposit can only take such interest as the depositor has to give; therefore, whether he has notice or not of the prior incumbrances, he will rank after them (*b*). One Webb borrowed 150*l.* of the plaintiff, and signed an agreement to deposit the deeds of a copyhold estate he was about to purchase as a security; he afterwards deposited the copy of court roll with the plaintiff. Robert died, and Thomas Webb, his heir, was admitted, and a new copy was granted to him. In April, 1837, Thomas Webb had notice of the plaintiff's charge. In July, 1837, Mr. Hinton, who had been the solicitor of Thomas in an ineffectual attempt at a sale (his clerk, Battiscombe, having been the active person), lent 50*l.* to Thomas on a deposit of his own copy. Battiscombe, Hinton's clerk, knew of the plaintiff's security in 1835. Battiscombe acted, not only as the clerk and agent of Hinton, but also as agent for Thomas Webb. Lord Langdale was of opinion that the knowledge of Battiscombe in 1835 could not be imputed to Hinton in 1837, or that his knowledge in July, 1837, that the proceeds of the sale were to be applied in discharge of the plaintiff's demand, clearly showed that even he at that time recollected, what he knew in 1835, that that claim was secured on the estate; but his Lordship considered that this was immaterial, for that all that Hinton could take under a mere deposit (he had not the legal estate) was what Webb, the son, could give (*c*); but, as before observed, even a legal mortgage may

(a) *Et v. sup.* p. 767, and the last note; *Whitworth v. Gaugain* is stated *infra*. See the additional note, No. 2.

(b) *V. sup.* p. 727, Order of Incumbrances.

(c) *Tylee v. Webb*, 6 Beav. 556. It is stated in the note that an appeal was pending,

be postponed to a prior equitable mortgage on the ground of constructive notice (a).

The Remedy which the deposit of deeds or muniments of title has to enforce his security in the Court of Chancery, is left in considerable doubt upon the authorities. Where the title arises upon a mere deposit, without any agreement showing what is to be the nature of the security, the question must depend upon whether the deposit is to be considered as constituting a lien or charge only, or as an agreement for a mortgage: if it is to be considered as constituting a lien or charge only, then a sale would be the proper form of decree, such being the form in which an equitable charge is rendered effectual; and accordingly, in several decrees, there has been a direction for an immediate sale, just as in the case of an ordinary equitable charge (b).

It certainly has been held by some of the most distinguished judges who have presided in the Court of Chancery, that a mere deposit of deeds or muniments of title with a creditor is equivalent to an agreement to grant a mortgage on the estate, and several decrees have been made upon that footing (c). But besides the decrees before cited

but no notice of the hearing is to be found in the subsequently published Indexes; the obtaining the legal estate by an equitable mortgage, with notice, will not give a priority, though the equitable charge was obtained without notice; *Allen v. Knight*, 5 Hare, 277.

(a) *Whitbread v. Jordan*, 1 Yo. & Coll. 330 (1 Phill. 255), though, as regards this case, *v. supra*, p. 785.

(b) *Russel v. Russel*, *ubi supra*; *Meux v. Ferne*, 5 Feb. 1818; *Spring v. Allen*, 12 Feb. 1830, cited by Lord Cottenham, 2 My. & K. 422. In *Pain v. Smith*, 2 My. & K. 418, Sir J. Leach held that the deposit created an equitable charge and decreed a sale; but in *Brocklehurst v. Jessop*, 7 Sim. 442, the Vice-Chancellor of England,—though the precise point was not before him, the depositor being dead, which his Honour considered to make a difference and to entitle the depositary to a sale,—said, that the decrees which had been furnished to him by the Registrar (they are mentioned in Mr. Simons' note, p. 440,) showed that *Pain v. Smith* was manifestly wrong: this case was decided one year before *Parker v. Housefield*, (see No. 1, additional note,) and was cited in that case. In *Smith v. Nelson*, Seton on Decrees, 180, there was also a decree for a sale; but, as Mr. Miller has observed, this was the case of a deposit of a lease, and the depositor might have been un-

willing to have a decree for an assignment and foreclosure, and thus to make himself liable for the covenants in the lease. Lord Eldon, in *Ex parte Abdy*, *supra*, appears to have considered that in the case of a deposit of a lease the proper decree was for a sale.

(c) See *Parker v. Housefield*, add. note No. 1, at the end of this section; and *inf. al. Card v. Jaffray*, 2 Scho. & Lef. 378, though from p. 382 it would appear that Lord Redesdale only assimilated the case to *Russell v. Russell* in respect of letting in parol evidence; *Moores v. Choat*, 8 Sim. 513, *arguendo*, and p. 523 of the judgment. In that case, and in the late case of *Robinson v. Rosher*, 1 Y. & Coll. C. C. 10, 11, which equally as *Moores v. Choat* arose upon a mere deposit, it seems to have been assumed that the deposit gave, as between the parties, a right to an assignment, but that the landlord could not enforce it: in the view that the deposit only gives a charge, a ready and decisive answer might have been given to the claim of the landlord. See also *Malone v. Geraghty*, 2 Conn. & L. 240. In *Featherstone v. Fenwick*, *infra*, p. 792, the decree was for an absolute assignment. In *Tylee v. Webb*, 6 Beav. 557 (1843), Lord Langdale gave "the ordinary decree for foreclosure of the equitable mortgage," to which he said the plaintiff was entitled; the question was not debated. In *Ball v. Harris*, 8 Sim. 498,

which contained directions for a sale, without reference to the analogy of foreclosure, there are dicta of Lord Cottenham, in two cases which came before him not long after the case of *Parker v. Housefield*, that would lead to the conclusion that, in his Lordship's view, a direction for a sale, giving the depositor or his representatives six months' time to redeem (a), is the proper kind of decree to be pronounced in such cases; and such, perhaps, on the balance of authority, may now be considered to be the proper form of decree: where the depositor is dead, it seems to be admitted that the depositary is entitled to a decree for a sale (b), which is a convenient arrangement, for the

affirmed by Lord Cottenham (Miller, p. 62); 4 My. & Cr. 264, which was a case of deposit with a written memorandum, not adverting to a mortgage, a decree was made for a foreclosure, and absolute conveyance in default of payment; but the question argued was as to the power of the trustee to sell or mortgage in any way, no question was raised as to the form of decree. When the case of *Russel v. Russel* was before the Lords Commissioners, Lord Loughborough and Ashhurst, J., the plaintiff claimed to be entitled to a sale on the footing of his having a lien; in the note, p. 270, it is said that Lord Thurlow afterwards decreed a sale. In two other cases Lord Thurlow, according to the Reporter, said that the deposit of the deeds entitled the depositary to have a mortgage executed, though there were no special agreement to assign, going in this respect beyond the Lords Commissioners. But I find from the entries in the Registrars' books, and their minute books, that the cases of *Featherstone v. Fenwick* and *Harford v. Carpenter* were not such as entirely to bear out Mr. Brown's statement of them, or Lord Eldon's recollection of those cases stated in *Ex parte Mountfort*, 14 Ves. 607. Both were cases of deposits of leases; in the first an order, reciting an agreement to mortgage, was made by consent that the plaintiff should be paid out of the proceeds of the lease which had been sold, and should be at liberty to prove for the difference, if any: the order is in the minute book only. In *Harford v. Carpenter* the circumstances were special, and evidence was gone into; the lease had been sold by the assignees to one Greenhill in an improper manner; the decree directed a reference to the Master to take an account of the rents received by Greenhill since he had been in possession, and he was ordered to pay them to the plaintiff, and also to assign the lease to the plaintiff absolutely, and no right to redeem was given. I could not find *Hales v. Bircham* or *Brander v. Boles* mentioned in Mr. Brown's other note to *Russel v. Russel*,

in the Registrar's books, though every assistance was afforded to me by the officers. In *Lucas v. Comerford*, 1 Ves. J. 235, 3 Bro. 166, according to the report in Brown, the question did not depend on a mere deposit, there was a covenant that the premises comprised in the lease should be subject to the payment of the sums borrowed; see, as to this case, 8 Sim. 512, 523; *et v. supra*, n. (e), p. 783.

(a) *Lewis v. John*, 1 C. P. Coop. 8: *Parker v. Housefield*, 2 My. & K. 419, was decided in December, 1834; the dates of the subsequent cases are stated in the next note. In *Meller v. Woods*, 1 Keen, 22, Lord Langdale, after consulting the Lord Chancellor, said, the rule was established to allow the six months in all cases of mortgage, whether legal or equitable; in that case the plaintiffs were materially prejudiced by its application, as their mortgage, according to the terms of the agreement, did not carry interest; and see *Thorpe v. Gartside*, 2 Y. & Coll. 730; and *Metcalfe v. Archbishop of York*, in the next note.

(b) *Brocklehurst v. Jessop*, 7 Sim. p. 442. "It was there said," observed Lord Cottenham, in *Metcalfe v. Archbishop of York*, (1 My. & Cr. 547, Nov. 1836,) "for the defendants, that all equitable charges rest upon specific performance and the right to have a legal charge. This is by no means so. The equitable incumbrancer has totally different remedies; what right has an equitable mortgagee by a deposit of deeds to ask for a legal mortgage?" (cited by the Vice-Chancellor of England, in *Moore v. Choat*, 8 Sim. 516, without observation); and see the dictum of the same distinguished judge in *Price v. Carver*, 3 My. & Cr. 161 (Aug. 1837); in that case the right to redeem had descended to an infant, though his Lordship's observation does not specifically point to that fact, nor is it qualified by any reference to the consent of the depositary, or to a sale being for the benefit of the infant, (but see *Scholefield v. Heafield*, 8 Sim. p. 470,) though a sale has been sometimes directed in the case of

surplus, if any, goes to the estate of the depositor: if insufficient, the depositary may prove against the estate for the deficiency. If, together with the deposit, the creditor enters into an agreement in writing, or, according to some of the authorities, verbally only to give a mortgage (a), then the creditor is entitled to have a legal mortgage executed, or a foreclosure, or a sale, if the agreement should include a power of sale, in case he be not redeemed (b). Upon a bill by an equitable mortgagee by deposit, if the decree be for a conveyance of the legal estate and a foreclosure, the decree will contain a direction for delivery up of the possession of the property (c); but where the mortgagee comes for foreclosure of a legal mortgage, he is left to recover possession by ejectment (d). When the deposit is treated as a charge, it is so far assimilated to a mortgage that the depositor and those claiming under him will have six months to redeem (e). Where the equitable mortgagee files a bill praying a sale, the heir of the mortgagor being an infant, the court may clearly order an immediate sale if such appears to be for the infant's benefit (f).

Equitable mortgages are not within Lord Rosslyn's General Order of March, 1794, authorizing a mortgagee to apply for a sale in bankruptcy; but the deposit may apply to the court for a sale (g).

Where the equitable mortgagee applies to the Court of Bankruptcy, relying on the deposit merely, as the necessity for the application is created by the defect in the petitioner's security, the expences of all

ordinary mortgages, where the equity of redemption is vested in an infant without reference to either of those circumstances; see Daniell's Pr. by Headlam, 177. In *Tipping v. Power*, 1 Hare, 410, the Vice-Chancellor Wigram says, "An equitable mortgagee by deposit has no right but to a sale, his contract is that he shall be at liberty to sell the estate and prove for the difference," referred to afterwards by the V. C. 1842, without observation. The decrees made by the same learned judge, whose authority is very high as regards the practice of the court, in *King v. Leach*, 2 Hare, 57, and *Jordan v. Jones* (see 2 Phill. 170), were for a sale; and see *Whitworth v. Gaugain*, 1 Phillips, 729. The original deposit, it may be observed, at least in ordinary cases, is to secure the repayment of the money borrowed, the obtaining the estate by foreclosure can hardly be said to be the object of a person who takes a security by mere deposit; and if it is, such a speculation is hardly to be encouraged; and yet this is the only possible advantage that he loses by the effect of the deposit being treated as a lien only; in either view the deposit must come to the court to

render his security effectual: if he particularly desires to have the estate, he has an opportunity, with leave of the court, to bid for it, and thus to get it at a fair price, *et v. supra*, p. 783, n. (e).

(a) *Hockley v. Bantock*, and other authorities, *supra*, p. 783, n. (e).

(b) *Whitworth v. Gaugain*, 1 Phillips, 729; *S. C. Cr. & Phill.* 325; 3 Hare, 416; *Lister v. Turner*, x. Jur. 752; 5 Hare, p. 281.

(c) *Hiern v. Mill*, Seton on Decrees, 179; *Price v. Carver*, 3 My. & Cr. 157, 161. It was in this case that Lord Cottenham suggested that a decree for a sale was the proper course. If the decree be for a foreclosure and the infant be entitled to the equity of redemption, he must have a day to show cause, *ibid.* 162; if for a sale no day is given, *ibid.* 163; 1 C. P. Coop. R. 11; *Scholefield v. Heafield*, 8 Sim. 470.

(d) *Sutton v. Stone*, 2 Atk. 101.

(e) *Parker v. Housefield*, 2 My. & K. 419.

(f) *Redshaw v. Newbold*, xii. Jur. 833.

(g) *Ex parte Jennings*, 2 Swanst. 360; 1 Mad. 331; see 16 Ves. p. 435, and the references.

fair inquiries into the validity of the security ought to be satisfied out of the proceeds of the sale (*a*); it is fit, said Sir J. Leach, that where the equitable mortgage is not evidenced by writing, the mortgagee should bear the expenses of asserting his title in a court of justice: but the rule is otherwise, where the applicant has had the precaution to take a written memorandum; in that case he has his costs (*b*), and a letter written after the deposit and referring to it only in general terms is sufficient (*c*).

Where there is no writing, even though it were owing to the bankrupt that no regular mortgage was made, the rule applicable to the absence of writing will apply (*d*); but if there be a written document, though parol evidence may be required to identify the deposit, the equitable mortgagee will have his costs (*e*).

Where an equitable mortgagee is satisfied upon a bankruptcy, no release from him is necessary, nor will the expense of it, if taken, be allowed in the solicitor's bill (*f*). Where an inquiry is directed in bankruptcy as to the title of the petitioner, and he obtains a report in his favour, he will be entitled to the rents from the date of the order of reference (*g*). An equitable mortgage by deposit is so far recognized by the courts of law, that where the equitable mortgagee has received the rents, he will not be compelled to refund them to an assignee in bankruptcy (*h*).

A judgment has relation to the time when it is entered up, and it will not affect any *bonâ fide* conveyance or charge in equity made before the entry of the judgment; it can only attach upon what remains in the debtor: therefore, notwithstanding the stat. 1 & 2 Vict. c. 110, which gives to a judgment the effect of a charge upon the land, an equitable mortgagee retains his right to enforce his security in preference to a subsequent judgment creditor, though he may have acquired the legal seisin by suing out an *elegit*, and though he may have had no notice of the equitable mortgage (*i*). Whether a judg-

(*a*) *Ex parte Garbutt*, 2 Rose, p. 79; it is not sufficient that there is a memorandum, unless it specifies the purpose; *Ex parte Smith*, 1 Mont. D. & D. 171.

(*b*) *Ex parte Trew*, 3 Mad. 372; *Ex parte Brightens*, 1 Swanst. 3.

(*c*) *Ex parte Bisdee*, 1 Mont. D. & DeG. 333.

(*d*) *Ex parte —*, 2 Mad. 281. The rule in bankruptcy will not, it seems, be extended to suits in equity: *Reg v. Chambers*, 4 Yo. & Coll. 54; *Connell v. Hardie*, 3 Yo. & Coll. 582.

(*e*) *Ex parte Vauxhall Bridge Company*, 1 Gl. & J. 106.

(*f*) *Ex parte Robinson*, 21st May, 1820, Mad. MS. Pr. and P. i. 678.

(*g*) *Ex parte Smith*, 3 Mont. D. & D. 680.

(*h*) *Garry v. Sharratt*, 10 Barn. & C. 716; *Jarman, Mortgage*, by Sweet, 126.

(*i*) *Whitworth v. Gaugain*, 1 Phill. 728, 732, affirming the decision, 3 Hare, 416; and see *Averall v. Wade*, Ll. & G. 262, *inf.* 835; and *Worthington v. Morgan*, *supra*, 789; *et v. sup.* p. 325.

ment creditor, who has obtained a charge under the 1 & 2 Vict. c. 110, is entitled to an immediate sale, or whether the parties claiming the equity of redemption may require a delay till six months after the Master's report, is left in uncertainty (a).

It may be here observed, that, according to the opinion of Sir E. Sugden, leasehold estates are now, by the effect of the stat. 1 & 2 Vict. c. 110, s. 11, bound by judgments equally as freeholds (b).

(a) *Carlton v. Farlar*, 8 Beav. 526; see, as to equitable mortgages, *Pain v. Smith*, 2 My. & K. 417; (but which decree the Vice-Chancellor of England, 7 Sim. 442, as before observed, said was clearly wrong in directing a

sale;) and *Parker v. Housefield*, in add. note, No. 1, : six months was given by the decree in *Lister v. Turner* (1846), 5 Hare, 293.

(b) Sugd. V. and P. ii. 401, 10th edit.

ADDITIONAL NOTE.—No. I.

Parker v. Housefield, 2 My. & K. 420; v. *supra*, p. 791.

This was a case of a deposit of deeds, apparently without any agreement. The Registrar had drawn up the decree according to the usual form in ordinary mortgages. It was insisted, on the part of the plaintiff, the depositary, that this was wrong, and that the decree ought to be for an immediate sale. The defendant does not appear to have objected to the minutes being altered by directing a sale, but he insisted that he ought to have six months to redeem: that was the only question. Lord Cottenham, then Master of the Rolls, in reference to this point, collected and reviewed the precedents of decrees in similar cases; and his Lordship incidentally examined the authorities as to the nature of the contract which is to be considered as arising from a deposit of deeds. The result was, that it appeared that Lord Thurlow, Lord Chief Baron Eyre, and Lord Eldon (in one case, *Newton v. Aldous*, 18th July, 1804, the decree, in which there was a direct declaration on the point, had been framed by Lord Eldon himself) had treated the holder of the deeds as entitled to have a mortgage, and several of the decrees had proceeded on that principle. The decree in *Newton v. Aldous* was, that in default of payment on the day fixed (six months), the plaintiff will be entitled to the said premises, free and clear of all right and interest and equity of redemption, and to have an absolute conveyance accordingly. Three other decrees, in 1806, 1818, and February, 1828, are stated by his Lordship, which were to the same effect. In two (*Meux v. Fearn*e, 25th Feb., 1828, and *Spring v. Allen*, 5th Feb., 1818) the decrees were for a sale, but six months to redeem were given in each. All that his Lordship decided was, that six months must be given, whether the decree was for a sale or a foreclosure (*ibid.* 422).

ADDITIONAL NOTE.—No. II.

The cases relating to the possession of the title-deeds are observed upon in Jarm. Mortg. by Sweet, p. 475 to 486. Mr. Jarman draws this conclusion from *Plumb v. Fluit*—"If the case simply be, that the mortgagor deposits the deeds with A., and afterwards makes a mortgage to B. without notice, A. has no equity against B. to have the benefit of the legal estate which the latter has acquired;" *ibid.* p. 482.

§ 3.—Of Liens.

Common-law Right of Lien.

Lien on Ship.

Claims on Earnings by Part-owner and by Mortgagees, &c. in respect of Repairs and Disbursements.

Certificate of Registry—Master—Ship-brokers.

Lien of Creditor by Judgment—his Remedies.

Lien of Solicitor.

On Deeds.

On Fund recovered.

Rights in Equity equivalent to Liens.

The common-law right of Lien attaches on personal property exclusively, and is subject to the same rules at law and in equity (*a*). A lien at law has been defined to be a right in one man to retain that which is in his possession, belonging to another, till certain demands of him, the person in possession, are satisfied (*b*); and it may arise by contract or by usage: and the foundation of lien at common law being possession, it is, generally speaking, lost by abandonment of possession (*c*). But a creditor may obtain a right over property not actually in his possession or vested in him, which has been, though improperly, called a lien; for instance, a factor having sold goods, has a lien on the price of the goods in the hands of the buyer, though he has not the actual possession either of the goods or the money; the reason being that the factor is the legal hand to receive the price. So where goods have been deposited by way of security, as for the payment of a bill of exchange, a party who has not the possession, as an indorsee of the bill, may incidentally become entitled to the benefit of the deposit (*d*).

And as regards liens, or claims in the nature of liens, upon Ships:—A shipwright, in whose possession a ship is placed to repair it, may not be bound to part with the possession until he is paid for the repairs, any more than a tailor or other artificer in regard to the object of his particular trade, unless there be an agreement, or such an usage

(*a*) *Oxenham v. Esdaile*, 2 You. & J. 493; *Gladstone v. Birley*, 2 Meriv. 404; Jarman, Mortgage, by Sweet, p. 3.

(*b*) *Per Grose, J.*, 2 East, 235; Jarman, Mortgage, by Sweet, *ubi supra*. In the 1st chapter of that learned work the doctrine as to liens at common law will be found.

(*c*) Jarman, Mortgage, p. 12.

(*d*) Jarman, Mortgage, by Sweet, pp. 13, 14; and see *Hammonds v. Barclay*, 2 East, 227; *Ex parte Perfect*, 1 Mont. 25; *Ex parte Waring*, 2 Rose, 182; *Ex parte Copeland*, 3 Deac. & Ch. 199.

in the trade as may amount to an agreement; but a shipwright who has parted with possession, or a tradesman who has provided ropes and material without taking possession, is not, by the law of England, preferred to other creditors, nor have they any lien on the ship (a). As regards the Owners of a ship, they are tenants in common, and not joint-tenants; upon a bankruptcy, therefore, the bankrupt's share passes to his creditors under the bankruptcy, free from any lien of the other tenants in common, in respect of any sums they have paid, or have become liable to pay, for repairs. The freight is liable for the joint demands, but the ship is not, and this stands upon the nice distinction of a tenancy in common (b).

The Court of Chancery follows the law when claims depending on the right of lien incidentally come before it for decision. The subject of claims upon the earnings of ships by a part owner, he being managing owner, and by mortgagees and others in respect of repairs and disbursements, was lately the subject of an elaborate judgment of the Vice-Chancellor Wigram. The claimants upon the freight unapplied were first the plaintiff, who was registered owner of one-eighth and managing owner and ship's husband, in which character he had expended or become liable to pay a large sum, exceeding the amount of the unappropriated freight, for the repair and outfit of the ship preparatory to the voyage; he had received his own share of the earnings: the other claimants were mortgagees of seven-eighths of the ship and of the freight, the mortgage having been made during the voyage: the ship's earnings arose from a cargo of whale oil, not in the shape of freight. The Vice-Chancellor held (c) that the earnings must follow the general law in partnership cases, and were therefore liable to the joint demands, and that there was no distinction in this respect between earnings and freight; the expenses of earning the freight are first to be paid in ascertaining what freight is coming to the parties: the ship was owned in common, but the adventure was joint (d): and the Vice-Chancellor held that the same rule applied even to the expenses of the repairs of the hull of the ship (e), those repairs being done with a view to the particular adventure in which the earnings were made, and without which that adventure could not have been

(a) Abbott on Shipping, by Shee, 8th edit. p. 143. The master has no lien for repairs in port in England; see *Hussey v. Christie*, 13 Ves. 594; 3 Swanst. p. 139; *Ex parte Halkett*, 3 Ves. & B. 135; nor *à fortiori* have other persons employed by him, *Buxton v. Snee*, 1 Ves. 154.

(b) *Ex parte Harrison*, 2 Rose, 77-8; *Ex*

parte Young, 2 Ves. & B. 242, overruling, in effect, *Doddington v. Hallett*, 1 Ves. 497.

(c) On the authority of *Holderness v. Shackells*, 8 B. & C. 612; and *Ex parte Hill*, 1 Mad. 66; and *Ex parte Young*, *supra*.

(d) *Green v. Briggs*, 6 Hare, pp. 403, 404, 405, 408.

(e) The ship had been broken up.

undertaken; and the Vice-Chancellor seemed to be of opinion that the expenses in repairs not having been exhausted with the adventure did not alter the case (*a*). It was not necessary to resort to the fact that the plaintiff was managing owner, though that would give a new ground for his claim (*b*); and the Vice-Chancellor added, that he should not have decided against the plaintiff without giving him the benefit of the evidence in support of the usage in his favour, but which, as he decided the case on general grounds, it was not necessary to resort to: and, for the same reason, it was unnecessary to enter into the question of notice as respects the mortgagees (*c*).

The master of a ship has no lien on the certificate of registry, either for his wages, or for moneys disbursed by him for the use of the ship; nor have the ship-brokers any lien on the certificate of registry for advances made by them to the owner for the use of the ship; nor has the master of a ship any lien or claim on the accruing freight for his wages or for moneys disbursed by him, without a special contract (*d*): a person who advances moneys for repairs of a ship on a bottomry bond, with notice of a prior mortgage, cannot claim as against the mortgagee any lien for his expenses beyond the amount of the bond (*e*).

As regards what has been called, but improperly, the lien of a creditor by Judgment (*f*); where the Court of Chancery is selling the estate on the decease of the debtor, the Court will pay off the judgment debt (*g*); but Mr. Jarman observes that it is stated too largely in some books (*h*) that the Court will in all cases accelerate the creditors' remedy by a sale. The remedy which a judgment creditor might have had, prior to the late stat. 1 Vict. c. 110, against the beneficial interest in equity, when he had none at law, has before been

(*a*) 6 Hare, 407.

(*b*) *Ibid.* 408.

(*c*) *Ibid.* 409.

(*d*) *Gibson v. Ingo*, 6 Hare, 112.

(*e*) *Dobson v. Lyall*, 2 Phill. 323, note.

(*f*) See Lord Cottenham's judgment, *Neate v. Duke of Marlborough*, 3 My. & Cr. p. 407, 417. Of the remedy which the judgment creditor had by the more ancient statutes, see Jarman, Mortgage, by Sweet, 27-39, 50, 51; and of his remedies by the statute 1 Vict. c. 110, see p. 48, *et v. supra*, p. 722; and as to the priorities of judgments in the administration of assets, see *ibid.* p. 54: but as docketing under 4 & 5 Will. & M. c. 20, is, as before mentioned, abolished by stat. 2

Vict. c. 11, which has some special provisions as regards purchasers, priority can no longer be lost by that omission; *v. ibid.* p. 64: of the effect of bankruptcy upon judgments, see Jarman, Mortgage, by Sweet, 55, *et seq.*, *et inf.* p. 799; and of contribution, see p. 60, *et seq.*; of the satisfaction and release of a judgment, *ibid.* p. 62, *et seq.* In the same work, p. 64, *et seq.*, the law in regard to crown debts is stated. The general doctrines may also be found in Mr. Coote's valuable work: I have referred specifically to Mr. Sweet's edition of Jarman, as being later in date.

(*g*) *Stileman v. Ashdown*, 2 Atk. 610.

(*h*) On Mortgages, by Sweet, 39, referring to Coote on Mortgages, p. 78.

adverted to (a): in giving this relief, equity followed the law, and only gave a remedy for a moiety of the lands (b). However, a judgment creditor might have applied for the aid of the Court to prevent an outstanding legal estate being used in bar of his execution at law, or for a receiver; and he will have his due priority allowed to him where the estate of the debtor is administered in the Court of Chancery (c); but in any case, to procure relief in equity, the creditor, when plaintiff, must show by his bill that he has proceeded at law to the extent necessary to give him a complete title: thus, in the case above alluded to, he must show that he has sued out the writ of *elegit* or *fieri facias*, the execution of which is avoided; but it is not necessary for the plaintiff to obtain a return to the writ (d). In the case of an equity of redemption, as it was necessary that a judgment creditor should redeem the whole mortgage, he thereby became, on redemption, mortgagee of the whole, so that he might tack his judgment debt against the whole; and, by the same rule, the judgment creditor was paid out of the whole produce of the estate remaining after satisfying prior charges, where an estate was directed to be sold for payment of debts (e): but this has now become immaterial, as the statute before referred to has (sect. 13) given the creditor a charge upon the whole of the real estate of the debtor, under certain regulations including partial and reversionary interests, which cannot be extended (f). It seems to be considered that a judgment obtained after a sale, and of which the purchaser has notice, is a lien on unpaid purchase money, though it does not affect the estate (g).

It may here be observed, that it has been decided, on the effect of the Irish Bankrupt Act, 6 Will. IV. c. 14, § 126, but without reference to the Act 1 Vict. c. 110, or the corresponding Act operating in Ireland, that if a trader confesses a judgment to one, and afterwards mortgages his estate to another, and then becomes bankrupt; the mortgagee will not, as in the case of an absolute purchase, take, subject to the judg-

(a) *Forth v. Duke of Norfolk*, 4 Mad. 504; *supra*, p. 40; *et v. Tunstall v. Trappes*, 3 Sim. 286.

(b) *O'Gorman v. Comyn*, 2 Scho. & L. 137, 150; *Stileman v. Ashdown*, 2 Atk. 477, 608; Ambl. 13. Now the whole and not a moiety only may be taken in execution, stat. 3 & 4 Will. IV. c. 104; *v. supra*, vol. i. p. 295.

(c) *Davidson v. Foley*, 2 Bro. p. 203; *Plas-kett v. Dillon*, 1 Hog. 324; 2 Bli. N. S. 239; and the other cases cited Jarman, Mortgage, by Sweet, 40, 41; *White v. Bishop of Peterborough*, and *Silver v. Bishop of Norwich*, are in 3 Swanst. R.; these are cases of re-

ceivers appointed on sequestrations: and see Redesdale, Pl. 148-9, Smith's edit.

(d) Redesdale on Pl. *ubi supra*; *Neate v. Duke of Marlborough*, 3 My. & Cr. 419; but there are exceptions, *v. supra*, p. 662; and *Barnewall v. Barnewall*, 3 Ridgw. P. C. 24.

(e) *Sharpe v. Earl of Scarborough*, 4 Ves. 538, 542; *Tunstall v. Trappes*, 3 Sim. 300.

(f) On the effect of this act, see Jarman, Mortgage, by Sweet, 48, *et seq.*; particularly as to terms for years and as to the defeating of powers of appointment, *et v. supra*, 795.

(g) *Ibid.* pp. 47, 48.

ment; by reason, that the Bankrupt Act cuts down the operation of judgment debts against the general assets of the bankrupt which are to be administered in the bankruptcy (a).

As regards the lien of an Attorney or Solicitor (b):—The lien of a solicitor on the deeds and papers of his client is merely a right to withhold the papers from his client, and not a right to enforce any claim against him (c); so long as the client allows the papers to remain in the solicitor's hands, the lien is unavailing (d). It is quite settled that the right of lien is, as against the client and his heirs and executors and other representatives, general; that though the papers may have come into the solicitor's hands in different transactions, he has a lien against the client and his representatives for the general balance due to him (e). It is also clear that a prior incumbrancer can never be affected by this lien, though the solicitor may not have had any notice of such incumbrance: the solicitor's right to the deeds is only commensurate with that which the client had at the time of the deposit (f).

Where deeds were delivered to a solicitor to raise money, and the solicitor failed in his purpose, but the deeds were left in his possession, he was allowed to withhold the deeds, as subject to his general lien (g).

The solicitor's lien for his costs is not confined to deeds and papers, but extends to books and other articles delivered to him for the purpose of being exhibited to witnesses at the trial of an action (h); but he has no lien on his client's will (i), nor on deeds and papers which came into his possession, not in the character of solicitor, but as steward (k).

The lien depends, not on contract, but on the law, and the law cannot give a lien for the debt of the client upon the deeds not

(a) *White v. Baylor*, 4 Dru. & War. 297, 301.

(b) Of mortgages to solicitors, vide *supra*, p. 630.

(c) *Blunden v. Desart*, 2 Conn. & L. 119; *Bozon v. Bolland*, 4 My. & Cr. 358.

(d) *Bozon v. Bolland*, 4 My. & Cr. p. 358: on the general doctrine, see Jarm. Mortgage, by Sweet, p. 8, *et seq.* It may be observed, that the right to Tax the solicitor's bill is personal to the party who employs him; if a trustee pays a bill containing improper items, he may be liable to his *cestuis que trust*, but they cannot apply to tax the bill so as to make the solicitor refund; *Langford v. Mahony*, 2 Conn. & L. 320.

(e) Lord Chancellor Sugden, *Blunden v. Desart*, 2 Conn. & L. p. 120. In this case a very ample collection of the authorities on the subject of the lien of a solicitor will be found. As to the different acts by which it may be lost, see *Ex parte Nesbitt*, 2 Scho. & L. 279, and *infra*, p. 801.

(f) *Ibid.*; and *Smith v. Chichester*, 1 Conn. & L. 486; *Morgan v. Scott*, 2 Ir. Eq. R. 128; and see *Petty v. Wathen*, *infra*, and *Young v. English*, 7 Beav. 17, and *Blunden v. Desart*, *ubi sup.*

(g) *Ex parte Pemberton*, 18 Ves. 282.

(h) *Friswell v. King*, 15 Sim. 191.

(i) *Balch v. Symes*, T. & R. 92.

(k) *Champernown v. Scott*, 6 Mad. p. 93.

belonging to the client, but to others: as against a purchaser or a mortgagee who is *pro tanto* a purchaser, the lien cannot prevail for subsequent advances (a).

Where a client employs A. and B., and they then take C. into partnership with them; it has been held that A. and B. have no lien for their debt on the papers that come into the hands of A., B., and C. (b): as they do not lose their lien for their former debt by taking another partner, so they do not gain an additional one (c).

The lien of a solicitor upon the title deeds of his client is good as against a judgment creditor (it is different as to bond creditors) only to the extent of the costs incurred at the time of the obtaining the judgment, and although execution may not have been sued out (d). When a mortgage is paid off, the solicitor of the mortgagee cannot retain the deeds which have been deposited with him by the mortgagee on the ground that he has a lien upon them for the expenses of the transaction due to him from the mortgagee (e). Where a defendant is ordered by the decree to deliver up all deeds, &c., in his possession, the solicitor with whom the defendant has deposited the deeds for the purpose of the suit will be ordered to deliver them up (f). A solicitor cannot refuse to produce a deed executed in his favour by his client with a power of revocation; he ought to have given to him a counterpart (g).

The lien of a solicitor as against the client extends further than a mortgage to him, for it extends to subsequent costs (h); but if the solicitor take a security he abandons his lien (i). A solicitor has no lien on the estate for any sum he may have advanced to buy off an adverse claimant (k).

The lien of a solicitor being merely a right to withhold the papers from his client, and not a right to enforce his claim against him, it is unlike a lien arising in the case of a contract: it has not the character of a pledge or mortgage, so that after he has parted with the deeds or papers, whether voluntarily or under an order made at the instance of a person having a paramount right and therefore entitled to a pro-

(a) *Blunden v. Desart*, 2 Conn. & L. 130, 131.

(Exch.), pp. 2, 3; and, *Rider v. Jones*, 2 Yo. & Coll. C. C. 329, 332, 334.

(b) *Re Forshaw*, 16 Sim. 121.

(f) *Bell v. Taylor*, 8 Sim. p. 216; and see *Rider v. Jones*, 2 Yo. & Coll. C. C. 334.

(c) Vice-Chancellor Wigram, *Petty v. Wathen*, 15th March, 1849; this case is now under appeal; it will be reported in Mr. Hare's next volume.

(g) *Balch v. Symes*, T. & R. 92.

(d) *Blunden v. Desart*, 2 Conn. & L. 111; see pp. 122-3, 127, 129, 130.

(h) Lord Chancellor Sugden, *Blunden v. Desart*, 2 Conn. & L. 114, 125.

(e) *Wakefield v. Newbon*, 6 Rep. Q. B. p. 276; and see *Lee v. Barlow*, 5 Railway Ca.

(i) *Balch v. Symes*, *ubi sup.*, Lord Eldon; *Chace v. Westmore*, 5 M. & Selw. 180; of securities given to a solicitor, v. *sup.* 630, 631.

(k) *Christian v. Field*, 2 Hare, 184.

duction, the lien, at least as regards third persons, is gone; to treat it otherwise would be to treat the right of lien as an incumbrance, which it is not (*a*). If the solicitor voluntarily, *without any agreement*, produces a document which is necessary to enable the client to establish his title to a fund, he cannot afterwards fasten upon the fund recovered for remuneration (*b*).

It would seem, from the language of Lord Eldon in *Lord v. Wormleighton* (*c*), that a solicitor's lien may be transferred to the succeeding solicitor, if he shall have paid him off.

The lien upon the Fund realized in the suit, which is a lien which the solicitor may *actively* enforce (*d*), is confined to the costs in the suit, or costs immediately connected with it (*e*).

A solicitor was discharged by his client: he had a deed in his possession; this deed he produced as evidence in the cause; it was held that he had no lien for his general costs; but he was allowed to have a lien for his costs in the cause, not in respect of his lien on the deed, but under the general lien of the solicitor on the fund (*f*). A fund in court was decreed to the assignees of a defendant who had become bankrupt, and certain costs were ordered to be paid to the defendant by the plaintiff; the defendant's solicitor applied, alleging that the plaintiff was insolvent, for immediate payment of his costs out of the fund in court, which the Lord Chancellor ordered on appeal (*g*). An executrix as such was indebted to the estate in respect of her receipts; an annuity was given to her by the will: her annuity as it became due was ordered to be applied in payment of the debt due to the estate, and her solicitor was declared to have a lien for his taxed costs upon any payment which might become due to the executrix in respect of her annuity after satisfaction of the debt (*h*).

As the law allows the assignment of debts, a debt due to an attorney for costs may be assigned; and if it be assigned the assignee may be entitled in some measure to the dormant lien for that debt, as an additional security (*i*). A solicitor to whom his client has given

(*a*) *Blunden v. Desart*, 2 Conn. & L. 120, 121; and see *Bozon v. Bolland*, 4 My. & Cr. 358. Lord C. Sugden, on the case stated by Mr. Maddock, Pr. and P. i. p. 755, being cited to him (2 Conn. & L. p. 117), where the deeds having been delivered by the solicitor to an executor, to enable him to maintain certain suits, the executor was held liable for the costs, said there must have been a contract.

(*b*) *Bozon v. Bolland*, 4 My. & Cr. 359; as to his liability to produce, see 10 Beav. 234, 270.

(*c*) Jacob, R. 582.

(*d*) *Bozon v. Bolland*, 4 My. & Cr. 357-8.

(*e*) *Lann v. Church*, 4 Mad. 391 (4 My. & Cr. 357); *Lucas v. Peacock*, 9 Beav. 180.

(*f*) *Bozon v. Bolland*, 4 My. & Cr. p. 354. The marginal abstract would imply that the lien was given in respect of the original lien on the deed. Lord Cottenham, in this case, disapproved of the dictum of Sir T. Plumer, in *Worrall v. Johnson*, 2 Jac. & W. 214.

(*g*) *Pounset v. Humphreys*, 1 C. P. Coop. R. 142.

(*h*) *Skinner v. Sweet*, 3 Mad. 244.

(*i*) Vice-Chancellor Knight Bruce, *Bull v. Falkner*, xiii. Jur. 93, *et v. sup.* note (*c*).

bonds or bills cannot rely upon them as another person might to prove the existence of his debt; but must, irrespective of such securities, prove the debt for which such securities were given (a).

Rights in equity equivalent to liens may arise under various circumstances. There are liens, said Sir W. Grant, which exist only in equity, and of which equity alone can take cognizance (b). If an estate is mortgaged and the mortgagor has sold successively various portions of the estate to different purchasers, if the mortgaged debt is paid by one, he has a right to compel the other purchasers to contribute (c). The lien of a joint-purchaser for repairs has been already mentioned (d); but it seems that where two or more purchase an estate, and one pays the money and the estate is conveyed to them both; the one who pays the money gains neither a lien nor a mortgage, because there is no contract for either; nor can it be construed as a resulting trust, as such a trust cannot arise at an after period: and perhaps, says Sir E. Sugden, the only remedy he has is to file a bill for a contribution (e). If one of two joint-tenants of a lease renew for the benefit of both, he will have a lien on the moiety of the other joint-tenant for a moiety of the fines and expenses (f).

If a person being entitled to an estate stands by without interference, whilst another innocently builds or makes improvement on the land, thinking that he has a title to it, the person making such improvements will be entitled to compensation (g).

It has been held that where a man agrees to sell his estate and to lend money to the purchaser for improving the estate; he, still having the legal estate, will have a lien for the advances so made, as well as for the purchase-money (h).

As regards liens in equity the following may be given as additional illustrations. A trustee is entitled to a lien upon the trust estate for his expences, so long as it remains trust estate, and in whatever shape it

(a) *Lawless v. Mansfield*, 1 Dr. & W. 557.

(b) *Gladstone v. Birley*, 2 Meriv. 403; *et v. int. al. Cotesworth v. Stephens*, 4 Hare, 193.

(c) *Averall v. Wade*, Llo. & G. temp. Sugd. p. 252; *et v. Barnes v. Racster*, 1 Yo. & Coll. C. C. 401; *Lanoy v. Duke of Athol*, 2 Atk. 448; *Aldrich v. Cooper*, 8 Ves. p. 391: but see *Hartley v. O'Flaherty*, Llo. & G. temp. Plunkett, 216.

(d) *Supra*, 206, 304; *Lake v. Craddock*, 1 Eq. Ab. 291; *S. C.* 3 P. W. 158; *Sugd. V.* and P. 902, § 2: and see, on the subject of a lien for repairs and improvements, *Neesom v.*

Clarkson, 4 Hare, 103, a case where the husband conceiving he was entitled in fee, paid off the vendor's lien, and made improvements.

(e) *Sugd. V.* and P. 902, referring to the observations of Lord Langdale, in *Peck v. Cardwell*, 2 Beav. p. 137.

(f) *Id.*, p. 905; *Hamilton v. Denny*, 1 Ball & B. 199.

(g) *Shine v. Gough*, 1 Ball & B. p. 444; *Lord Cawdor v. Lavis*, 1 Yo. & Coll. 432.

(h) *Ex parte Linden*, 1 Mont. D. & D. 435, Sir J. Cross.

may be, whether it be expressed in the instrument or not (a); but the agents and persons employed by the trustees have no claim upon the trust fund (b).

Annuitants scheduled to a trust deed do not acquire any lien upon the trust estate therein comprised by force of the trust deed, unless they are made parties to the deed (c).

Where a transaction is set aside as usurious at the instance of the assignees of the party who granted the security, the creditor is not entitled to a lien for his advances; he is entitled to interest at five per cent. to the date of the fiat; but not to call upon the assignees to pay what may be due; he can only prove for the balance under the fiat (d).

One of several residuary legatees, with the concurrence of the others, induced the executors to sell out stock forming part of the residuary estate, and to lend him the proceeds, on his executing to them a warrant of attorney, and depositing certain title deeds as a security for the replacement of the stock and payment of the dividends, but without any express lien upon or reference to his share of the residue; it was held that the executor had on the bankruptcy of the residuary legatee a lien on his share (e).

Where a person having a general lien takes an express security on an estate, as a general rule, it will be presumed that he means to rely on his express security only: one Kent purchased of Bond the lands in question; he mortgaged them for securing part of the purchase money, and gave a promissory note for the other part: it was held that Bond had no lien on the land for the promissory note (f).

(a) *Worrall v. Harford*, 8 Ves. p. 8; see *Ex parte Swinburne*, Mont. & Ch. 119.

(b) *Worrall v. Harford*, *ubi sup.*

(c) *Foster v. Blackstone*, 1 My. & K. 310.

(d) *Belcher v. Varden*, 2 Coll. 175-6.

(e) *Ex parte Makins*, 2 Mont. D. & De G. p. 508.

(f) *Bond v. Kent*, 2 Vern. 281; Sugd. V. and P. 862; *v. supra*, p. 773.

SECTION XI.—*Of the Mode in which the Account is to be taken between the Mortgagor and Mortgagee, and particularly where the Mortgagor is in Possession—Costs.*

Account against Mortgagee in Possession.

Not allowed to make any Charge for Trouble.

But may charge what he has properly paid to a Receiver.

Expences of Repairs, &c.

Liability for Waste.

Expences of Improvements.

Annual Rests.

Interest to be paid on Rents received after the Debt has been discharged.

Wilson v. Metcalfe.

Semble, Account between Mortgagor and First Mortgagee, prima facie, binds the Second Mortgagee.

Appropriation of Payments.

Costs of Mortgagee, and Costs in Suits for Redemption and Foreclosure generally.

THE principles upon which the account between the mortgagor and mortgagee is to be taken, may be collected from the foregoing pages (a); and several of the points which ordinarily occur in taking the account, as between the mortgagor and mortgagee, have already been generally adverted to (b). The case of the mortgagee entering into possession is that which demands more particular attention.

(a) *V. inf. al. supra*, 616, 629, 642.

(b) For instance, the following points (*inf. al.*), besides those referred to in the following pages, have been generally noticed.—The right of the mortgagee to have six months' notice before he is paid off, p. 652; and where the money is to be paid clear of deductions for commission, &c. p. 653. That the mortgagor cannot, unless under special circumstances, be called upon to account for the rents he has received, *supra*, p. 646-7. That the mortgagee in possession cannot be called upon to account for rents paid over to the mortgagor without notice of the second mortgage, p. 648, and see *Archdeacon v. Bowes*, M'Clel. 165. How the statutes for the limitation of actions affect the mortgagee's claim for interest, p. 685, 716, 724, note (b). That the mortgagee cannot claim interest upon interest under any stipulation to that effect in the mortgage deed, p. 628, 656 (with an exception in favour of bankers, p. 629); or that the interest shall be advanced

to a higher rate in default of payment, unless in the way of penalty, p. 631; and that he cannot, with notice, turn interest, even when due, into principal, as against a subsequent mortgagee; and see *Montague v. Ratcliffe*, 2 Fonbl. 438. That the mortgagee cannot charge for management, p. 649; and in what cases the mortgagee of a West India estate is entitled to a commission on consignments, p. 628-9. How Emblements are to be accounted for where the mortgagor is evicted by the mortgagee, p. 646. That a mortgagee is not entitled to surplus rents in the hands of a receiver appointed for the benefit of strangers, p. 647. That the mortgagee in possession is liable to the second mortgagee for any rents, &c., he may pay over to the mortgagor after notice, p. 648. The right of the mortgagee to add any expences properly incurred by him, and the situation of the mortgagee in regard to the expence of working mines, and the like, p. 650. The

A mortgagee in possession must account for the rents and profits, so that they may be applied, after deducting all reasonable expences and allowances, towards the discharge of the debt. The common decree against a mortgagee in possession now is, for an account "of what he has received, or what he might have received without his own wilful default" (*a*): the mortgagee is not, however, bound to enter into speculations, nor indeed will he be allowed the expences if entered into (*b*). Any sums received subsequently to the decree must be brought into the account (*c*). The obtaining judgment in ejectment is, as before observed, for this purpose, in most cases, the same as entering into possession (*d*); but where the mortgagee is in possession as agent of the mortgagor, he will not be treated as mortgagee in possession (*e*): where the mortgagee enters, and then permits the mortgagor to receive the rents, he will be accountable to a subsequent incumbrancer, of whose incumbrance he had notice, as mortgagee in possession (*f*). Where the decree against the mortgagee in possession had directed that an account should be taken of what he had received, or might have received, with an allowance for expences and improvements in the usual form; he was charged with the gross amount of what he had received from working mines, and was not allowed his expences in working; the Vice-Chancellor observed that the mortgagee had in fact sold away a part of the inheritance (*g*). If the mortgagee has turned out, or refused to accept, a responsible tenant, he is liable for the loss that may be sustained by reason of such act (*h*). If it be proved that the premises were let at a certain rent at

condition of an assignee of a mortgage as regards interest on the interest which he may have paid, p. 656; and of a purchaser who has given less than the amount secured, p. 656-7: and the question as to the costs of a person to whom an assignment is made *pendente lite* is noticed p. 692. The obligation of the party redeeming to pay all arrears of interest due to the party sought to be redeemed, p. 666. The doctrine as to mortgages to solicitors for costs is stated, p. 630-1; and it may be observed that the delivery of the bill is not an essential preliminary, *Ex parte Bovill* (note to *Christian v. Field*, 2 Hare, p. 179; though the case, as reported 2 Mont. & Ayr. 382, n. (*a*), would lead to a contrary conclusion); and see *Christian v. Field*, 2 Hare, 183; and *Bristol v. Warner*, 10 Ir. Eq. Rep. 246, to same effect; and *Harrison v. Wiltshire*, 9 Sim. 255. The terms in regard to payment of interest on the opening of a foreclosure are noticed p. 688; and the rule as to costs where the deeds have been lost is stated p. 620.

(*a*) *Berney v. Sewell*, 1 Jac. & Walk. 650;

contra, 1 Ch. Ca. 258; and see Seton on Decrees, 145, and the cases there cited; and *Beare v. Prior*, 6 Beav. 184.

(*b*) *Hughes v. Williams*, 12 Ves. 493, *et v. infra*, n. (*g*), and *supra*, p. 650.

(*c*) *Bulstrode v. Bradley*, 3 Atk. 582; the same rule applies to a trustee, *ibid.*; *v. infra*, note (*g*).

(*d*) *Duke of Buckingham v. Gayer*, 1 Vern. 258; *supra*, p. 649.

(*e*) *Lord Trimleston v. Hamill*, 1 Ball & B. 383. See *Page v. Linwood*, Sugd. Law of Prop. p. 581, 4 Cl. & Fin. 399; there, under special circumstances, the mortgagee was held not to be a mortgagee in possession.

(*f*) *Coppring v. Cooke*, 1 Vern. 270. In *Bentham v. Haincourt*, Prec. Ch. p. 30, it was held that the mortgagee could not claim any interest against the subsequent incumbrancers during that time; nothing is there said as to notice: *et v. sup.* p. 648.

(*g*) *Thornycroft v. Crockett*, xii. Jur. 1081, Vice Chancellor of England.

(*h*) *Anon.* 1 Vern. 45.

any time during the mortgagee's possession, it will, it seems, be for the mortgagee to show that such was not the rent during the whole time (a). The doctrine as to agreements that the mortgagee should hold at a certain rent, has been stated above (b).

On the principle that a mortgagee is not permitted to obtain any advantage out of the mortgage fund beyond the principal and interest, and it may be added on grounds of policy (c), he is not allowed to make a charge as receiver, if he himself has personally received the rents (d); and this, although it may have been agreed that he should be paid for his trouble in receiving them (e), and though a receiver might have been employed at the expence of the mortgagor (f); but if he has actually paid a bailiff, whom he has properly employed, for receiving the rents, he will be allowed such payment (g): however, it is only where the nature of the property requires it, and where the owner himself in the ordinary course of management would have had to employ one, that the mortgagee is entitled to employ a bailiff or receiver (h), unless with the sanction of, or by contract with, the mortgagor (i): the same principle applies to a West India mortgage (k): where a Receiver is appointed by deed with a per centage, and his expences are to be paid in the first place, and the property is of such a description as that it cannot be supposed that he was personally to attend and receive the rents, he may employ an attorney, and charge the cost as part of his expences (l).

A question often arises as to what expences are to be allowed to the mortgagee, particularly in respect of Repairs and Improvements, which he alleges to have made, which has been briefly adverted to in a former page (m). If a mortgagee has expended money in supporting the right of the mortgagor to the estate, he may add this to the principal of his

(a) *Blacklock v. Barnes*, Select C. C. 53; but see *Metcalf v. Campion*, 1 Molloy, 238, where Sir A. Hart states the general rule.

(b) *V. supra*, p. 633.

(c) *Drew v. Power*, 1 Sch. & Lef. 182; *Gubbins v. Creed*, 2 Sch. & Lef. 214, 218; 1 My. & K. 281; *v. supra*, p. 628-630.

(d) *Godfrey v. Watson*, 3 Atk. 518; *Bonithon v. Hockmore*, 1 Vern. 316; *Carew v. Johnston*, 2 Sch. & Lef. 301; *Davis v. Dendy*, 3 Mad. p. 170; *Leith v. Irvine*, 1 My. & K. 287, and the cases there cited.

(e) *French v. Baron*, 2 Atk. 120; *Scott v. Brest*, 2 T. R. 238; 1 My. & K. 281, 286.

(f) *Langstaffe v. Fenwick*, 10 Ves. 405; and see *Gould v. Tancred*, 2 Atk. 534.

(g) *Godfrey v. Watson*, 3 Atk. 518; *Bonithon v. Hockmore*, 1 Vern. 316; 2 Sch. & Lef. 301; *Davis v. Dendy*, 3 Mad. 170; and see *Leith v. Irvine*, 1 My. & K. 295-6.

(h) *Langstaffe v. Fenwick*, *Davis v. Dendy*, *ubi sup.*; *Godfrey v. Watson*, 3 Atk. 518; and see *Gilbert v. Dyneley*, 3 Scott, N. R. 379; *v. sup.* Sect. ii. p. 648.

(i) *Chambers v. Goldwin*, 9 Ves. 271, 272.

(k) *Chambers v. Goldwin*, *ubi sup.*; *Leith v. Irvine*, 2 My. & K. 281; *Forrest v. Elwes*, 2 Meriv. 68.

(l) *Gilbert v. Dyneley*, 3 Scott, N. S. 364.

(m) *V. supra*, p. 649, 650, 653; and see, on this point, the decree in *Quarrel v. Beckford*, 1 Mad. 273.

debt; and it will carry interest (*a*) at the same rate as the mortgage debt (*b*). If a mortgagee of a leasehold interest pays renewal fines he is entitled to be reimbursed with interest (*c*); as, on the other hand, any profit or benefit he may make by renewal of leases or otherwise, in the event of redemption, accrues for the benefit of the mortgagor (*d*): indeed, the general principle as regards renewals of leases is, that if a person having a particular interest in a lease renew it, it shall be for the benefit of every one who is interested in the old lease (*e*). An inquiry will not generally be directed as to extra expences, in the absence of any proof that such have been disbursed (*f*).

It is to be observed that a mortgagee in possession is not obliged to lay out money any further than to keep the estate in necessary repair (*g*); nor is he bound to leave the houses and buildings on the estate, especially after a long-continued possession, in as good condition as he found them (*h*): but he is not permitted to pull down houses or the like, or to injure them; if he do so, in taking the account he will be charged with the amount of the damage sustained (*i*): however he will be allowed his expences in pulling down houses on a copyhold estate which are ruinous, and building better ones, where else the estate might have been forfeited (*k*); and such repairs as are necessary for the support or protection of the property he will of course be allowed for with interest (*l*): but the mortgagee has not a right to make it more expensive for a mortgagor to redeem, than may be absolutely necessary for the purpose of keeping the property in a proper state of repair, at least without the concurrence or assent of the mortgagor (*m*). If indeed the mortgagee has obtained the consent of the mortgagor, or has given him notice in which the mortgagor has acquiesced, then the mortgagee may be allowed for sums of money which he has laid out in increasing the value of the property; but he has no right of his own accord to lay out money for that purpose, for this might be done in

(*a*) 3 Atk. 518.

(*b*) *Woolley v. Drag*, 2 Anst. 551.

(*c*) *Hamilton v. Denny*, 1 Ball & B. 202; *Manlove v. Bale*, 2 Vern. p. 84; *Lucam v. Mertins*, 1 Serj. Wils. R. 34.

(*d*) *Rakestraw v. Brewer*, 2 P. W. 511, affirmed on appeal; and the cases in Cox's note.

(*e*) *Taster v. Marriott*, Ambler, 668, and Blunt's note, where the leading authorities are collected. In *Owen v. Williams*, Ambl. 735, the principle was applied by fixing on the money the tenant for life had received for giving up her pretensions; and see *Waters v. Bailey*, 2 Y. & Coll. C. C. 224-5.

(*f*) *Sandon v. Hooper*, 6 Beav. 249.

(*g*) *Godfrey v. Watson*, 3 Atk. 518.

(*h*) *Russell v. Smithies*, 1 Anst. p. 96: the premises were malt-houses; the mortgagee had been in possession forty years.

(*i*) *Sandon v. Hooper*, 6 Beav. 248; *Hardy v. Reeves*, 4 Ves. 480; *Hanson v. Derby*, 2 Vern. 392; *et v. supra*, p. 650.

(*k*) *Hardy v. Reeves*, 4 Ves. 480.

(*l*) *Sandon v. Hooper*, 6 Beav. 248 (N. B. Plaintiff is there put for defendant, p. 250); *Godfrey v. Watson*, 3 Atk. 518; *Lord Trimleston v. Hamill*, 1 Ball & B. 385.

(*m*) *Sandon v. Hooper*, 6 Beav. 248; *Lord Trimleston v. Hamill*, 1 Ball & B. 385.

such a way as to make it utterly impossible for the mortgagor with his means ever to redeem.—This has been called improving a mortgagor out of his estate (a).

Another very important question constantly arises, as to when and how the surplus rents are to be applied in the reduction of the principal of the debt (b). The general rule has been stated to be, that wherever the gross sum received by the mortgagee exceeds the interest, it shall be applied to sink the principal (c); and that, at least when the interest was not in arrear when the mortgagee entered into possession, the court, in taking the account between the mortgagor and mortgagee who has entered into possession of a real estate mortgaged, will direct that annual rests be made, so that the excess of the rent or value beyond the interest may be applied in sinking the principal (d). It is obvious that unless this were done the mortgagee would have an unfair advantage, for the interest on the debt would run on until its final extinguishment, and the mortgagee would have, besides this, the benefit of the excess of the rents received by him from time to time: but this rule, as after noticed, is not universal, and particularly it is not the rule that every small excess of interest is to be applied in sinking the principal (e). Although the interest may at an earlier time have greatly exceeded the rents, and the interest has therefore been in arrear, yet that will not prevent the account being directed with annual rests, if a proper case is then made out for annual rests: and where, at the time of the filing of the bill, the arrears have been satisfied, and the rents have for some time exceeded the interest, the mortgagee has no claim for interest on such back arrears, for interest is never allowed on interest, unless by virtue of a contract (f); nor will rests be made in any case so as to give the mortgagee a benefit (g).

(a) *Sandon v. Hooper, ubi sup.*

(b) See on this subject, *Jarm. Mortgage*, by Sweet, 400, *et seq.*

(c) Dict. Lord Hardwicke, *Gould v. Tancred*, 2 Atk. 534, and see *Robinson v. Cumming, ibid.* 410; in *Quarrel v. Beckford*, the original decree, which was affirmed on appeal, see 1 Mad. 274, directed annual rests though the defendant denied by his answer that the debt had been satisfied, but in fact it had, *ibid.* 277; so in *Montgomery v. Calland*, 14 Sim. 80; but in *Wilson v. Metcalfe*, 1 Russ. 531, the common decree only was made, and the order for taking the account with annual rests was made on further directions, *v. infra*; the mortgage had been paid off before the filing of the bill.

(d) Lord Hardwicke, *Robinson v. Cumming*, 2 Atk. 410 (not where the subject is personal

estate, *ibid.*); *Shephard v. Elliot*, 4 Mad. 254; *et v. inf.* 310. Lord Cottenham, in *Heighington v. Grant*, 5 My. & Cr. 265, *et seq.* has explained how a direction to make annual rests is to be carried out; and see *Binnington v. Harwood*, Turn. & R. 477, 481, where Sir T. Plumer said that the sums which the mortgagee receives in respect of the mortgaged premises, at times intermediate between the dates of the annual rests, must be applied when they exceed the interest to the reduction of the principal, and see *Raphael v. Boehm*, 11 Ves. 103, 110, 111, *infra*; but that was the case of an executor bound to accumulate.

(e) *Gould v. Tancred, ubi supra*; *Horlock v. Smith, ubi inf.*

(f) *Quarrel v. Beckford*, 1 Mad. 282.

(g) See *Jarm. Mort.* by Sweet, 400.

In all cases where the court is called upon to direct an account in terms departing from those ordinarily employed in decrees to redeem, there must be sufficient grounds laid in the pleadings, even were it only asked that further directions should be reserved (*a*). The Master, to whom it is referred to take the account between the mortgagor and the mortgagee, cannot, unless specially directed by the decree, apply surplus rents after satisfaction of the interest to the liquidation of the capital, that is, make yearly rests (*b*). It is by no means of course in a decree for an account against a mortgagee in possession, to introduce any particular directions of that kind (*c*): the mere fact of an arrear of interest being or not being due to the mortgagee, when he takes possession, is not of itself decisive upon the question of rests, but every circumstance must be regarded (*d*). Lord Langdale, speaking on this subject in a late case, said, that he considered it to be the general rule, with some qualifications, not to direct annual rests to be made in the accounts of a mortgagee in possession, when the interest is in arrear at the time when he *takes possession*; and in the absence of any special reason, said his Lordship, I conceive that if a mortgagee is not liable to account with annual rests, when he enters into possession, he does not become so liable when the arrear of interest is paid off, or till after the mortgage debt has been paid off by receipt of the rents; although from the time when the debt is ascertained to be paid off annual rests will be decreed, though none were ordered previously (*e*): but this dictum, looking to the authorities, seems to require some explanation, for there is no instance of a decree with rests from a particular period of the account, as from the time when the arrear of interest was discharged; there are only two forms of decrees, either with or without rests (*f*): so that it would appear that, if at the filing of the bill the case was not a proper case for directing rests, it will not become so by what may afterwards occur (*g*). Lord Langdale, in the same case, held that, although the mortgagee may have taken possession under circumstances which did not render him liable to account with annual rests; yet if there were afterwards a settled account, by which it appeared either that no in-

(*a*) Lord Cottenham, *Scholefield v. Ingham*, C. P. Coop. R. 477-8. In the same case the form of a decree in a suit for redemption and foreclosure, by a second mortgagee against the first mortgagee in possession and the mortgagor is given, p. 479, *ibid*.

(*b*) *Webber v. Hunt*, 1 Mad. 13; *Donovan v. Fricker*, *ubi infra*.

(*c*) *Davis v. May*, 19 Ves. 385; *S. C. Coop.* 238; *Donovan v. Fricker*, Jacob, 165, 168.

(*d*) *Scholefield v. Ingham*, 1 C. P. Coop. R. 478; *Horlock v. Smith*, 1 Coll. 297; there rests were refused.

(*e*) *Wilson v. Cluer*, 3 Beav. 136; and see *Finch v. Brown*, *ibid*. 70.

(*f*) Sir W. Grant, *Davis v. May*, 19 Ves. 385; *Latter v. Dashwood*, 6 Sim. 462.

(*g*) *Davis v. May*, 19 Ves. 383; *G. Coop.* 238 (6 Sim. 461).

terest was due, or that any interest which was due was satisfied as interest by being converted into principal, and the mortgagee continued in receipt of the rents of amount more than sufficient to satisfy the interest of such principal, such settlement of account ought to be considered as a rest made by the parties themselves; and that the mortgagee continuing in possession after the statement of such account, and with no interest due to him, must from that time be dealt with as a mortgagee who takes possession without any interest in arrear (a).

Annual rests will equally be directed in respect of the occupation-rent fixed on a mortgagee in possession, as in respect of rents received (b); but in order to charge a mortgagee with an occupation-rent, it must be alleged and proved that he has been in the actual occupation of at least a portion of the property (c).

Annual rests may be directed when it shall appear that the mortgage debt has been discharged under such circumstances as to give a title to the account in that form, though nothing on the subject is to be found in any previous decree or order (d).

According to the doctrine of Sir Thos. Plumer it does not follow that the mortgagee is to be charged with interest upon interest after the time when the annual rents have liquidated the whole of the principal (e); however, in *Wilson v. Metcalfe*, Lord Gifford held the contrary; he said, if a mortgagee, receiving the rents of a mortgaged estate after his debt has been satisfied, does not immediately pay them over to the mortgagor, but retains them for his own use, he is availing himself of another man's money, and ought to be charged with interest: and his Lordship thought that the principle of the decision in *Quarrell v. Bechford* fully justified him in directing annual rests in that case (f). To this extent it seems to be clear, that the mortgagee must from the time that the debt has been discharged, or at least from the time of the

(a) Lord Langdale, *Wilson v. Cluer*, 3 Beav. 140.

(b) *Wilson v. Metcalfe*, 1 Russ. 535.

(c) *Trulock v. Robey*, 15 Sim. 273.

(d) *Wilson v. Metcalfe*, 1 Russ. p. 536; *Wilson v. Cluer*, 3 Beav. 140.

(e) Sir Thos. Plumer, *Donovan v. Fricker* (1821), Jac. R. 169: this was the case of a purchase set aside for fraud, a less favourable case than that of a mortgage, *ibid.*; and see *Archdeacon v. Bowes* (1824), 13 Price, 369.

(f) *Wilson v. Metcalfe*, 1 Russ. 535, referring, no doubt, to the observations 1 Mad. 277, 280-83; but they were directed to the question as to charging the mortgage with simple interest, *ib.* 283, which was all that

was sought: four per cent. only was directed to be paid, though the mortgage was of a West India estate, carrying six per cent., and six per cent. had been allowed on the mortgagee's expenditure, *ib.* 284-5. The propriety of Lord Gifford's deduction may be doubted: neither *Donovan v. Fricker*, or *Archdeacon v. Bowes*, *supra*, were cited. In *Raphael v. Boehm*, 11 Ves. 92 (see p. 104, 106, *et seq.*), interest at five per cent., with half-yearly rests, was given against an executor, but he had a legacy for his trouble, and was directed to accumulate; and Lord Eldon said he hoped never again to see a decree in such terms as Lord Rosslyn had pronounced in that case, *ib.* 111.

filing of the bill, pay interest at four per cent. on the balance found to have been in his hands, and be charged with interest on each sum afterwards received by him for rent from the respective times when they were received (a).

Even if it shall appear, on the result of the account, that the debt was paid off at the time of the filing of the bill, unless the mortgagee has set up an adverse title against the mortgagor (b), or improperly insisted that there was still a debt due to him on the mortgage (c), the mortgagor must, it seems, bear the costs of the suit (d); but this, perhaps, may depend in each case on the particular circumstances: whether or not the mortgagee has kept regular accounts as he is bound to do, and has or has not produced them when called for, will always be material as regards the costs (e). The general subject of costs will presently be considered.

It has been held that an account settled before a Master, between a mortgagor and the first mortgagee, binds the second mortgagee, though not a party, unless fraud or collusion be shown (f). But a specific devisee of a mortgage is not bound by an account settled between the representatives of the mortgagor and the executors of the mortgagee (g), for the mortgagor must have notice of the specific devise: if the mortgage were devised to the executor, to pay debts and legacies in general, such an account with the executor would bind every one (h).

As a general rule a person who receives money without any specific,

(a) *Quarrel v. Beckford*, 1 Mad. 269, 284; *Binnington v. Harwood*, Turn. & Russ. 477; *Lloyd v. Jones*, 12 Sim. 491; the Vice-Chancellor Knight Bruce evidently considers that there is no doubt upon this point, *Horlock v. Smith*, 1 Coll. 297; *Archdeacon v. Bowes*, 13 Price, 353; *S. C. McClellan*, p. 166; *Montgomery v. Calland*, 14 Sim. 81, 82.

(b) See *Binnington v. Harwood*, Turn. & R. 485-6: and *Harvey v. Tebbutt*, 1 Jac. & W. 202. But see Dan. Pr. 2nd ed. 1266.

(c) See *Montgomery v. Calland*, *ubi infra*.

(d) See *Quarrel v. Beckford*, 1 Mad. 279; *Wilson v. Metcalfe*, 1 Russ. 536; but in those cases the costs of the suit were given in compliance with the terms of the original decree; in *Quarrel v. Beckford*, the decree had directed taxation only, not payment, and see *Wilson v. Metcalfe*, 1 Russ. 536. In *Montgomery v. Calland*, 14 Sim. 81, the defendant, the mortgagee, denied by his answer that the principal and interest had been paid off; it

turned out on the account which was directed with annual rests that in fact it had; he was ordered on further directions, as he had retained the balance in his hands on a false suggestion, to pay the costs from the time of putting in the answer; and the Master was directed to compute interest at four per cent. on the balances in his hands, from the time the debt had been extinguished, not confining it to the time of filing the bill: for other instances where the mortgagee has had to pay or been refused his costs or part of them in such cases, see 14 Sim. 81, and Jarm. Mortgage, 390; *et v. infra*, p. 814.

(e) *Quarrel v. Beckford*, 1 Mad. 278, Sir J. Plumer.

(f) *Needler v. Deeble*, 1 Ch. Ca. 299; *S. C.* 1 Eq. Ab. 12, pl. 7; and see *Wrixen v. Vyse*, 1 Conn. & L. 303-5, and the other cases there cited.

(g) *Langley v. Earl of Oxford*, Amb. 17.

(h) *Ibid.*; *et v. supra*, 373, 381.

direction as to its application, may apply it to such one of the debts due to him from the person making the payment as may be most beneficial to himself (*a*); but where there is a debt by mortgage, and a debt unsecured, if it appear from the nature of the transaction that the money was paid on account of the mortgage debt, it must be so applied (*b*).

Unless some special case be made against him, a mortgagee is as much entitled to his costs properly incurred as to his principal and interest (*c*); and in an ordinary decree for foreclosure or redemption there is always a direction to tax the mortgagee his costs (*d*): if, however, the mortgagee seeks to have any costs beyond those of the suit, a special case must be made by the bill, and they must be specially mentioned in the decree (*e*.) The court, on a case being made, will give to the mortgagee all that his contract, or the legal or equitable consequences of it, entitle him to receive, and all the costs properly incurred by him in asserting or defending such rights, whether at law or in equity (*f*), and he is entitled to the costs of an ejectment brought by him for recovering possession (*g*); but not of proceedings founded on a mistake on his part as to his rights, legal or equitable (*h*). The mortgagee is also entitled to be allowed in account against the mortgagor, all expences properly incurred by him for the recovery of the mortgage money; he will therefore be allowed the costs of an action brought against a person who had joined the mortgagor as surety in a bond for the mortgage money, where the fruit of the action and the costs of it have been lost by the insolvency of the surety (*i*).

So long as the mortgagee acts reasonably as mortgagee to that extent he is to be indemnified (*k*); which means reasonably with respect to such rights as his mortgage title gives him, not such as

(*a*) *Deraynes v. Noble*, (*Clayton's case*), 1 Mer. 605, 606.

(*b*) *Young v. English*, 7 Beav. 16; and see *Johnson v. Bourne*, 2 Y. & Coll. C. C. 268, 276-7.

(*c*) Lord Cottenham, *Dunstan v. Patterson*, 2 Phill. 344; — *v. Trecothick*, 2 Ves. & B. 181; *Drew v. Harman*, 5 Price, 323; *Archdeacon v. Bowes*, M'Clel. R. 167.

(*d*) Seton on Decrees, 139, 140, and Beames on Costs, 39, 45, there referred to.

(*e*) Seton on Decrees, 140; *Ward v. Barton*, 11 Sim. 534; and usually the general costs have been given, even where the mortgagee appears to have been overpaid, see *Lord Trimleston v. Hamill*, 1 Ball & B. 386, and *supra*, p. 812; but in most if not all of these cases this

has been in consequence of the Court being bound by the terms of the original decree. *V. supra*, Sect. v. p. 692, as to costs occasioned by assignment *pendente lite*.

(*f*) Lord Cottenham, *Dryden v. Frost*, 3 My. & Cr. 675; *Ramsden v. Langley*, 2 Vern. 536; 1 Eq. Ab. 328, p. 5; *Hunt v. Fownes*, 9 Ves. 70.

(*g*) *Sandon v. Hooper*, 6 Beav. 250.

(*h*) *Dryden v. Frost*, 3 My. & Cr. 676.

(*i*) *Ellison v. Wright*, 3 Russ. p. 458; and see *Horlock v. Smith*, 1 Coll. 296.

(*k*) Lord Eldon, *Detillin v. Gale*, 7 Ves. 584, 585; in that case the mortgagee was made to pay costs, his conduct having been unreasonable and oppressive.

have arisen from his having mistaken his rights (a). The mortgagee is not entitled as against the mortgaged estate to the costs of an action brought by him to recover his debt against the executor of the mortgagor (b). When there has been great litigation at law, and then a bill is filed for redemption, the court has it in its power, in a proper case, to allow the extra costs to the mortgagee; and where the mortgagee having, from fear that his mortgage might be defeated at law, got administration as principal creditor in the Ecclesiastical Court, he was allowed those costs also (c). A mortgagee clearly cannot claim his own expences from other persons with whom he is litigating, with regard to those acts which upon his part are not only unreasonable but oppressive (d).

As a general rule, if a mortgagee is brought before the court to have his security impeached, and no decree can be, or is, obtained against him; he is dismissed with costs (e).

If there be positive misconduct on the part of the mortgagee (f); if his conduct has been either usurious (g), oppressive (h), unfair (i), unjust (k), or fraudulent (l), or he has made an unjust defence (m), as by setting up an absolute title (n), the court exercises a discretion to refuse to the mortgagee his costs, and in some cases more especially where the mortgagee has improperly instituted a suit for foreclosure (o), has ordered him to pay them (p); so where he has refused to accept a tender of all that is due to him, each of such cases will depend upon its own circumstances (q).

(a) *Dryden v. Frost*, 3 My. & Cr. 675-6; *England v. Codrington*, 1 Eden, p. 169; *Morony v. O'Dea*, 1 Ball & B. 121; — v. *Trecothick*, 2 Ves. & B. 181, there cited.

(b) *Lewis v. John*, 9 Sim. p. 366; 1 C. P. Coop. R. 8.

(c) *Ramsden v. Langley*, 2 Vern. p. 536; *Lomax v. Hide*, 2 Vern. 185.

(d) Lord Eldon, *Detillin v. Gale*, 7 Ves. 585; and see *Leftus v. Smith*, 2 Scho. & Lef. 642; *Morony v. O'Dea*, 1 Ball & B. p. 109; and see *Dryden v. Frost*, 3 My. & Cr. 675, Lord Cottenham, case of equitable mortgagee; and *supra*, 646, note (b); Beames on Costs, pp. 39 to 46.

(e) See the dictum of Lord Hardwicke, *Taner v. Ivie*, 2 Ves. 468. In *Brodie v. St. Paul*, 1 Ves. J. 326, the mortgagees were dismissed without costs, under the particular circumstances.

(f) *Leftus v. Swift*, 2 Sch. & Lef. 657.

(g) *Bromley v. Holland*, 7 Ves. 27; S. C. Coop. 25.

(h) *Detillin v. Gale*, 7 Ves. p. 583; and *Shuttleworth v. Lowther*, cited *ibid.* 587.

(i) *Taylor v. Baker*, 5 Price, 311.

(k) *Mocatta v. Murgatroyd*, 1 P. Wms. p. 393.

(l) *Morony v. O'Dea*, 1 Ball & B. p. 121, and cases in note; see also *Franklyn v. Fern*, Barn. 33.

(m) 1 P. Wms. 395.

(n) *England v. Codrington*, 1 Eden, p. 169; *Spurgeon v. Collier*, *ibid.* 55; *et v. supra*, p. 812, notes (b) and (d).

(o) *Binnington v. Harwood*, Turn. & R. 485.

(p) Lord Cottenham, *Dryden v. Frost*, 3 My. & Cr. 675; *England v. Codrington*, 1 Ed. 174; and see — v. *Trecothick*, 2 Ves. & B. 181; Dan. Pr. 1265-7; *et v. sup.* 812, n. (e).

(q) Vide *supra*, p. 652, as to tender. The following cases, in addition, may be referred to on this subject: *Taylor v. Baker*, Daniell's Rep. p. 81; *Shuttleworth v. Lowther*, cited 7 Ves. 587, case of tender; *Harvey v. Tebbutt*, 1 Jac. & W. p. 197; *Rider v. Jones*, 2 Yo. & Coll. C. C. 329, case of oppression; *Cliff v. Wade*, 2 Yo. & Coll. C. C. 598, 604; *Smith v. Green*, 1 Coll. 555, 563; *Morley v. Bridges*, 2 Coll. 628, cases of tender.

The mortgagor must pay the costs of all parties who are brought before the court, by reason of the mortgagee having devised or settled his mortgage interest; and the same rule prevails whether the suit be for foreclosure or redemption (*a*): but he is not bound to pay the expence of a declaration of trust in favour of a third person, executed by the mortgagee (*b*).

A mortgagee is allowed the costs of procuring administration to an incumbrancer under the will of the mortgagor, as a necessary party to the foreclosure (*c*). A mortgagee cannot of course have any costs as against a person claiming in priority to his mortgage (*d*).

The mortgagor must bear the costs of obtaining a reconveyance of the mortgaged property (*e*). The doctrine as to how the costs are to be paid in the event of a sale being decreed instead of a foreclosure, has already been stated (*f*); and the rules, as to the costs of disclaiming defendants, are noticed above (*g*).

(*a*) *V. sup.* 670; *Bartle v. Wilkin*, 8 Sim. 238; and see the other points as to costs there stated; see also p. 699.

(*b*) *Ex parte Grubb*, 2 Moore & P. 240; 5 Bing. 160; *Jarm. Mortg.* by Sweet, 388.

(*c*) *Hunt v. Fownes*, 9 Ves. 70.

(*d*) *Shackleton v. Shackleton*, 2 Sim. & St. p. 242.

(*e*) *V. supra*, pp. 669, 670.

(*f*) *Supra*, pp. 678-679; *Kenebel v. Scrafton*, 13 Ves. p. 370, before Lord Eldon, appears to be at variance with the more modern practice.

(*g*) *Supra*, p. 691; and see the other points as to Costs there stated.

ADDITIONAL NOTE.

Hicks v. Morland, 21st July, 1835—*Rolls*.

Costs of Solicitor claiming to be Incumbrancer.

In *Hicks v. Morland*, 21st July, 1835, a solicitor claimed to be incumbrancer for about 5000*l.*; a bill was filed against him to take the account on the ground that the accounts delivered were made out in such a manner as this court does not allow between parties standing in that relation; the amount, on retaking the account, was reduced to about 4600*l.*, it was not alleged that there was any specific fraud: Sir C. Pepsy, Master of the Rolls, ordered the defendant to pay the costs down to the taking of the account.

SECTION XII.—*Out of what Funds Mortgage Debts and Charges generally are to be paid—Of the Exoneration of the Primary Fund—Of the Marshalling of Assets and Securities, including the General Doctrine as to Marshalling of Assets in favour of Creditors and of Legatees—and of Contribution.*

General Doctrine as to what Fund is primarily liable for Payment of Debts.

Order of the Application of Funds for Payment of Debts.

Exoneration of Personal Estate.

Administration of the Estate of a deceased Mortgagor—Exoneration of Mortgaged Estate.

Estate not to be exonerated, to the disappointment of Creditors or Legatees.

Where the other Real Estates must exonerate the Mortgaged Estate.

Order of the Application of the Assets may be varied by Express Declaration, or from the Implied Intention.

In order that there may be a case for Exoneration, the Debt must have been the proper Debt of the Mortgagor.

Earl of Ilchester v. Earl of Carnarvon, 1 Beav.

Of the Marshalling of Assets—As regards Creditors and Legatees.

Tombs v. Roch, 2 Coll.

Marshalling in favour of Legatees—Where the Creditor has a specific Lien on the Land.

Doctrine of Marshalling as regards the Lien of a Vendor.

Marshalling of Securities.

Averall v. Ward, before Lord C. Sugden.

Barnes v. Rackster, before the Vice-Chancellor Knight Bruce.

Gregg v. Arrott, before Lord C. Sugden.

Contribution, its Nature.

As between Persons to whom different Estates comprised in one Mortgage devolve.

Contribution between Devisees and Legatees.

Johnson v. Child, 4 Hare.

Contribution between Tenant for Life and Remainderman.

Contribution amongst Sureties.

When the Court will decree Possession and Account of Rents and Profits, and when not.

Additional Notes.

No. I.—Judgment of the Vice-Chancellor Knight Bruce, in Tombs v. Roch.

No. II.—Judgment of the Vice-Chancellor Wigram, in Johnson v. Child.

It may be proper, in reference to several of the points that will come under consideration in the course of the present section, to revert to some of the general doctrines in regard to the payment of debts and legacies.

The personal estate, as has already been mentioned, in the absence of any charge, is *primâ facie* and generally the sole fund when suffi-

cient, and when insufficient the first fund, for the payment of the debts of a deceased debtor; though this rule, as will presently be noticed, is subject to exceptions founded on justice and reason (*a*).

By the common law, even before the Statute of Westminster the Second, on the decease of a debtor by specialty, in which the heirs were bound, one moiety of the lands of the deceased was liable to be extended at the suit of the creditor (*b*); and so the law stood until our day; but now, by the statute 3 & 4 Will. IV. c. 104, as has been noticed in a preceding chapter, the whole of the lands freehold and copyhold, of a deceased debtor, have become liable to his debts by simple contract as well as by specialty, in aid of his personal estate (*c*); the statute making the real estate liable for debts does not directly affect legatees, but in reference to the doctrine of marshalling it may have important consequences, as after mentioned (*d*). The statute above referred to, which gives the same remedy to simple-contract creditors as that which the specialty creditors had before, preserves the priority of specialty creditors where the assets are legal (*e*).

The order of the application of the several funds liable to the payment of debts is as follows:—1st. The general personal estate not expressly, or by implication, exempted.—2ndly. Lands expressly devised to pay debts, whether the inheritance, or a term carved out of it, be so limited.—3rdly. Estates which descend to the heir, whether acquired before or after the making of the will.—4thly. Devised or bequeathed property, real or personal, which is charged with debts, and then specifically disposed of subject to such charge.—5thly. General pecuniary legacies *pro ratâ*. It had been held that the next fund was, 6thly, Specific legacies *pro ratâ*; and then, 7thly, Real estate devised, and, if the rule were subject to the old law, whether in terms general or specific (*f*); but it is now fully settled, as will be more particularly noticed hereafter, that the devisees of real estate have no right to throw the specialty debts upon specific legatees of the personalty, each must contribute *pari passu* (*g*); though it had been said by Lord Thurlow that estates particularly devised without any charge are never applied in payment of debts till all the other funds are exhausted (*h*).

(*a*) V. *supra*, 334, *et seq.*; and see *Tombs v. Roch*, 2 Coll. p. 497: which case is more particularly noticed in page 839 of this Section: the order in which debts *inter se* are to be paid has been stated, vol. i. pp. 192-3-4.

(*b*) V. *supra*, vol. i. p. 173.

(*c*) V. *supra*, pp. 313, 319: the lands themselves are charged, not the tenant's interest only, Dict. *Downe v. Morris*, 3 Hare, 399.

(*d*) V. *supra*, 326-7, *et* 330; *et infra*, in this Section, of Marshalling in favour of Legatees.

(*e*) V. *supra*, p. 319.

(*f*) I have taken this from Jarman on Wills, ii. 546-7.

(*g*) See *Tombs v. Roch*, *inf.* p. 839.

(*h*) Lord Thurlow, *Davies v. Topp*, 1 Bro. 526, Append. (cited 2 Bro. 264); *Galton v. Han-*

The personal estate, and indeed any other of the funds applicable to the payment of debts, may, as will be more particularly noticed hereafter, be exonerated (*a*) as between the real and personal representatives of the testator, though not so as to prejudice the creditors; but the Court of Chancery, notwithstanding an express devise of a real estate for the payment of debts, not attended by an exoneration of the personal express or implied (*b*), will direct the personalty to be first applied in payment of them (*c*).

A legacy given generally is payable out of the personal estate only (*d*); but, as we have seen in a former chapter (*e*), legacies may be charged on the real estate. As a general rule, where the estate is actually charged with the payment of legacies, it will only be held to be liable in case of necessity in its usual rank and order (*f*); but legatees may circuitously, by the doctrine of marshalling, have their legacies, or a portion of them, satisfied out of the real estate, on a deficiency of the personal estate, though not charged on the land, as will presently be more particularly adverted to. Where a legacy or an annuity is given out of the real and personal estate, the personal estate is first liable: if the estate is directed to be sold, and to form, together with the personal estate, one fund, and the annuity or legacy is made payable out of the mass, then both are to be considered as liable *pari passu* (*g*).

In the administration of the assets of a morgagor, the rule of exoneration, which has been adverted to in treating of the exoneration of the personal estate from debts and legacies (*h*), comes into operation. The general rule is, that where a person dies intestate, and where he makes a will and no intention to the contrary either expressed or implied is to be collected from the will (*i*), and any part of his

cock, ubi sup. (2 Bro. 263). See Mr. Raithby's note, pp. 438-9, where there is a laborious collection of the authorities applicable to each of the above propositions; and 2 Jarman on Wills, 554-5.

(*a*) *Et v. supra*, p. 334, *et seq.*; and Jarm. Mortgage, by Sweet, 368.

(*b*) As to which, see *Wainwright v. Bendloes*, Prec. Ch. p. 451; *Bamfield v. Wyndham*, Prec. Ch. 101; and *supra*, p. 333, *et seq.*

(*c*) *Gower v. Mead*, Prec. Ch. p. 2; *Dolman v. Smith*, *ibid.* 458; 2 Vern. 740; *Hall v. Brooker*, Gilb. Eq. R. 72; *Wainwright v. Bendloe*, Gilb. Eq. R. 125; *Stapleton v. Colville*, Forrest. 202; Butler's note (No. 106), Co. Litt. 208, a; *Ancaster v. Mayer*, 1 Bro. 460. Mr. Cox has collected the cases which form exceptions on the ground that the estate

not the person was or has become the debtor, in his note to *Evelyn v. Evelyn*, 2 P. W. 664, before referred to; *v. supra*, Chap. vii. Sect. iii. p. 333, 336; *et v. infra*, Lord Brooke *v. Earl of Warwick*, 1 Hall & Tw. 142, 148.

(*d*) *V. supra*, p. 327, 334.

(*e*) *Ibid.*

(*f*) *Supra*, p. 336.

(*g*) *Boughton v. Boughton*, in the House of Lords, Sugd. Law of Prop. 436-7, reversing the Vice-Chancellor Knight Bruce's decision, 1 Coll. 26; as to the first point, Sir E. Sugden (*ibid.* 437-8) prefers the Vice-Chancellor Knight Bruce's decision.

(*h*) *V. supra*, Chap. viii. Sect. iii. p. 334, *et seq.*

(*i*) *Howell v. Price*, Prec. Ch. 477; 1 P. W. 293, and Mr. Cox's note; *v. supra*, p. 334;

real estate is mortgaged, either with or without a covenant for the payment of the money (a), and such debt is the debt of such person originally or by adoption, and not a charge primarily affecting the estate (b), the personal assets are the fund to be first applied for the payment of the mortgage debt in exoneration of the land (c). The rule applies whether the personal estate was increased by the money being borrowed by the mortgagor (d), or the debt originated in any other way, provided the debt were purely the testator's own debt, and not primarily payable out of the estate as above (e). The rule also applies generally, whether the estate has descended to the heir or has been devised to a stranger, and to the devisee of a particular estate equally as to the devisee of the inheritance; provided the devise be not such as to impose upon the devisee the obligation of paying off the mortgage; or, in other words, such as that the mortgage is clearly to be a deduction from the property devised, and that the devisee is to take *cum onere* (f). Although the estate be devised "subject to the mortgages," still the devisee, unless under peculiar circumstances, will be entitled to have the estate exonerated, it having been considered that those words, unless coupled with others clearly exonerating the funds which, according to the usual order, would be applicable for that purpose, are to be taken only as descriptive of the property (g);—one other of the remains of the influence which favour to the *hæres factus* and *hæres natus* has had in fixing the rules of law (h).

But the application of the personal estate, in ease or exoneration of the mortgaged estate, either in favour of the heir or devisee, was never allowed to take place to the defeating of creditors by simple contract when their claims were confined to the personal estate: if, therefore,

Lockart v. Hardy, 9 Beav. 379; stated *supra*, p. 346, add. note.

(a) *Supra*, p. 334.

(b) *V. supra*, 335; (but "not" should be inserted before "be," in the 11th line;) and see *Earl of Oxford v. Lady Rodney*, 14 Ves. 423; *Bickham v. Cruttwell*, 3 My. & Cr. 768; and *Jarman, Mortgage*, by Sweet, 369, 373, where the doctrine as to a devise *cum onere* is considered, *et v. inf.* p. 824.

(c) The early cases are collected in Mr. Cox's note to 1 P. W. 294; and see *Musket v. Cliffe*, xii. Jur. 739; and *supra*, p. 335.

(d) *Supra*, p. 334; and see *Cope v. Cope*, 1 Salk. 450; *Howel v. Price*, Prec. Ch. 423; *Pockley v. Pockley*, 1 Vern. 36-7; *Bartholomew v. May*, 1 Atk. 487; and Mr. Butler's note, Co. Litt. 208 a.

(e) Lord Hardwicke, *Robinson v. Gee*, 1 Ves. 252; and see *Tweddell v. Tweddell*, 2

Bro. 106.

(f) Lord Thurlow, *Donne v. Lewis*, 2 Bro. 264. The earlier cases on the subject are:—*Meynell v. Howard*, Prec. Ch. 61; *Lutkins v. Leigh*, Forrest. 54; *Balsh v. Higham*, 2 P. W. p. 455; *King v. King*, 3 P. W. 358; *Cope v. Cope*, 1 Salk. p. 450; *Robinson v. Gee*, 1 Ves. p. 252: though Lord Hardwicke, in that case, introduces the words "with a covenant;" and see Butler's note, Co. Litt. 208 a, note (106). Formerly the rule was not held to extend to the *hæres factus*; Forrest. p. 54: the modern rule was settled by *Galton v. Hancock*, 2 Atk. p. 436.

(g) *Serle v. St. Eloy*, 2 P. W. 386; *Wythe v. Henniker*, 2 My. & K. 635 (*v. supra*, 342, note); *et v. supra*, p. 346, and the references; and *Ram on Assets*, 441.

(h) *V. int. al.* 2 Atk. 435.

the mortgagee, as a creditor, had exhausted the personal estate, or caused it to be deficient for the payment of the general debts, the other creditors were held to be entitled to resort to the mortgaged premises to the extent to which the mortgage had been satisfied out of the personal estate (a); and a creditor who has acquired this right of marshalling is not barred by a lapse of less than twenty years (b). Judgment creditors, it is to be observed, are to be paid in the first instance (c).

Nor is the rule permitted to prevail so as to disappoint legatees, whether general or specific, for the effect would be in that case to defeat the testator's intention in favour of one object of bounty to the prejudice of another, for in this respect a devisee and a legatee stand upon the same footing (d): the legatees are therefore entitled to stand in the place of the mortgagee, if he has resorted to the personal estate, to the extent to which the mortgagee may have been satisfied out of the personal assets (e). But a mere residuary legatee, as such (for if the residue be exonerated, it is, as we have seen, different (f)), is not protected from having the personal estate so applied; for the gift of a residue of a personal estate implies what remains after satisfying the charges upon it, and therefore does not of itself imply an intention that the legatee shall in all events receive something (g): an express bequest of the personal estate to the executor does not in general make him a legatee, being no more than the law would give him (h). If the legacies are given out of a residue, of course the legatees will be in the same condition as a residuary legatee: where a person by his will stated that he computed that the surplus of his personal estate, after debts and funeral expences paid, would amount to 5800*l.*, which he distributed in legacies, the legatees to abate, or take the surplus

(a) *Robinson v. Gee*, 1 Ves. 252, *v. infra*, p. 827.

(b) *Vickers v. Oliver*, 1 Yo. & Coll. C. C. p. 211.

(c) *Sharpe v. Scarborough*, 4 Ves. 538.

(d) *Hawes v. Warner*, 2 Vern. p. 477; *Oneal v. Mead*, 1 P. W. p. 693; *Tipping v. Tipping*, 1 P. W. p. 730; *Davis v. Gardiner*, 2 P. W. 190; *Rider v. Wager*, 2 P. W. p. 335; and see Mr. Cox's note to *Clifton v. Burt*, 1 P. W. 680; *Galton v. Hancock*, 2 Atk. 437; and *Ram on Assets*, p. 440; and *supra*, 343. The Vice-Chancellor's judgment, in the late case of *Tombs v. Roch*, 2 Coll. 494, after referred to, has established the principle, that in all cases, legatees and devisees being equally objects of bounty, are entitled to equal consideration; and that the old notion of favour to the inheritance will not now be applied in

determining the respective liabilities of the legatee and the heir or devisee, in respect of the benefits intended to be conferred on them.

(e) *Lutkins v. Leigh*, Forrest. p. 53; *Forrester v. Lord Leigh*, Ambl. 171 (recognized, *Wythe v. Henniker*, 2 M. & K. 635, 644); and see 2 Jarman on Wills, 602.

(f) *Supra*, Chap. iii. Sect. iii.

(g) *Robinson v. Gee*, 1 Ves. p. 252; and see *Davis v. Gardiner*, 2 P. W. p. 189: even though the articles intended to pass are enumerated, it will be no less a residuary bequest in this sense (*Dict. Bowman v. Reeve*, Prec. Ch. 578, and see *Taylor v. Taylor*, 6 Sim. 249): though there may be a specific devise of a residue; *Adams v. Meyrick*, 1 Eq. Ab. p. 271, pl. 13; and see *Lord Brooke v. Earl of Warwick*, *ubi infra*; and 2 Fonbl. 296-7.

(h) *Haslewood v. Pope*, 3 P. W. 322; the

proportionably, the court held that it must be implied that he included his mortgages in the debts, although by this means the personal estate fell short of 5800*l.* (a). The widow's paraphernalia cannot be taken for the purpose of exoneration (b); but the personal estate, which would go as orphanage-part by the custom of London, or as the widow's customary portion in the province of York, is applicable to the purpose of exoneration (c).

It may be well here to introduce the following case of recent date, on account of its special circumstances:—By marriage settlement, an estate was settled on Captain Roberts, the testator, for life, remainder to his intended wife for life, remainder to the children, with a power to the trustees to sell and reconvert: part of the estate was sold, and the money lent to Captain Roberts on mortgage of his estates in Monmouthshire; the wife was to have 150*l.* a year in lieu of the rents of this portion of the estate. The testator by his will gave the interest of his personal estate to his wife for life, and the corpus after her death to his son and daughter; and he devised his Monmouthshire estates to trustees in trust to raise 600*l.* a-year, and pay the same to his wife till his son should attain twenty-five, the residue to be accumulated, and on his son attaining twenty-five to pay 200*l.* a-year to his wife, and then in trust for his son for life, remainder to his issue, remainder to his daughter for life, in the same manner as to the son (d), with remainders over. By his first codicil, the testator directed that the 150*l.* a-year which he was under an obligation to pay to his wife should be deducted from the annual sums of 600*l.* and 200*l.* respectively. By a second codicil, he directed that when his son or daughter should inherit the Monmouthshire estates, as an equivalent for the 200*l.* a-year being raised out of those estates, a certain mortgage for 2575*l.*, the interest of which *inter alia* was given for life to his wife, should revert to the possessor of the Monmouthshire estates. The wife and daughter survived: the question was whether the Monmouthshire estates were devised *cum onere*, or whether the devisees of those estates were entitled to have the mortgage debt raised out of the general personal estate of the testator. The Vice-Chancellor Knight Bruce held, taking the will and codicils together, that the usual administration of the estate, so far as related to the mortgage, was changed during the

same principle will, as I conceive, apply even now that the executor is trustee for the next of kin. Of the Exoneration of the personal estate from the payment of debts, *v. supra*, p. 333, *et seq.*

(a) *Hawes v. Warner*, 2 Vern. 477.

(b) *Tipping v. Tipping*, 1 P. W. 730.

(c) *Ball v. Ball*, cited in *Rider v. Wager*, 2 P. W. 335; *Pockley v. Pockley*, 1 Vern. 36; Coote, 569.

(d) I presume this was so, though it is not specifically stated.

life of the widow, but not after her death; and that the Monmouthshire estates must bear the burthen during her life, but that after her death the devisees would be entitled to have the mortgage debt paid off out of the general personal estate (a).

When an estate in mortgage is devised, and the personal estate is insufficient to exonerate the estate, it then becomes a question as to how far, and in what order the real estate may be liable to exonerate the mortgaged estate. The rule on this subject follows the order above stated, in regard to the application of assets for the payment of specialty debts, in which the heirs are bound. Lands devised for payment of debts are liable to discharge such mortgaged lands, either descended or devised (b), even though the mortgaged lands may have been devised expressly *subject* to the incumbrance (c): lands descended shall exonerate mortgaged lands devised (d). Unencumbered lands, and mortgaged lands, both being specifically devised, but expressly after payment of all *debts*, shall *contribute* to the discharge of the mortgage (e): but such right of contribution, as it is given by the will, so it is in force only when the party claims under the will, and not where the demand it set up in defiance of it (f).

The Order in which the real assets are applicable for the payment of the mortgage debt may be varied by the testator, either by express declaration, or by an intention to be collected from the mode in which he has devised his estates.

“Where a person seised of three or four estates devises one estate for the particular purpose of paying his debts, that estate,” said Lord Thurlow, “is applied;” and he added, “I therefore do not apprehend that the general rule, cited as sustaining *Galton v. Hancock* (g), that estates descended must *always* be applied to exonerate estates devised, is law: where an estate is particularly devised for payment of debts, yet the personal estate, as the primary fund, unless exempted by the

(a) *Sargent v. Roberts*, xii. Jur. 429.

(b) *Bartholomew v. May*, 1 Atk. p. 487; *Marchioness of Tweeddale v. Earl of Coventry*, 1 Bro. 240. I have taken this from Mr. Cox's note to *Howel v. Price*, 1 P. W. 294, which has often been referred to with commendation, and has been generally adopted; and see Coote on Mortgages, 577.

(c) *V. infra*, and *Serle v. St. Eloy*, 2 P. W. 386, affirmed by Lord King, *ibid.* note; this case, though not always approved of, has since been considered as a leading authority, *Duke of Ancaster v. Mayor*, 1 Bro. 454, and

other cases cited, *ibid.* p. 386; see Coote, 573.

(d) *Galton v. Hancock*, 2 Atk. 436.

(e) *Carter v. Barnadiston*, 1 P. W. p. 505, 521: it was there decided that where one seised in fee of two estates mortgaged one, and by will charged all his real estates with the payment of his debts, and devised the mortgaged estate to A. and the unencumbered estate to B., A. might compel B. to contribute to pay off the mortgage. The decision on the appeal, 3 Bro. P. C. 64, turned on another point.

(f) *Ibid.*

(g) 2 Atk. 424, 427, 430.

testator, shall be first applied; but I do not recollect any case where debts have been directed to be paid out of the real assets descended, in preference to estates *so devised*" (a): "however," his Lordship added, "the principle of *Galton v. Hancock*, as stated, is that the testator did not mean to charge his estate, with a view to *future* property; yet he might so mean: it is unfit, however, where cases are precisely similar, that different judgments should be given (b); therefore, whatever might be the reasoning upon *Galton v. Hancock* when decided, it is exceedingly fit to collect the principle upon which it was decided, to govern other cases." In *Galton v. Hancock*, and in the case before his Lordship, there was a general charge, not a devise or trust for payment; his Lordship, therefore, in deference to authority, held that the descended estate, subsequently acquired, was liable to exonerate the devised estates: but he took this distinction. The principle which seems to distinguish the case is this—"When a general charge is made applicable to the whole estate of the testator at the time, no intention appears that the estate is so charged, with a view to exonerate future property; but where a testator charges part of his estate, leaving other parts to descend, his inclination to burthen a part in exoneration of the rest is manifest" (c). Lord Thurlow, in the subsequent case of *Donne v. Lewis* (d), held that the devised estates, under the circumstances, were liable for the deficiency of the primary fund selected for the payment of the debts, before the descended estates acquired subsequently to the date of the will.

The doctrine is now established, that if a person selects the mortgaged estate itself, or a portion of his estate, and going beyond a charge (e), devises it or creates a term, expressly for the payment of his mortgage debts; or he expressly declares that the devisee shall pay the mortgages, (so that there is in effect no devise of the estate mortgaged, beneficially, excepting to the extent that it may not be exhausted by such payment); the estate or interest so pointed out will be the first fund to be applied to the payment of the debts, to the exoneration of descended estates, whether subsequently acquired or not: and if there be also a direction that the personal estate shall not be applied in payment of debts, even the next of kin taking it as

(a) Lord Thurlow, *Davies v. Topp*, 1 Bro. 527, append.

(b) See 2 Bro. 263.

(c) *Davies v. Topp*, 1 Bro. 528, although a testator may now pass estates subsequently acquired, the doctrine now under consideration may be applicable in many cases.

(d) 2 Bro. 257, 265; *sup.* p. 324, followed in *Manning v. Spooner*, 3 Ves. 114.

(e) See *Harmood v. Oglander*, 8 Ves. 116. Lord Thurlow made the distinction between a devise and a charge, putting the former first in order, only in deference to previous authorities; and see *Milnes v. Slater*, 8 Ves. 303.

undisposed of will not be liable to the payment of the mortgage debts (a).

Where the testator has expressly directed that his personal estate, the primary fund, shall not be applied in payment of his mortgage debts, but has not said that the descended estates, the secondary fund, shall not be so applied; the secondary fund will not be exonerated (b). When the estates are devised subject to the incumbrances, that will not exempt the primary fund: “for a primary fund is not exonerated merely because another fund is provided; such other fund is considered as auxiliary only, unless the primary fund be expressly exonerated” (c).

On the principle that regard must be had to the testator's intention in adjusting the claims upon his estate for exoneration or compensation, where real estate before the stat. 3 & 4 Will. IV. c. 106, § 3, was devised to the heir, though he took by his preferable title, namely, by descent, so that the estate as descended assets was liable to the creditors in priority to the other devised estates, yet the heir was entitled to contribution from the other devisees (d).

It has already been mentioned, that to enable the devisee of a mortgaged estate to claim exoneration, the debt must have been the proper debt of the mortgagor (e). The following case, decided by Lord Langdale, on that point is important, on account of the principle which it involves, and the observations made by the Vice-Chancellor Knight Bruce, in the late cases of *The Earl of Clarendon v. Barham* (1842) (f), upon that case, and *Scott v. Beecher* (g) and *Evans v. Smithson* (h), on which it was founded. Henry Earl of Carnarvon purchased an estate called Marston, for 8400*l.*, which he raised by a mortgage of that and another estate, called Blunsden, and his bond. By his

(a) *Milnes v. Slater*, 8 Ves. 295, 304, 306, 307, and see *Donne v. Lewis*, 2 Bro. 262; *Manning v. Spooner*, 3 Ves. 114; Lord Eldon and Lord Redesdale seem to have considered that a distinction ought to have been taken where the descended estate came to the testator after the date of his will; but in all cases where the principle, that all that is given is what remains, applies, there seems to be no ground on which the devisee can claim to have his estate exonerated out of any property real or personal.

(b) *Barnewell v. Lord Cawdor*, 3 Mad. 456; *Milnes v. Slater*, 8 Ves. 305, Lord Eldon.

(c) Sir J. Leach, *Barnewell v. Lord Cawdor*, *ubi sup.* citing *Watson v. Brickwood*, 9 Ves. 447.

(d) *Biederman v. Seymour*, 3 Beav. 372; the heir now takes as devisee for all purposes, see *Strickland v. Strickland*, 10 Sim. 374.

(e) *V. supra*, p. 335; and Coote, 577.

(f) 1 Y. & Coll. C. C. 708, 712. The Vice-Chancellor Knight Bruce followed the cases mentioned in the text, though disapproving of them; his Honour particularly referred to *Lex Prætor*. 315, where C. B. Gilbert distinguishes between the case where the son is executor, and has received assets of the father; and where the personal estate which he leaves is strictly his own; in *Scott v. Beecher*, *ubi supra*, this passage was not cited.

(g) 5 Mad. 96.

(h) Not reported.

will, made previously to this purchase, he devised the Blunsden estate to his younger son Charles, and his issue ; and he gave all the rest of his estate to his eldest son, Henry George, the second Earl, subject to the payment of his debts and legacies. The personal estate received by Henry George was more than sufficient for payment of the debts and legacies. The Marston estate descended to Henry George. The Blunsden estate went to Charles's daughter Augusta, and on her marriage (1824) it was settled on certain trusts ; Henry George, the second Earl, covenanting to exonerate it from the principal and interest due on the mortgage. Henry George, the second Earl, devised all his estate, real and personal, to Henry John George, the present Earl, subject as to both to the payment of his debts, &c., and to any legacies he might give. By a codicil he devised certain freehold and leasehold estates, including the Marston estate, upon trust, to sell and raise an annuity for his daughter Harriett ; the residue of the rents and produce to be accumulated till the same amounted to 5000*l.*, and then to be laid out in the purchase of lands, to the same uses as his settled estates in Hants ; the residue of the moneys to arise from the devised estates, after securing the annuity, were to be laid out in the purchase of lands to the same uses as the settled estates. In July, 1830, the mortgagee being satisfied that the Marston estate was a sufficient security for the 8000*l.* and interest, that mortgage was assigned to certain trustees to secure the mortgage money. The testator's daughter, Harriett, died in 1836. The testator, Henry George, died in 1833. The question in the cause was, whether the devisees in trust of the Marston estate were entitled to have the mortgage on that estate paid out of the general personal estate of the testator Henry George ; or were to take it *cum onere*. It was contended that Henry George, having received assets, was bound to have exonerated the Blunsden estate, and in effect Marston ; distinguishing this case (*a*) from *Scott v. Beecher* (*b*) ; and that Henry George, having in the settlement of 1824 entered into a personal liability to discharge the mortgage, and bequeathed his estate, subject to his liabilities, to the defendant Henry John George ; he had adopted the debt. The Master of the Rolls, Lord Langdale, agreed that Henry George was liable to exonerate the Blunsden estate out of his testator's personal estate, or, if necessary, the descended estates ; but he considered that in both instances, namely, on the occasion of the settlement, and of the transfer of the mortgage, he made an exclusive charge on the descended (Marston) estate, instead of paying

(*a*) See pp. 215, 216.

(*b*) *Ubi supra*.

off the mortgage, only for his own convenience. Lord Langdale thought that the case of *Scott v. Beecher* distinctly applied; and it followed that the mere circumstance of Henry George being the owner of the personal estate which in his hands was the primary fund, and also of the descended real estate which was the secondary fund, was not a reason why, as between those who were entitled to his personal estate, and those who were entitled to the devised mortgaged estate, the latter should be relieved. Lord Langdale thought that the transactions of 1824 and 1830 did not amount to an adoption of the debt as his own, or to evidence of an intention that the estate should be exonerated; and on the whole his Lordship was of opinion that the devisees of the Marston estate must take it *cum onere* (a).

A testator gave an estate, which was subject to a mortgage, to A., expressly declaring that it should be enjoyed discharged of the mortgage; he appropriated another estate for the payment of all his debts, and gave the residue of his estate, real and personal, to B., free from his debts: the estate appropriated to the payment of the debts turned out not to be sufficient for the payment of the whole of the debts, including the mortgage debt; the question was between A., the specific devisee, and the residuary legatee,—each according to the words of the will being entitled to receive what was given to him discharged of debts—how the debts were to be borne or paid. The Vice-Chancellor Knight Bruce, and the Lord Chancellor on appeal, held, that the residue was liable to pay the deficiency: the testator had expressed no intention on the subject as affecting the state of things that had happened, the case must therefore be determined on principle: the testator had no power to exonerate his estate generally, but he had to exonerate a particular estate, and that he had done: he had also thought that the residue would not have to be resorted to; but as he could not exonerate the residue from payment of his debts, without providing some other sufficient fund for that purpose, the residue, in the events that had happened, must therefore bear its natural burthen (b).

An important question frequently arises where the estate of a deceased person consists of various distinct subjects, each of which is liable to the demands of different claimants by security or otherwise, as to how the different estates and funds may be applied in paying off

(a) *Earl of Ilchester v. Earl of Carnarvon*, 1 Beav. 221-2.

(b) *Brooke v. Earl of Warwick*, Lord

Chancellor, 18th Jan. 1849, MS., and 1 Hall & Twells, 142, 148.

the various claims affecting different portions of the property of the deceased; so as to prevent the assertion of the rights of one claimant turning to the injury of the others, where his rights may be secured to him by an equitable adjustment, the effect of which shall be, that his security and those of the other encumbrancers or claimants, shall all be provided for, at least so far as the funds will extend: and this question may present itself, not only as regards the creditors *inter se*, but as regards legatees, who may be affected, by the funds to which they have to resort having been taken by the creditors (a).

It being the object of the Court of Chancery (b) that every claimant upon the assets of a deceased person shall be satisfied as far as such assets *can*, by any arrangement consistent with the *nature* of the respective claims, be applied in satisfaction of such claims: it has long been settled, that where one claimant has more than one fund to resort to, and another claimant only one, the first claimant shall resort to that fund to which the second cannot resort (c). This, in legal language, is called Marshalling the Assets.

It has been observed that there is not a more useful power in this court than that of marshalling assets and funds; particularly in cases where there are creditors and legacies to children for their portions (d). The principle of marshalling, said Sir J. Wigram, in a late case, may not, perhaps, always be just in practice towards creditors, but the principle is sound and cannot be disputed: one party has two funds to resort to, and the court compels him to resort to that which will leave the rights of others *inter se* undisturbed (e).

On this principle it was established, at a time when simple-contract creditors could only resort to the personal assets for payment of their debts, that if a specialty creditor, whose debt might be recovered from the real assets—that is, a creditor whose debt was secured by a security in which the heirs were bound—received satisfaction out of

(a) *V. supra*, pp. 233, 315, 318, 327, note, 334, 410. The doctrine as regards legatees is treated of in Williams on Executors, p. 1344, *et seq.*, 3rd edit.

(b) I am here following Mr. Cox's note to *Clifton v. Burt*, 1 P. W. 679: in *Aldrich v. Cooper*, 8 Ves. 382, the accuracy of Mr. Cox's statement of the principles of the court is recognized, and *Robinson v. Tonge*, stated in Cox's note, 1 P. W. p. 680, was overruled, as being inconsistent with the principles so laid down.

(c) *Lanoy v. Duke of Athol*, 2 Atk. 446; *Lacam v. Mertins*, 1 Ves. p. 312; *Mogg v. Hodges*, 2 Ves. 53; *Trimmer v. Bayne*, 9 Ves. 209 (4 Russ. 339); *Aldrich v. Cooper*, 8 Ves.

388; and see *Ex parte Stephenson*, xii. Jur. 8. It does not appear to me that the maxim, *Nemo ex alterius detrimento fieri debet locupletior*, on which the author of the Treatise on Equity, and after him Mr. Justice Story, found this doctrine, is at all applicable.

(d) Lord Harcourt, *Hanby v. Fisher*, from De Grey's MS., cited 2 Coll. p. 514; and see 2 Coll. 497, p. 507: see also Ram on Assets, ch. xxviii. p. 410, where this subject is treated at large, and all the important cases down to the date of the publication are collected.

(e) *Per* Vice-Chancellor Wigram, *Johnson v. Child*, 4 Hare, 94; *Savage v. Lane*, 6 Hare, p. 39.

the personal assets, the simple-contract creditors should stand in the place of the specialty creditor against the real assets, whether they were devised or left to descend (*a*), so far as the latter should have exhausted the personal assets in payment of his debt (*b*). Formerly the court would control the creditor's right of election to resort to the real or personal fund; but the practice of marshalling being in general sufficiently protective of the equity of other creditors, has rendered such controlling interference in most cases unnecessary (*c*). In marshalling, it must be observed that simple-contract creditors, and the same principle will apply to all others who seek to have the benefit of this process, are not entitled to have a larger fund raised out of the real estate than the personal estate originally amounted to (*d*). The covenantees in a voluntary bond, though they are not entitled to compete with creditors for valuable consideration even by simple contract, are entitled to stand in the place of mortgagees who have been satisfied out of the funds applicable for payment of debts (*e*).

Lord Eldon observed, that in order that the doctrine of marshalling may hold between two creditors, both must be creditors of the *same* person, and have demands against funds, the *property of the same person*. "But it was never said," observed his Lordship, "that if I have a demand against A. and B., a creditor of B. shall compel me to go against A. without more; as if B. himself could insist that A. ought to pay in the first instance, as in the ordinary case of Drawer and Acceptor, or Principal and Surety, to the intent that all the obligations arising out of these complicated transactions may be satisfied: but if I have a demand against both, the creditors of B. have no right to compel me to seek payment from A., if not founded on some Equity, giving B. the right for his *own sake* to compel me to seek payment from A." (*f*).

In a case before Sir J. Leach, a mortgagee having realized his security, sought to prove in the Master's office, under a Decree for the administration of the mortgagor's Estate, for the full amount of his

(*a*) *Sagitary v. Hyde*, 1 Vern. 455; *Selby v. Selby*, 4 Russ. 341.

(*b*) *Anon.* 2 Ch. Ca. 4; *Sagitary v. Hyde*, 1 Vern. p. 455; *Neave v. Alderton*, 1 Eq. Ab. 144, pl. 21; *Wilson v. Fielding*, 2 Vern. 763; *Galton v. Hancock*, 2 Atk. 436.

(*c*) 2 Fonbl. p. 299; see Mr. Fonblanque's observations as to where such interference may still be necessary or proper; *ibid*.

(*d*) *Cradock v. Piper*, 15 Sim. 302.

(*e*) *Lomas v. Wright*, 2 My. & K. 775.

(*f*) *Ex parte Kendall*, 17 Ves. p. 520; this

passage would probably have been put in rather different language by Mr. Swanston or Mr. Walker. Devaynes had been a partner in a firm, of which there were four surviving partners: "Unless," said Lord Eldon, "the creditors of the four could establish that it was just and equitable that Devaynes' estate should pay in the first instance, they have no equity to compel a man to go against that estate who has resort to both funds;" this subject will be further considered in Vol. iii. title *Partnership*.

debt: it was insisted that the mortgage was quite independent of his claim as a creditor against the general assets, that he might therefore, according to the general rule, pursue all his remedies concurrently; but Sir J. Leach, adverting to the rule above referred to, that he who has two funds must *first* resort to that which he only can touch, carried it to this extent, that he would not permit the mortgagee to prove for more than the deficiency of the proceeds of the mortgage to satisfy his debt (a); but this decision has not been approved (b). On the same principle, a wife is protected from her paraphernalia being taken by creditors, if the assets, real and personal, are sufficient for payment of debts without resorting to the paraphernalia (c). Where specialty creditors have exhausted the personal Estate, they will not be let in to any participation in the Equitable assets until the simple-contract creditors have first had so much paid to them as will put them on an equality with the specialty creditors in proportion to the amount of their respective debts (d).

Legatees, as has been already adverted to, claiming only from bounty, stand in a somewhat different situation from creditors. Where lands are specifically devised, the legatees shall not stand in the place of the creditors against devisees (e): where nothing appears but certain devises and bequests, it must equally be the intention of the testator that the devisees should have the estates devised to them, as that the legatees should have their legacies; and if there should be no fund to pay the legacies, which the testator must be taken to have known, they are payable out of the personal estate only: it requires some expression to that effect in the will to enable the legatees to diminish the interests given to the devisees, to the extent of making them even participate in payment of

(a) *Greenwood v. Taylor*, 1 R. & M. 187. Sir J. Leach said, "The question did not depend on the rule in bankruptcy, that a mortgagee who seeks to prove must first have the estate sold, and prove for the deficiency."

(b) Lord Cottenham, in *Mason v. Bogg*, 2 My. & Cr. 448, observed, in regard to *Greenwood v. Taylor*, "With respect to the principle of that case, it is to be observed, that a mortgagee has a double security; he has a right to proceed against both, and to make the best he can of both: why he should be deprived of this right because the debtor dies, and dies insolvent, it is not easy to see:" see, as to this point, Williams on Executors, 1459, where the other authorities are collected.

(c) *Tipping v. Tipping*, 1 P. W. 729-30; *Tynt v. Tynt*, 2 P. W. 542; 2 Coll. 507.

(d) *Soames v. Robinson*, 1 My. & K. 500;

Bailey v. Ploughman, Moseley, 95; cited *sup.* 314, 315, 318.

(e) *Clifton v. Burt*, 1 P. W. 678; *Scott v. Scott*, Ambl. 383; S. C. 1 Eden, 458; *Hamly v. Fisher*, Dick. 105; S. C. Ambl. 128; *Forrester v. Lord Leigh*, Ambl. 172-174; *Keeling v. Brown*, 5 Ves. 359; Lord Eldon, *Aldrich v. Cooper*, 8 Ves. p. 397; *supra*, p. 327. Until the late Wills Act, no one could devise any estate of which he was not seised, so that a residuary devise was specific, and affected only the estates of which the testator was seised at the date of his will; now a residuary devise carries all the real estate which the testator may have subsequently acquired; but this would not seem to make any difference as regards the principle adverted to in the text: see however and consider *Tombs v. Rock*, 2 Coll. 495.

the debts; the personal estate being the natural fund for the payment of debts, and the residue after payment of the debts, as the testator must also be taken to have known, being the only fund applicable to the payment of simple legacies. But of course, if the testator expresses his intention to prefer the pecuniary legatee to the specific devisee or even to a specific legatee, or if that intention must be necessarily implied from the context, the court must give effect to it (a). Where the testator has left any part of his real estate to descend to his heir, there the legatees have the same equity as simple-contract creditors, as against the real estates descended; the bounty of the testator towards the legatees is thus effectuated, without interfering with any other object of his bounty (b).

Now that, by the statute 3 & 4 Will. IV. c. 104, simple-contract creditors may proceed to recover payment of their debts against the real estate they have a double fund: the same principle will therefore apply in favour of the legatees as against descended estates, in case simple-contract creditors should exhaust the personal estate, as was formerly applied to the case of specialty creditors (c). In the late case of *Tombs v. Roch* (1846), before referred to, it was insisted by the devisees that the Statute of Fraudulent Devises, 3 & 4 Will. & M. and the Statute of 1833, namely, 3 & 4 Will. IV. c. 104, were intended for the benefit of creditors merely, and that they were not intended to advance the rights or improve the condition of legatees. This

(a) Sugd. Law of Prop. 422, referring to 3 Bli. N. S. 108; and see *Creed v. Creed*, 1 Dru. & W. 424. Sir E. Sugden, in p. 424 and the following pages of his late valuable work above referred to, enters into a full consideration of the important case of *Spong v. Spong*, 3 Bli. N. S. 84 (*sup.* p. 327): and in page 426, Sir Edward, with a view to its being clearly understood what was the effect of that decision, examines and comments upon Lord Cottingham's view of that case in *Mirehouse v. Scaife* (*supra*, 328). Sir Edward also states the case of *Creed v. Creed*, 1 Dr. & W. 416; 11 Cl. & Fin. 491, which is also an important case as to the question of priority, as between persons having legacies or annuities directly charged on the real estate, such legacies and annuities being considered as specific not in terms but from the nature of the property on which they are charged, and legacies given generally and charged on the lands in the event of the personal estate not being sufficient not so as to be considered to be specific; *Willox v. Rhodes*, 2 Russ. p. 452, being cited to this point: annuities and legacies stand upon the same footing in this respect; *Creed v. Creed*, 1 Dru. & W. 424.

(b) *Culpepper v. Aston*, 2 Ch. Ca. p. 117; *Bowman v. Reeve*, Prec. Ch. 578; *Tipping v. Tipping*, 1 P. W. p. 730; *Lucy v. Gardener*, Bunb. 137; *Lutkins v. Leigh*, Forrest. p. 54. "In the case of legatees against assets descended," said Lord Eldon, "a legatee has not so strong a claim to this species of equity as a creditor. But the mere bounty of the testator enables the legatee to call for this species of marshalling; that if those creditors, having a right to go to the real estate descended, will go to the personal estate, the choice of the creditor shall not determine whether the legatees shall be paid or not. That in some measure," added his Lordship, "is upon the doctrine of assets; but with relation to the fact of a double fund, both are in law liable to the creditors, and therefore by making the option to go against the one, they shall not disappoint another person, who the testator intended should be satisfied;" *Aldrich v. Cooper*, 8 Ves. 396. I have not here, or in p. 828, followed Mr. Vesey's punctuation; indeed it is seldom to be implicitly followed.

(c) See Williams on Executors, 4th edit. p. 1460.

called forth the following remarks from the Vice-Chancellor Knight Bruce:—

“The equity of marshalling arises from a creditor’s power to resort, not from the *mode* in which he acquired the power of resorting,” (viz., whether under the Act of Fraudulent Devises, or for making Real Estates liable for Debts, or otherwise,) “to each or either of two funds belonging to the debtor whose rights, subject to the debt, have become divided; and though,” said the Vice-Chancellor, “I do not forget the passages to be found in the reports of *Galton v. Hancock* (a) and *Forrester v. Lord Leigh* (b), it seems to me impossible, consistently with the principle of decisions of the highest authority, or consistently with any legal principle, to take the view of the effect and consequences of a liability to creditors, creditors created merely by statute, that the devisees take in this case: certainly the liability in general of personal estate in the first instance to the debts of a deceased debtor, the intent of the Statute of Fraudulent Devises, and the intent of the Statute of 1833, do not, in my judgment, establish their proposition.” “The argument,” added his Honour, “seems in substance not to stop short of asserting that inasmuch as it is by statute that copyholds are assets for creditors, and freeholds for simple-contract creditors, therefore there cannot be marshalling for legatees against descended copyholds, or in respect of simple-contract debts, against descended freeholds: it will surprise me exceedingly to hear of such a doctrine having met, or meeting, with support or acceptance” (c). And if, though specifically devised, the land is made subject to all debts, that distinguishes the case, for there is a double fund; and as by that denotation of intention the creditor has a double fund, the land devised and the personal estate, he shall not disappoint the legatee (d).

Legatees, as indeed may be collected from what has been already stated, are not entitled to stand in the place of bond creditors, and to have satisfaction out of the real estate devised (e); the creditors have no specific lien on the lands devised, and it cannot be supposed that the testator intended to diminish the estate devised by a deduction on account of general debts: the same principle will still apply as regards simple-contract creditors, for they have only the same remedies as were given to specialty creditors before the act.

But where the creditor has a specific lien on the land, as a mortgage

(a) 2 Atk. 424.

(b) Ambl. 171.

(c) *Tombs v. Roch*, 2 Coll. 499.

(d) And see *Aldrich v. Cooper*, 8 Ves. 397, Lord Eldon; *Hanby v. Roberts*, Ambl. 129,

Lord Hardwicke; and *Foster v. Cook*, 3 Bro. p. 347.

(e) Dict. *Herne v. Meyrick*, 1 P. W. 203; *Forrester v. Lord Leigh*, Ambl. pp. 172-174; *Scott v. Scott*, Ambl. 383.

created by the testator, and it is presumed that the same principle will apply to a judgment registered prior to the death of the testator, the assets will be marshalled as well against real estate devised as against the descended estates: so that, in case of a deficiency of the personal estate, the legatee will be entitled to stand in the place of the mortgagee against the estate mortgaged, or the judgment creditor against all the estates devised on which he has a lien by his judgment (at least if judgments are to be put on the same footing as mortgages), to such extent as they may have been paid out of the personal estate (a). In the late case of *Johnson v. Child*, the Vice-Chancellor Wigram held, in a case involving special circumstances, on the general principle, that a legatee of a leasehold estate must take *cum onere*, there being a deficiency of the personal estate to pay the debts and general legacies (b).

Lord Hardwicke (c) laid down that, "If one having land and personal estate makes his will, being indebted by specialty, and he gives specific legacies, and then gives the rest and residue of his real and personal estate; if the creditors exhaust the personalty, the legatees shall stand in their place and come upon the residuary devisee, because he has only the rest and the residue:" this only means, said Lord Cottenham, in *Mirehouse v. Scaife* (d), adverted to below, that as between a specific legatee of personalty and a residuary devisee of land, the land shall be first applied in payment of specialty debts, which Lord Cowper had before said in *Long v. Short* (e). In *Mirehouse v. Scaife*, where Lord Cottenham examined the leading cases on this subject, including *Hanby v. Roberts*, and *Spong v. Spong* (f), in the House of Lords, it was held that there was no equity on the part of general pecuniary legacies to have the assets marshalled, so as to throw the debts upon the real estates taken under a residuary devise of real and personal estate (g).

(a) *Lutkins v. Leigh*, Forrest. p. 54, followed by Lord Hardwicke, *Forrester v. Lord Leigh*, Ambl. p. 172; dict. note to *Davis v. Gardiner*, 2 P. W. p. 190; *Selby v. Selby*, 4 Russ. 341; *Wythe v. Henniker*, 2 My. & K. 644-5, following *Forrester v. Lord Leigh*, *ubi supra*; and see *Tombs v. Roch*, 2 Coll. 497. The Vice-Chancellor Wigram, in *Johnson v. Child*, 4 Hare, 94, puts it on the ground that the devisee should take *cum onere*, if the personal estate should be insufficient to pay his debts and legacies: the distinction taken by Lord Talbot between specialty debts and mortgages (Forrest. pp. 54-5), would seem to bring judgment debts, registered, within the rule, for neither heir or devisee can sell, so as to make a good title against the judgment credi-

tor: however it is to be observed that the doctrine of Lord Talbot and Lord Hardwicke, in the above-cited cases, though followed in the instance of mortgages, has not been universally approved; 2 My. & K. 644-5, *sup.*

(b) *Johnson v. Child*, 4 Hare, 87, 95, *supra*: this case is also referred to *infra*.

(c) Dict. Lord Hardwicke, *Hanby v. Roberts*, Amb. p. 127; S. C. 1 Dick. 104, *nom. Hamly v. Fisher*.

(d) *Mirehouse v. Scaife*, 2 My. & Cr. p. 700.

(e) 1 P. W. 403; v. *infra* as to this case.

(f) 1 You. & J. 300; 3 Bli. N. S. p. 84: Lord Cottenham, 2 My. & Cr. 705, observed that *Spong v. Spong*, and *Hanley v. Roberts*, were not cases of marshalling, but of priority of liability to the charge.

(g) *Mirehouse v. Scaife*, on appeal, 2 My.

Where legacies given by the will are charged on the real estate, but not the legacies given by codicil, the legatees under the will, on the general principle above stated, upon a deficiency of the personal assets to pay the whole, will be compelled to resort to the real assets, or the assets will be marshalled so as to produce the same effect (a).

The exception to the rule of marshalling, as regards Charity Legacies, has before been adverted to (b).

In order to entitle a creditor to the benefit of marshalling, the bill must be filed on behalf of all the creditors (c).

There is a considerable conflict of authority as to the right of a legatee to have the assets marshalled in the case of a purchaser exhausting the personal estate, and not resorting to his lien. It has been insisted that the lien exists for the benefit of the vendor alone (d); however, in the late case of *Sproule v. Prior*, the Vice-Chancellor of England decided that the legatees, being objects of bounty, were entitled, as against the heir who took the estate purchased by descent, to have the assets marshalled, so as to give them the benefit of the vendor's lien (e): but where the estate is *devised*, the principle of marshalling does not apply as regards legatees, for all are equally objects of bounty; though it did apply in the case of a devise, as regards simple-contract creditors (f).

We are now to proceed to the doctrine as to the Marshalling of Securities. On the principle above adverted to—namely, that if a party

& Cr. p. 695: the question as to marshalling turned on whether a residuary devise of land must be considered as specific, or as so much as shall remain after payment of the debts to which it was liable, so as to enable legatees to resort to the real estate to the extent of such debts; or, in other words, whether the same terms are to be held to constitute a residuary devise of land, which amount to a residuary gift of personalty, and with the same consequences; v. *ibid.* 705, 706: Lord Cottenham held they are not: there must be something giving to the legatees a title to claim payment out of the real estate in their own right, and then marshalling is excluded; v. *ibid.* p. 707. In the case before Lord Cottenham, the testator had directed all his debts and legacies to be paid within six months after his death, which was held to amount to a charge, v. *supra*, p. 322. See Sir E. Sugden's observations on this case, and on *Spong v. Spong*, Law of Prop. 425-6-7 (*sup.* p. 830, n. (a)); and Lord Cottenham's observations on the dictum of Lord

Manners (*sup.* p. 327, note), 2 My. & Cr. 705.

(a) *Hyde v. Hyde*, 3 Ch. Rep. 83; *Masters v. Masters*, 1 P. W. 422; *Bligh v. Earl of Darnley*, 2 P. W. 620; *Norman v. Morrell*, 4 Ves. 769; *Bonner v. Bonner*, 13 Ves. 379.

(b) V. *supra*, p. 233; and see Williams on Executors, ii. p. 1349, 3rd edit.

(c) *Conolly v. M'Dermot*, 3 Jones & Lat. pp. 263-4.

(d) See Sugd. V. and P. 874-8.

(e) *Sproule v. Prior*, 8 Sim. 189 (and see 1 Yo. & Coll. C. C. 712); Sir E. Sugden objects to this decision; saying, after going through the cases, "Thus we may observe how step by step error becomes confirmed," V. and P. *ubi sup.*; but the error appears to be on the side of justice and good sense; see *Selby v. Selby*, 4 Russ. 340, 341.

(f) Sugd. V. and P. 878; *Selby v. Selby*, 4 Russ. p. 336. Now, by the effect of the statute 3 & 4 Will. IV. c. 104, the estate would be liable for simple-contract debts, as before stated.

has two funds by which his debt is secured, a person having an interest in one fund only has a right in equity to compel the former to resort to the other fund, if that should be necessary in order that both may be satisfied :—if A. has two mortgages for his debt, and B. has one, B. has a right to throw A. upon the security which B. cannot touch, provided that in so doing the rights of the person having the two funds cannot be prejudiced (a).

A person having two funds, said Lord Eldon, will not be permitted by his election to disappoint the party who has one fund only, or to determine by his act whether such person shall be paid or not (b); and equity in such case, to satisfy both, will throw him who has two funds upon that which can be affected by him only, to the intent that the only fund to which the other has access may remain clear to him (c).

On this principle, “a mortgagee, whose interest in the estate was affected by an extent of the Crown, has found his way, even in a question with general creditors, to this relief; that he was held entitled to stand in the place of the Crown as to those securities, which he could not affect *per directum*, because the Crown affected those in pledge to him” (d). It is to be observed that this rule does not subject any fund to a claim to which it was not before subject, but only provides that the election of one claimant shall not prejudice the claims of the others (e).

But, according to Lord C. Sugden, this doctrine cannot generally be enforced against an encumbrancer who is a mortgagee of two different estates; that is, as I understand, where no one offers to pay him off

(a) *V. supra*; *Lanoy v. Duke and Duchess of Athol*, 2 Atk. 446; the other leading cases to be referred to are *Att.-Gen. v. Tyndall*, Ambl. 614; *Trimmer v. Bayne*, 9 Ves. 209; *Averall v. Wade*, Llo. & G. temp. Sugd. 259; a special case; *Gwynne v. Edwards*, 2 Russ. 289, note; *Selby v. Selby*, 4 Russ. p. 341; *Greenwood v. Taylor*, 1 Russ. & M. p. 185; stated *supra*; *Aldrich v. Cooper*, 8 Ves. 388, 395, so often referred to, which contains an ample exposition of the subject, by Lord Eldon, in all its bearings; though sometimes conveyed in language not eminent for propriety or perspicuity: and *Sagitary v. Hyde*, 1 Vern. 455; see also for other distinctions on the same principle, *Ponye's case*, 2 Freem. 51; *Peters v. Erving*, 3 Bro. C. C. 54; *Wright v. Nutt*, *ib.* 326, and 1 H. Bl. 136.

(b) “Suppose another case,” says Lord Eldon, *ubi sup.*: “two estates mortgaged to A., and one of them mortgaged to B., he has no claim under the deed upon the other estate; it may be so constructed that he could not affect that estate after the death of the mort-

gagor; but it is the ordinary case to say a person having two funds shall not by his election disappoint the party having one fund.”

(c) Lord Eldon, *Aldrich v. Cooper*, 8 Ves. 388, 396; and see *Lanoy v. Duke of Athol*, 2 Atk. 446; and see *Porey v. Marsh*, 2 Vern. 182; *Mills v. Eden*, 10 Mod. 489; particularly the latter (2 Fonbl. 299). Lord Eldon also refers to *Lutkins v. Leigh*, Forrest. p. 53, a case of legatees, and to the case of *Paraphernalia*; but he adds, as regards the latter case, “Though this court will not restrain the party, yet he shall not so operate his payment as to disappoint another claim, whether arising by the law or by the act of the testator;” but unless the sale be restrained in this case the widow must be disappointed to this extent, that she cannot get the very jewels or ornaments that have been sold: see *Tipping v. Tipping*, 1 P. W. 731.

(d) Lord Eldon, *Aldrich v. Cooper*, 8 Ves. 388, 395.

(e) 2 Atk. 438; 1 Ves. 312.

and he therefore has to foreclose: whatever may be the equity of the creditor with only one security, the mortgagee of both estates has a right to compel the *debtor* to redeem, or he may foreclose (*a*). Where a second mortgagee, having the security of two estates, filed a bill to redeem against the prior mortgagee of one estate only, who also claimed to be entitled to an equitable lease of the estate comprised in the prior mortgage, under an agreement entered into by the mortgagor subsequently to the second mortgage; it was held by Lord Chancellor Sugden, that the plaintiff could not be compelled in that suit to resort to the estate not in mortgage to the prior mortgagee, in order to give operation to the equitable lease claimed by the prior mortgagee; if he had any right under the agreement independently of his mortgage, it would be to redeem (*b*).

A judgment was entered up against the owner of estates A. and B., which were therefore, as regards those persons to whom the respective estates might pass, *primâ facie* liable in proportion to their respective values: afterwards the owner against whom the judgment was obtained settled estate A. for valuable consideration, covenanting that it was free from incumbrances; and then a second judgment was obtained against him for valuable consideration; he then died. A question as to marshalling arose between the subsequent judgment creditor and the persons entitled to the settled estate. It was contended by the person who had obtained the second judgment, that he was entitled to throw the prior judgment altogether on the settled estate, or, if not, that he had at least a right to demand contribution: Lord Chancellor Sugden held that there was no equity on the part of the subsequent judgment creditor to throw the prior incumbrance upon the settled estate; that a subsequent transaction could not increase the charge on the settled estate (*c*). The persons claiming under the settlement contended that they were entitled to throw both judgments on the unsettled estate. The Lord Chancellor said that even if there had been no covenant, if the owner had settled the estate A. without noticing the judgment, equity would have thrown the whole on the unsettled part in the hands of the original owner; but here there was an express covenant which the court would have specifically enforced (*d*): and the Lord Chancellor held, not only that there was no right to throw any part of the second judgment on the settled estate, but that that estate had a right to be indemnified against both at the expense

(*a*) Lord C. Sugden, *Averall v. Wade*,
Lloyd & G. temp. Sugd. 255.

(*b*) *Gregg v. Arroll*, Llo. & G. 250-1.

(*c*) *Averall v. Wade*, Lloyd & G. 256.

(*d*) *Ibid.* 260, 262; and see *Whitworth v. Gaugain*, *supra*, p. 794.

of the unsettled estate; saying that no subsequent judgment creditor could disturb that right after it had once attached (a).

One Rackster, being seised of Foxall Coppice, and a piece of land (No. 32), mortgaged Foxall in 1792 to Barnes, in 1795 to Hartwright; in 1800 he mortgaged Foxall and No. 32 to Barnes, to secure a further advance, together with what was originally due on Foxall alone, and in 1804 he mortgaged both to Williams; all the subsequent incumbrances were taken with notice; the proceeds of the property were insufficient to pay all the incumbrances, but No. 32 was sufficient to pay the whole of Barnes's demand under both his securities. The question was, whether Hartwright, who had no charge on No. 32, could, as against Williams, compel Barnes to resort to No. 32, so as to make Hartwright the first incumbrancer on Foxall. Williams insisted that the burthen of the first mortgage ought to be borne rateably by Foxall and No. 32. The Vice-Chancellor Knight Bruce was of opinion, that prior to 1804 Rackster had full right, as against every one but Barnes, to deal with No. 32 as he pleased, and that by his subsequent mortgage to Williams the latter took No. 32, subject only to a rateable proportion of the prior charge upon that estate and Foxall, so that Barnes must be paid out of the respective proceeds of No. 32 and Foxall rateably; that the residue of the proceeds of Foxall must be paid to Hartwright, and the residue of the proceeds of No. 32 to Williams (b).

Where a testator devised two several estates for the payment of his debts, and also gave an annuity payable out of one of them, and the trustees sold the estate out of which the annuity was payable; the court decreed that the other estate should stand charged with the annuity (c).

If a mortgagor sells a portion of his equity of redemption for valuable or good consideration, the entire residue, if undisposed of by him, is applicable in the first instance to the discharge of the mortgage, and in ease of a *bonâ fide* purchaser; and it is contrary to

(a) Lord Chancellor Sugden, *ibid.* p. 264; the Lord Chancellor in this case examined the cases of *Hartly v. O'Flaherty*, 1 Beat. 61, decided by Sir A. Hart, and Lord Plunket's reversal of that decision, p. 262; as to which, *v. infra*, and *Hamilton v. Royse*, 2 Scho. & Lef. 315; and *Boazman v. Johnson*, 3 Sim. 377: see as to the principal case, *Barnes v. Rackster*, 1 Yo. & Coll. C. C. 401, p. 403. There is an useful collection of the cases on this subject in the reporter's note, including the doctrine as to contribution by Sureties, Llo. & G. pp. 264-9, as to which *v. infra*.

(b) *Barnes v. Rackster*, 1 Yo. & Coll. C. C. 408-9; and see *Bugden v. Bignold*, 2 Yo. & Coll. C. C. 377; *Barnes v. Rackster* is adverted to in the latter case, p. 393; the Vice-Chancellor considered that the case of *Titley v. Davies*, from Serg. Hill's MS. *ibid.* p. 388, supported his views in the former case.

(c) *Mad. Pr. & P.*, citing 1 Ch. Rep. p. 295; I cannot find the case. Mr. Maddock adds: "and see *Fran. Max. Eq.* 10, where other cases are mentioned, illustrative of the doctrine of marshalling securities."

every principle of justice, said Lord Chancellor Plunket, that a person purchasing from that mortgagor should be in a better situation than the mortgagor himself with respect to any of his rights (*a*).

The right which a subsequent mortgagee has in general of compelling the prior mortgagee, when he has a second fund to resort to, and the common fund is a deficient one, to exhaust the second fund before he touches the common one, equally exists where the mortgagor has become bankrupt (*b*).

We have now more particularly to consider another branch of this subject, namely, the right which a person may have to call for Contribution:—

“Contribution, if it differs from marshalling, does so *in specie* rather than generically, in form rather than in nature. Marshalling and Contribution are each of them between several persons of their rights respectively *inter se*, in respect of a charge or claim, which, affecting all of them, or properties belonging to all of them respectively, has been or may be enforced in a manner not unjust as far as the person is concerned by whom it was or may be enforced, but not just as between the persons or properties liable—a branch of Jurisprudence known to the civil law, and which could not but belong, in some form more or less extensive, to an enlightened system of laws; in ours it is well established and familiar” (*c*). The question as to the right to contribution arises, sometimes upon the instruments themselves; sometimes between persons claiming by gift under the will of a testator: in the latter case it may be stated as a general rule that, for the purposes of this adjustment, every will ought to be read as in effect embodying a declaration of the testator that the payment of his debts shall be as far as possible so arranged as not to disappoint any gifts made by it unless the instrument discloses a different intention (*d*).

Where several estates, or parts of estates, are comprized in one mortgage, and they devolve or become vested by devise, descent or otherwise, upon several persons, the general rule is that each estate, or part of estate, mortgaged, according to its value, shall bear a pro-

(*a*) *Per* Plunket, C., *Hartly v. O'Flaherty*, 1 Ll. & G. temp. Plunket, 219, reversing the decision of Sir A. Hart, C., 1 Beat. 61; which decisions are, as above stated, examined by Sir E. Sugden in *Averall v. Wade*, Ll. & G. temp. Sugden, 252, *supra*, note.

(*b*) *In re Cornwall*, 2 Con. & L. 131. I shall have occasion again to recur to the subject of Marshalling in the next volume.

(*c*) Vice-Chancellor Knight Bruce, *Tombs v. Roch*, 2 Coll. 500. The early cases on the subject of Contribution are collected in 1 Eq. Abr. chap. xviii. p. 113, *et seq.* which Sir A. Hart in *Hartly v. O'Flaherty*, 1 Beatty, 78, referred to with approbation.

(*d*) Vice-Chancellor Knight Bruce, *Tombs v. Roch*, 2 Coll. 502. See as to the qualifications, *ib.* 504-5.

portionate part of the mortgage money (*a*); but this rule is liable to be varied by an intention clearly expressed to be found in the instrument, that one estate shall be primarily liable. As regards what shall be considered as an expression of such intention: where an estate is conveyed, and in the same deed the mortgagor covenants that "for better securing" the payment of the mortgage money he will surrender a copyhold estate (*b*), this is not sufficient to make the freehold estate the primary security (*c*): but in a case where a second estate, which chiefly consisted of mines and the necessary apparatus, was conveyed by a second witnessing part, and it was expressed that it was for further better and more effectually securing the mortgage money, and by way of collateral (*d*) security; Lord Eldon, in giving judgment, said the question must be decided by the effect of the deeds, regard being had to the contents of those deeds and the nature of the property which was the subject of the disposition; and his Lordship held, on the circumstances, without laying down any general rule, that the freehold estate was to be considered as the primary security as between the persons claiming under the mortgagor (*e*).

As regards the question in reference to devisees and legatees: in the case of *Oneal v. Mead* (*f*) it was decided that as between a devisee of a mortgaged fee-simple estate, and a specific legatee of personalty, the devisee shall not have his mortgage paid by the specific legatee, for that would have the effect of defeating the legacy, but shall take the mortgaged estate *cum onere*: *A fortiori* a specific legatee of a mortgaged leasehold shall not have contribution towards his mortgage from specific legatees of other leaseholds. So where the testator had bequeathed three leaseholds to three different persons, one being mortgaged, and directed that his residuary personal estate should pay the mortgage; the residuary estate having turned out to be insufficient, it was held that the legatee of the mortgaged leasehold was not entitled to contribution against the other two (*g*). But where there is a general charge of debts, and then an estate subject to a mortgage is devised to one, and other estates clear of incumbrances are devised to other persons; the devisee of the incumbered estate is entitled to contribution against the other devisees (*h*).

(*a*) *Heveningham v. Heveningham*, 2 Vern. 355.

(*b*) Lord Eldon observed, 2 Russ. 290, that as this provision referred to copyholds, there was a reason for its being in a distinct part of the instrument.

(*c*) *Aldrich v. Cooper*, 8 Ves. 382; *Marquis of Bute v. Cunynghame*, *ubi inf.*

(*d*) It was contended that "collateral" meant "concurrent."

(*e*) *Marquis of Bute v. Cunynghame*, 2 Russ. 275; see pp. 298, 299, 300.

(*f*) 1 P. W. 693.

(*g*) *Halliwell v. Tanner*, 1 Russ. & M. 633; and see *Tipping v. Tipping*, 1 P. W. 730.

(*h*) *Carter v. Barnadiston*, 1 P. W. 505.

It is now settled, that upon the failure of the general personal estate, the devisees and specific legatees shall each, according to the proportional value of the benefits conferred on each, contribute to the payment of specialty debts (a).

A testator after contracting for the purchase of an estate, by his will directed his executors to pay the purchase-money out of his personal estate, and devised the estate to his natural son, giving annuities and legacies to other persons; the personal estate turned out not to be sufficient to pay all: it was held that the son and the annuitants and legatees should all contribute rateably to the deficiency, the direction to the executor to pay the purchase-money was in the nature of a legacy, all therefore were equally the objects of bounty (b).

(a) *Tombs v. Roch*, 2 Coll. 490, approved by Lord Langdale, *Bateman v. Hotchkiss*, xi. Jur. 812, 1847; 10 Beav. 426, 434, stated *supra*. This had been decided (see Raithby's note, 2 Vern. 757) in *Short v. Long*, 2 Vern. 756-7; S. C. by the name of *Long v. Short*, 1 P. W. 402, 404, and *Silk v. Prime*, 1 Bro. 138, n.; but the Vice-Chancellor of England, in *Cornwall v. Cornwall*, 12 Sim. 303, had held that the specific legacies must be exhausted before the real estates were resorted to. In the case of *Tombs v. Roch*, above referred to, the Vice-Chancellor Knight Bruce reviewed the authorities, and examined the principle applicable to such cases in an elaborate judgment, which embraces the principles applicable to the entire subject. In that case the testator (whose will was made after the late Wills Act, and therefore would have carried subsequently acquired property, though he did not appear to have had any such) devised his real estate, so that every portion of it was to be considered as specifically devised; the will also gave specific and pecuniary legacies; there was no charge of debts in the will, nor was any part of the property in mortgage; the assets were wholly legal. The personal estate, not specifically bequeathed, was admitted to be more than sufficient for the payment of the simple-contract debts, but it was insufficient for the payment of the specialty debts, and the question was whether the amount necessary, in addition to the personal estate not specifically bequeathed, to pay the specialty debts, was to fall wholly on the specific legatees, or rateably on them and the devisees; for the specific legatees did not deny their liability to contribute. "Every thing," said the Vice-Chancellor (pp. 500-1), "claimed by each party is claimed under the bounty of the testator;—making to different persons various specific gifts of moveable and immovable chattels and real estate; did the testator wish, did he mean that the portion of them consist-

ing of real estate should be wholly indemnified from his debts by the rest? for that is the question. We have only to refer to the doctrine of what is called Election, to be satisfied of the proposition that a testator must desire the fulfilment of all the provisions of his will according to their apparent purport: if so, then, where one mode of arranging his assets for the payment of his creditors must wholly or partially disappoint those provisions according to their apparent purport, while by another they stand whole or are less invaded, it must surely be right to attribute to him a wish and meaning in favour of the latter course, so far as the objects of those provisions are concerned" (and see *Aldrich v. Cooper*, 8 Ves. 382; 2 Coll. 502): and the V.-Chancellor held that the amount necessary for payment of the specialty debts must be contributed rateably by the specific legatees and devisees; and see the additional note, No. 1. Lord Chancellor Sugden had expressed the same opinion in *Young v. Hassard*, 1 Jones & Lat. 466: and on the question again coming before the Vice-Chancellor of England, in *Gerviss v. Gerviss*, 14 Sim. 654, his Honour adopted the decision of the Vice-Chancellor Knight Bruce, and decreed accordingly; saying he was satisfied that his decision in *Cornwall v. Cornwall*, was erroneous. In these cases, the cases of *Silk v. Prime* and *Hastewood v. Pope*, 3 P. W. 322, *int. al.* are particularly examined. The Vice-Chancellor of England stated, referring also to a statement of Lord Eldon's to the same effect, that the cases in the 3rd vol. of Peere Williams' Reports were not of equal authority with those in the 1st and 2nd vols. In *Bateman v. Hotchkiss*, *ubi supra*, Lord Langdale held that the testator, by the terms of his will, had excluded the general rule as to contribution, xi. Jur. 812; 10 Beav. p. 435.

(b) *Headley v. Readhead*, G. Coop. 50, cited 4 Russ. 340.

The following case, of a late date, affords an instance of three of the points which we have had under consideration—Exoneration—Contribution—and Marshalling—under special circumstance. A testator at his death was entitled to a leasehold property in Lambeth, called the Belvidere wharf, subject to a mortgage for £5000, which was further secured by two policies of insurance for £3000; it was likewise subject to a mortgage for £1500, also secured by the testator's bond, and an assignment of a policy for £3000: he was also entitled to some leasehold premises at Streatham, subject to a mortgage, which was further secured by a policy. The testator, by his will, gave the whole of his real and personal estate, including the Belvidere wharf, to trustees in trust out of the rents of the Belvidere wharf to pay an annuity of £500 a year to his wife; if the rents should fall short (as they did), he directed the deficiency to be raised out of his general personal estate. After the death of the wife the trustees were to stand possessed of the Belvidere wharf, subject to a charge, in trust for the testator's son. The testator gave the residue of his residuary real and personal estate to his trustees, in trust to pay his debts and the legacies and annuities given by his will, and to pay off the incumbrances affecting his leasehold premises at Streatham and Brixton (*sic*), and to stand possessed of what should remain in trust for his son; the wife was one of the executors. After the death of the testator the three mortgages were paid off by means of the policies and the other personal estate of the testator; the assets were not sufficient to pay the other debts and the legacies. It was declared that the widow was entitled to have the leasehold premises at Streatham exonerated from the mortgage debt out of the general personal estate in priority to the legacies and annuities directed to be paid thereout (*a*)—that the widow had no priority in respect of the charge of the deficiency of the rents to pay her annuity as regards the general personal estate—that the mortgages which, at the testator's death, affected the Belvidere wharf and the policies of insurance respectively charged therewith, ought, as between the specific legatees of such wharf and the parties interested in the testator's general personal estate, to be borne by the wharf and the policies, rateably in proportion to their values at the testator's death (*b*)—and that the annuitants and legatees, under the will, as far as might be necessary for the payment of their annuities and legacies, were entitled to have the testator's assets marshalled, and to stand

(*a*) See on the point of priority, *Pepper v. Blomfield*, 2 Con. & L. 198, 204-5.

(*b*) Special directions were given as to how

the apportionment was to be made in respect of each policy.

as incumbrancers on the Belvidere wharf, and in the place of the mortgagees who had been so paid to the extent to which their mortgages ought to have been paid out of the Belvidere wharf, and to be recompensed to that extent, what should have been paid for the principal and interest of such mortgages and subsequent interest on such principal sums, the amount to be raised by sale or mortgage of the Belvidere wharf (a).

The right to Contribution and Exoneration may arise between parties under other circumstances besides those which have been hitherto considered, as in the following cases :—and first as to the right to contribution between the Tenant for life and those in Remainder. Where the mortgage is paid off, the rule now is, as between the tenant for life and remainderman, that the tenant for life, who it is to be observed is under no obligation to pay off the principal, shall contribute, beyond the interest which he is bound to keep down (b), in proportion to the benefit he derives from the liquidation of the debt. If the estate is sold to pay the incumbrance the tenant for life takes the interest of the surplus, the capital belongs to the remainderman (c).

As regards the exoneration of the estate of a Married woman. Where a mortgage is made of the wife's lands, to secure money borrowed by the husband—and in the absence of evidence to the contrary, the loan will be presumed to have been obtained for his purposes—his estate, especially where he covenants to pay the debt, must therefore pay the mortgage money, at the instance of the heir of the wife as well as the wife herself (d); although the husband may have paid off the mortgage, and taken an assignment in trust for himself, his executors, &c. and though by consequence legacies given by the husband may be defeated : for the wife joining in the security does not make it less the

(a) *Johnson v. Child*, 4 Hare, 94-6: the Vice-Chancellor himself raised the point as to marshalling, observing that there was no case precisely like that before him; in giving his final judgment his Honour made the observations contained in the additional note, No. 2.

(b) *V. supra*, p. 307, 344, 345, 546, 551; and *Faulkner v. Daniel*, 3 Hare, 199.

(c) *V. supra*, Sect. x. pp. 345, 551; and the other references, *supra*, note (b). "In general a court of equity endeavours to make every part of the ownership of the estate bear a part of the incumbrance," Lord Hardwicke, *Amesbury v. Brown*, 1 Ves. p. 480; and see Powell on Mortg., i. pp. 311, 312, Coventry's note; ii. 1043, Cov. note (c); 1 Fonbl. book i.

c. 5, § 9, n. (a), p. 386: and as to apportionment of charges, *v. supra*, p. 304, n., 545, 546, 549, 551.

(d) *Tate v. Austin*, 1 P. W. 264, and the cases cited in the notes, p. 266. The legacies were charity legacies, and it was attempted, without effect, to raise a distinction in their favour; charity legacies abate equally as other pecuniary legacies; *Attorney-General v. Robins*, 2 P. W. 25: and see, as to the points in the text, *Lord Huntington v. Lady Huntington*, 2 Vern. 437; 2 Bro. P. C. 1; 1 Ves. 252; *Jackson v. Innes*, 1 Bli. p. 104; *Innes v. Jackson*, 16 Ves. 356; *Ruscombe v. Hare*, 6 Dow, 1; 2 Bli. N. S. 192; Sugd. Law of Prop. 172.

debt of the husband, and her estate is considered as Surety only for the debt (a). Lord Cowper held that all other debts of the husband should be preferred to this (b); however, Lord Hardwicke laid down that the creditors could not stand in the place of the mortgagee against the wife's estate (c). But if the money be borrowed for the use of the wife or for the purpose of discharging debts contracted by her when sole, the mortgage will be considered as a charge on her estate, and no liability will attach on the husband (d); and where at the time of executing the mortgage of the wife's estate a settlement is made, whether before or after marriage, the husband's estate as a general rule will not be considered answerable to the wife's estate for the money borrowed (e); but particular circumstances may affect this as every other general rule.

In the late case of *Lancaster v. Evors* (f), the case was this: In 1772, Sir John and Lady Price mortgaged their respective estates for securing a debt of the husband; the husband died in 1776, and in 1782 the husband's estate was sold and the produce brought into court, and the surplus accumulated, in a suit (*Earl Temple v. Price*) which had been instituted by the mortgagee (*Earl Temple*). In another suit (*Burney v. Scott*) which was in effect a suit to administer Lady Price's estate, an account of her debts was taken, and the whole of her estate was administered (g). Burney, the plaintiff in that suit, was a judgment creditor of Lady Price, and the then plaintiff, his representative, claimed to have his debt paid out of the funds in the cause of *Earl Temple v. Price*, being part of the estate of Sir J. Price, alleging that two of the debts which had been paid out of Lady Price's estate to one Jaques were really debts of Sir J. Price, so that Lady Price was surety only, and that her estate ought to be indemnified to that extent, and he filed a bill against the heir-at-law of Sir J. Price praying accordingly: a great length of time had elapsed before the claim was made; but that objection was disallowed, as the fund was in court (h): it was declared that the legal personal representa-

(a) *Robinson v. Gee*, 1 Ves. 252; *Tate v. Austin*, 2 Vern. 689; 1 P. W. p. 264; *Parterich v. Powlet*, 2 Atk. 384; Jarman, Mortgage, by Sweet, 374.

(b) *Ibid.* 1 P. W. p. 264; see the decree, p. 265.

(c) *Robinson v. Gee*, 1 Ves. 252.

(d) *Lewis v. Nangle*, Ambl. 150; 2 P. W. 664, n.; 1 Cox, 240; Jarman, 374.

(e) *Lewis v. Nangle*, Ambl. 150; *Jackson v. Innes*, 1 Bli. 122, Sugd. L. of P. 174; in which case all the material cases prior to that

date are observed upon by Lord Redesdale, in moving the reversal of Lord Eldon's decree.

(f) 10 Beav. p. 154, affirmed by Lord Cottenham, on appeal.

(g) *Ibid.* pp. 160, 162.

(h) *Ibid.* p. 164; the defendant, the heir-at-law, also alleged that, not knowing of the plaintiff's claim, he had purchased incumbrances to an amount exceeding the fund in court; he was allowed as against the plaintiff, and in priority of him, only the amount he had paid, according to the usual rule; *supra*,

tives of Lady Price(a) ought to be considered as creditors upon the funds in the cause of *Earl Temple v. Price*, for the amount paid to Jacques out of Lady Price's estate (b).

Where the father, tenant for life, and the son, tenant in fee in remainder, join in a mortgage in fee, for a sum of money borrowed by the father for his own use; the son will be considered as a creditor on the real and personal assets of the father to the amount of the mortgage: and Lord Eldon added, that he might call upon the mortgagee to make use of the mortgage against the real and personal assets of his father to work out his relief (c). Payments made by or at the expense of the tenant for life will, as has already been stated, be *primâ facie* considered to be intended to be kept alive for the benefit of the tenant for life and his representatives (d).

The principle of equitable contribution is also applied in regard to Sureties. Where several sureties join in one deed, or the creditor has distinct collateral securities for the same debt; if he sue one of the sureties only, that surety has *primâ facie* a right, on grounds of natural justice independently of contract—excepting as from the universality of the rule a contract is to be implied (and so it has been treated by the courts of common law)—to be placed in the situation of the principal creditor as against the sureties: he is entitled to have all the separate securities which the creditor may hold, though they may have been entered into without the knowledge of such surety, provided all the sureties are bound for the same principal and for the same debt, applied for his indemnity in a fair proportion as between him and the other sureties (e): on the principle that equality is equity, the creditor who can call upon all shall not be at liberty to fix one with the payment of the entire debt; and if the creditor will not make all to

see the references in note (b), p. 841, and *sup.* p. 545 to 550: the authorities on this subject are collected in the note, 10 Beav. 166.

(a) No objection seems to have been taken that they were not the plaintiffs.

(b) Nothing was said as to the right of the executors to interest, or to a corresponding portion of the accumulations of Sir J. Pryce's estate.

(c) *Lord Rosse v. Stirling*, 4 Dow, 442; Sugd. Law of Prop. 577.

(d) *V. supra*, references in note (c), *supra*, p. 841; and *Faulkner v. Daniel*, 3 Hare, 217.

(e) *Mayhew v. Cricket*, 2 Swanst. 185, 191; and the notes, p. 190, 191, & 193. *Stirling*

v. Forrester, 3 Bli. 590, 591; *Deering v. Lord Winchelsea*, 2 Bos. & Pull. 270 (1 Cox, 318, 4 Y. & C. 441); *Hodgson v. Shaw*, 3 My. & K. 191, dict. of Lord Brougham, adopted from Sir Samuel Romilly's argument in *Craythorne v. Swinburne*, 14 Ves. 162; and Lord Eldon's judgment in that case, 164, 165, 169, 171; *Wright v. Morley*, 11 Ves. p. 21; *Parsons v. Briddock*, 2 Vern. 608; *Stirling v. Forrester*, 3 Bli. 575, 590; and see the cases collected in the Appendix to Mr. C. P. Cooper's first volume of Reports, p. 653: in p. 645, *Dowbiggin v. Bourne*, 2 Yo. & Coll. 462, on another point is particularly observed upon. See on this subject, *supra*, Vol. i. p. 661-3.

contribute equally, this court will finally, by arrangement, secure that object. But this principle does not apply where the suretiship of each is a distinct transaction (*a*), or where it is arranged by contract that each surety shall be liable only to a given extent (*b*):—where the sureties all join in the same deed, or by separate deeds for the entire debt, all must contribute equally; where, by separate deeds and for unequal sums, no one can be called upon to contribute beyond the amount to which he is liable on his own deed (*c*). Where a surety gives a bond for one part of the debt, and another security is afterwards given for another part of it, if the surety pays off his part of the debt he cannot claim contribution or indemnity out of the property comprised in the second security. The doctrine, said the Vice-Chancellor of England, never applies to a person who becomes surety at one time, and a security is given to the same creditor either for another debt, or, what is the same thing, for a distinct portion of the debt for which the first security was given. The doctrine, continued his Honour, is stinted to the particular contingency of the debt being one, and the security being given for the same debt at the *time* when the person becomes security for it (*d*). Lord Plunket held, on principle and analogy, that a surety paying and seeking contribution, cannot claim Interest from his co-surety upon the money paid or upon any part of it, but that in the absence of express agreement he is only entitled to contribution at any time towards the sum actually paid (*e*).

If one of three sureties has paid the debt, and the third has become insolvent, the surety who pays is entitled in equity to contribution to the extent of a moiety against the solvent co-surety (*f*). A surety for a surety cannot be called upon to contribute (*g*).

If a man borrow money on the mortgage of his estate for another, he may come into equity as every surety may against his principal to have his estate disincumbered by the actual debtor (*h*): parol evidence may be given to show who is principal and who is surety (*i*). If the

(*a*) *Coope v. Twynam*, Turn. & R. 426.

(*b*) *Swain v. Wall*, 1 Ch. Rep. 80; *Craythorne v. Swinburne*, 14 Ves. 169, 170; *Pendlebury v. Walker*, 4 Y. & C. 424, 442.

(*c*) Lord Eldon, *Craythorne v. Swinburne*, 14 Ves. 165, 169: this case and *Deering v. Lord Winchelsea*, *ubi sup.* are the leading cases on this subject.

(*d*) *Wade v. Coope*, 2 Sim. 155, 160.

(*e*) *Onge v. Truelock*, 2 Molloy, 44; Lord Plunket particularly referred to *Copis v. Middleton*, 1 Turn. & R. 224; which he considered to be a hard case, and contrary to previous authorities; *Bell v. Free*, 1 Swanst. 90; but see

Swain v. Wall, 1 Ch. Rep. 81, where interest by way of damages was allowed. In *Cox v. King*, 9 Beav. 530, Lord Langdale held that though the Master cannot give interest by way of damages on an unliquidated demand, the Court may do so in a case calling for it.

(*f*) *Peter v. Rich*, 1 Rep. Ch. 19; *Hole v. Harrison*, 1 Ch. Ca. 246; Finch, Rep. 15, 203.

(*g*) *Craythorne v. Swinburne*, 14 Ves. 166.

(*h*) *Lee v. Rook*, Moseley, 318; see also the other cases in the note to 2 Powell on Mortgages, by Coventry, 871 a, n. (*c*).

(*i*) Lord Eldon, *Craythorne v. Swinburne*, 14 Ves. 170.

principal creditor omits to sue for the recovery of the debt, the surety may compel him to do so, indemnifying him for the expences (a): in the Court of Chancery you cannot go against the surety whilst the fund previously applicable remains, for the surety has a right to have that fund first applied for his benefit (b).

The debtor himself has no right to insist that the creditor shall refrain from exercising any of his remedies, unless there be some other circumstances raising an equity which shall induce the court to interfere (c).

In concluding the general subject of Trust, or Equitable Estates in real estate, it may be well to observe that, "Where a man brings his bill in this court, where there is a trust, and upon a mere equitable title, there he shall recover the estate; and the court will give him an account of the rents and profits, and that from the time the title accrued, unless upon special circumstances, and then they will restrain it to the time of bringing the bill" (d). But when the right to possession depends upon a purely legal question, and no impediment is suggested, the necessity of removing which would entitle the plaintiff to transfer his complaint from a court of law and bring it into a court of equity, the court will not entertain jurisdiction to order possession to be delivered. So if the plaintiff, in addition to the prayer that possession may be given to him, also prays that the defendant may account for the mesne profits, these profits being of the ordinary character of rents of real estate, the Court of Chancery in such case also will not entertain jurisdiction; and it will not be inferred that the account of such profits cannot be properly taken in a court of law merely from the circumstance that they arise from the produce of a mine; and where a person out of possession of an estate claims equi-

(a) Com. Dig. Ch. 4, D 6; *Ranelagh v. Hayes*, 1 Vern. 190; *Wright v. Simpson*, 6 Ves. 733; *Antrobus v. Davidson*, 3 Meriv. 579; Mitford, Pl. 148.

(b) *Caulfield v. Macguire*, 2 Jo. & Lat. 141, 164; and see the same case as to the surety's right to be indemnified out of the interest made by the fund: the doctrines as to Principal and Surety generally will be considered in the next volume.

(c) *Holditch v. Mist*, 1 P. W. 695. The ground relied upon was that by Act of Parliament all the debtor's property was vested in trustees, to pay his debts; therefore he ought not to be sued, but the Lord Chancellor would not grant an injunction; recognised

by Lord Eldon, *Wright v. Simpson*, 6 Ves. 714, where Lord Eldon disputed the authority of *Wright v. Nutt*, 1 H. Bl. 136, and 3 Bro. 326; and see the notes, 1 P. W. 695; and see 6 Ves. 726, 728-738. For a more ample account of this doctrine, as applicable to Sureties, I beg to refer to Mr. Pitman's work on Principal and Surety, chap. iv. p. 146, *et seq.*: as to how the right to contribution may be lost or affected, *v. ib.* p. 152, *et seq.*

(d) Lord Hardwicke, *Dormer v. Fortescue*, 3 Atk. p. 130. See also *Tates v. Hambly*, 2 Atk. p. 363, and the other cases cited in the notes of the reporters to *Vice v. Thomas*, 470, 4 Yo. & Coll. 550.

table relief, the right to which depends upon the right to possession, the court requires that the party so circumstanced should recover the possession at law before he files his bill for the consequential equitable relief (a).

We now proceed to another description of equitable interest, namely, that which may be acquired in a Chose in action, or other subject which is not transferable according to the Rules of the Common Law.

(a) Judgment of H. R. H. Prince Albert, Lord Warden of the Stannaries, *Vice v. Thomas*, 4 Yo. & Coll. 558-60. The case of an infant is an exception, and there may be other excep-

tions arising from peculiar circumstances. See *Tilly v. Bridges*, Prec. Ch. 252; *Blomfield v. Eyre*, 8 Beav. 258.

ADDITIONAL NOTE.—No. I.

General Rule—Personal Estate liable in First Instance, and its Qualifications in favour of Legatees.—V. supra, p. 839.

“The mere fact that a testator by his will makes gifts,” said the Vice-Chancellor Knight Bruce in *Tombs v. Roch*, which has been so often referred to, “though he does not mention his debts or allude to a debt or a creditor, has the effect of changing the order and manner in which his assets bear the burthen of his debts. If a man dies intestate, owning freehold and personal estate, and indebted by specialty and simple contract, all his debts, whether by specialty or simple contract, whether secured or not secured by mortgage, fall in the first instance on his personal estate, and if that be deficient, on the various portions of his freehold estate, rateably; so that, should it devolve in different lines of descent, each heir suffers equally or in proportion. But let him leave a will making gifts, though wholly silent on the subject of his debts, nor alluding to a debt, or to a creditor, and the case is altered: for the portion, if any, of his freehold estate which he has allowed to descend, though also not mentioned or alluded to, may, in relief of the personal estate, be practically subjected to debts with which, had there not been a will, it would not have been burthened, or would have been to a less extent burthened; and the portion of the freehold estate devised, if mortgaged by the testator for his own debt, may be made practically liable to that debt, in exoneration or relief also of the personal estate, though the will does not in any manner allude to the mortgage. “All this,” said the Vice-Chancellor, “can, I apprehend, only be on the foundation of ascribing to the testator such an intention as I have stated, though the will is silent upon it. In truth,” said his Honour, “I consider it to be perfectly correct in principle, to say that every will ought to be read, as in effect embodying a declaration by the testator, that the payment of his debts shall be, as far as possible, so arranged as not to disappoint any of the gifts made by it, unless the instrument discloses a different intention.” And as regards authority, said the learned Judge, “How indeed else is the bulk, not to say the whole, of the various cases in which marshalling clearly takes place under different circumstances for general as well as specific legatees—how else is the liability of descended to indemnify devised freeholds from debts, secured or not secured by mortgage, to be satisfactorily accounted

for?" (Vice-Chancellor K. Bruce, *Tombs v. Roch*, 2 Coll. 501-2.) The Vice-Chancellor, pp. 503-4-5-6, refers to the qualifications or explanations of the general doctrine; noticing particularly *Pearce v. Loman*, 3 Ves. 135, where it was held that there should be no marshalling in respect of a legacy charged on real estate which had fallen into the real estate by the death of the legatee, and the preference given to a specific legacy over a general legacy.

ADDITIONAL NOTE.—No. II.

Extract from the Judgment of the Vice-Chancellor Wigram in Johnson v. Child,
4 Hare, 94-5.—V. *supra*, p. 841.

"It is not very easy to understand the principle upon which the court has proceeded in some of the cases referred to. The rule of law is clear, that a testator, by devising lands expressly 'subject to a mortgage,' does not thereby declare any intention that the devisee shall take *cum onere*, as against the testator's personal estate. It is equally well settled, that the amount of a testator's general personal estate is not a circumstance from which any inference can be legitimately drawn as to the construction of his will. Yet, if the amount of a testator's personal estate be insufficient for the payment of his debts and legacies, the court discovers an intention on the part of the testator, that the devisee of his real estate, subject to a mortgage, should take it *cum onere*. If the court, in that state of circumstances, had decided upon apportioning the deficiency between the pecuniary legatees and the devisee of the land, a reason might have been found for the determination, in the consideration that the court was dividing a burthen which the caprice of the creditor might otherwise have thrown wholly upon either. But that is not the determination of the court. The court is active in throwing the burthen wholly upon the devisee of the land,—upon the party apparently, and upon the ordinary principles of the court, entitled to be exonerated. And it is remarkable, that in *Forrester v. Lord Leigh* (1), the possibility of this very circumstance is stated as the reason why the court will not, in favour of a pecuniary legatee, marshal the assets, by compelling a bond creditor to proceed against devised estates. I am, however, bound by authority; and upon the authorities I think the specific legatee of the Belvedere leasehold must take the legacy *cum onere*, so far as the pecuniary legatees may be entitled, under the rule referred to, to have their legacies protected. The question then remains, What is the onus with which he must be charged? If the policies as well as the leaseholds had been specifically given, there must have been an apportionment of the mortgage debts between the leaseholds and the policies; and by reasoning analogous to that by which I suppose the court to be governed in holding the pecuniary legatees entitled to come upon the property charged with the debts in the place of the mortgagee, I think the apportionment must still take place. The court compels the creditor to take payment of his debt out of his security, or places the legatees in the same situation as if he had done so, not because the security is specifically bequeathed, but in spite of that circumstance. A rule which, in a specific case, marshals the assets in favour of pecuniary legatees at the expense of specific legatees, is not to be extended beyond the letter of authority, which only confines the creditor to his entire security."

(1) *Amb.* 171.

CHAPTER IX.

EQUITABLE INTERESTS ARISING FROM ASSIGNMENTS OF CHOSSES IN ACTION, POSSIBILITIES, AND CONTINGENT INTERESTS—ASSIGNMENTS OF SUCH INTERESTS AND OF RIGHTS OF ACTION—MAINTENANCE.

General Rule of Common Law that no Possibility, Right, nor Thing in Action shall be assigned.

The true Ground of the Rule.

Exception in favour of the Crown.

Bills of Exchange, &c.

Court of Chancery would not adopt this Doctrine.

Allowed Assignments of Choses in Action, and Possibilities for Valuable Consideration.

Assignment operates as Agreement.

Wright v. Wright.

Lord Hardwicke's Observations in this case.

Buckley v. Newland.

Remedy at Law on Assignment of Chose in Action.

Possibilities coupled with an Interest in Real Estate, now Assignable at Law.

Doctrines of the Court of Chancery in regard to the Assignment of Choses in Action and Possibilities, &c., have given rise to a class of Equitable Interests.

Sometimes the subject of Settlement.

Not competent to an Executor or a Trustee of himself to leave Chose in Action outstanding.

No particular Words or Form necessary in an Assignment of a Chose in Action.

May be by Parol.

Covenant to Assign.

Debts are Goods within the Stat. 21 Jas. I.

To complete a Transfer of a Debt, so as to avoid the Operation of the Statute, all must be done towards Delivery of Possession that can be done.

Notice to the Debtor or Holder of the Property Essential

Particularly incumbent on Trustees of a Settlement to give Notice.

Consequences generally of not giving Notice. Advantages of giving Notice.

Notice to one of several Obligors or Trustees sufficient.

Any actual Notice, though only in Conversation, sufficient.

In the case of an Assignment of a Mortgage, or of the Equity of Redemption, Notice not necessary.

Any Order given by Debtor to his Creditor, having a Fund in his hands, when shewn to the Party, amounts to an Equitable Assignment.

Bill of Exchange.

Any Order appropriating an Existing Fund to a particular Purpose, amounts to an Equitable Assignment.

But the Appropriation must be complete.

Adams v. Claxton.

In cases where Third Persons have been held to be entitled, there has usually been a Consideration for the Actual Assignment or Appropriation.

Mere Voluntary Remittances, with Orders to pay to a Third Person, not sufficient if revoked.

If not revoked Mandatory bound.

Though there may be an Assignment in Equity, which is not such at Law, it seems that what is not a Lien at Law is not a Lien in Equity.

Assignment of a Contract for Sale of an Estate may be made notwithstanding Stat. 32 Hen. VIII. c. 9.

Assignee of Chose in Action, as he is entitled to all the Remedies of Assignor, so he takes it subject to all Equities.

Length of Time, &c. may place the Assignee in a better Situation.

Assignment of Mortgage.

Assignment of a Legacy.

A Legacy may be assigned.

Expression of Intention communicated to the Executor not sufficient.

Where an Assignment is made of a Legacy charged on Land, though in a Register County, it is only considered as an Assignment of the Money.

Where a Legacy is assigned the Executor cannot set off a Debt due to himself from the Legatee.—Assignment by Executor of Legacy given to Himself.

Assignment of Possibilities, &c.

Mere Possibilities may be subject of Contract to be enforced in the Court of Chancery. So may an Interest to be acquired.

Freight to be acquired may be assigned in Equity.

So as to be good against Assignees in Bankruptcy.

The Court of Chancery binds the Property.

Interests not Assignable on the ground of Public Policy.

Half-Pay, &c.

Alimony.

It is only in respect of Assignments of Property that the Court of Chancery will exercise its Jurisdiction.

Right to avoid the Effect of a Legal Instrument on Equitable Grounds, not Assignable.

Doctrines as to Maintenance and Champerty.

Maintenance and Champerty still discouraged at Law and in Equity.

Not Maintenance to purchase an Interest which is the subject of a Suit.

Number of Persons having a common Interest joining in a Suit.

Assignment of Right to file a Bill in Equity.

Prosser v. Edmonds.

IN the preceding pages we have considered that kind of equitable estate or interest in transferable property, which a *cestui que trust* enjoys, where the legal estate is vested in a trustee in trust for

him : we have also considered the nature of the equitable estate or interest which the mortgagor is entitled to in the property mortgaged (a). Some account of the general doctrines of the Court of Chancery in regard to Legacies might be here expected, inasmuch as the legatee, at least until the executor's assent, and afterwards where the demand is for a pecuniary legacy, has an equitable interest only. The nature of legacies, and the origin of the jurisdiction of the Court of Chancery in regard to legatory matters, have been treated of in the former volume (a) ; and some of the more important doctrines, such as in regard to the vesting of legacies, the marshalling of assets in favour of legatees, and many other topics relating to legacies, have been incidentally adverted to ; and the subject of legacies given by way of Portion has been gone into at large in this volume : as Mr. Roper's work, with the large additions made to it by its learned and industrious editor, contains an elaborate exposition of the law relating to Legacies ; and Mr. Justice Williams's very learned work on Executors contains a comprehensive summary of the law on this subject, which I could only repeat in different words, and certainly without any improvement either as regards arrangement, diction, or accuracy ; and as the works above referred to are in every one's hands, I have thought it would be superfluous to enter into the general subject of Legacies. I therefore propose now to proceed to consider that kind of equitable interest which a person may become entitled to in property not assignable at the common law, such as choses in action and contingent interests and possibilities : this is the only remaining equitable interest to which our attention has to be directed (b).

"The wisdom and policy of the sages and founders of the law," says Lord Coke, and this has often been repeated, "have provided that no possibility, right, title nor thing in action shall be granted or assigned to strangers, for that would be the occasion of multiplying contentions and suits" (c). But, in regard to *choses in action*, as the same doctrine has been adopted in every other state of Europe, it may be doubted whether the reason, which has been the foundation of the rule everywhere else, was not also the reason for its introduction in this country ; namely, that the credit being a personal right of the creditor, the debtor being obliged towards that person could not by a transfer of the credit, which was not an act of his, become obliged towards another ; and the more especially as the mode of effecting

(a) *Supra*, Vol. i. p. 193, 194, 581.

(b) Equitable interests, arising from the maxim that "What ought to be done is con-

sidered as done," form the subject of the 4th Section of Chap. vi. *sup.* p. 251, *et seq.*

(c) *Lampel's case*, 10 Co. 48, a.

a virtual transfer which was invented by the Roman juriconsults, namely, by constituting the assignee the mandatory of the creditor (*a*) to sue for and recover the debt in the name of the creditor (*b*), has also been adopted in our system of jurisprudence. It may be observed that the sale of a debt, together with the security was declared to be valid by the Emperor Alexander Severus (*c*), and it was evidently not an uncommon thing for debtors to assign debts owing to them by others to their own creditors; and if notice were given to the debtor, the receipt of the assignor was no discharge: the same principle, as will be presently seen, now prevails in our system of jurisprudence (*d*).

It was once doubted whether an annuity was assignable though assigns were mentioned in the grant, the argument being that it was a mere personal contract, and therefore a chose in action, but it was settled in *Maund's* case (*e*), that express words would make the annuity assignable (*f*): and on the ground that a mere Possibility could not be assigned, it was held at law, that, if a term were devised or granted to one if he should live as long as the term should last and if he should die before the term should end with remainder to another, in such case, so long as the first grantee was alive, the remainderman could not at law assign his interest in the term, it being but a possibility (*g*).

As regards choses in action there was and is at law an exception to the general rule as laid down by Lord Coke in favour of the crown: thus a debt may be assigned to the king though it be not ascertained, as a debt upon a bond for performance of covenants; also the king may assign a chose in action, as a recognizance, obligation, &c., or a thing for which another is accountable, and the king's grantee may sue in his own name, or he may prosecute an extent in the king's name: but the king cannot assign an uncertain thing, as damages for a trespass; and where an obligation forfeited by outlawry is assigned, the grantee cannot sue in his own name unless he has special words enabling to do it (*h*).

There is also at law an exception as regards private persons in the instance of bills of exchange and promissory notes: the property which

(*a*) *Ibid.*; and see Cod. J. viii. 42, 1; Do-mat. lib. iv. tit. 4, § 3, 4.

(*b*) See Pothier's Treatise on Contract of Sale, quoted, Story, § 1040, note.

(*c*) Cod. J. iv. tit. 39, l. 3.

(*d*) Cod. J. viii. 42, 3; v. *infra* as to the same doctrine in the Court of Chancery.

(*e*) 7 Co. 28, a.

(*f*) So it is said, Harg. note to Co. Litt. 144, b.; but *Maund's* case seems to apply to

a rent-charge; the reason given, namely, *modus et conventio vincunt legum*, if applicable to the case of a personal annuity, would extend to annulling a rule founded on general policy, for Lord Coke puts the rule against assigning choses in action on that foundation.

(*g*) 4 Co. 66, b.; Touchst. p. 239.

(*h*) Com. Dig. Assignment, D. [p. 355]; *Miles v. Williams*, 1 P. W. 252 3.

is vested in the payee may be transferred or assigned by him to any other person, which power of assignment, as Sir Wm. Blackstone observes, is the life of paper credit. Still a promissory note is not a chattel in possession; though by statute it is made assignable and transferable according to the custom of merchants like a bill of exchange, yet it is still a chose in action and nothing more (a).

But the Courts of Chancery from the earliest times thought the doctrine on which the common law proceeded in these cases, as too absurd for it to adopt (b): that court, acting upon principles of general jurisprudence, held, that a man may bind himself to do anything which is not in itself impossible (c), and that he ought to perform his obligations (d); and accordingly it has always been held in the Court of Chancery as far back as its records reach, that the assignment of a chose in action (e), founded on a valuable consideration (f), ought to be enforced (g). So the Court of Chancery has given effect to assignments of every kind of future and contingent interests and possibilities in real and personal property, if made for valuable consideration (h). "An assignment," said Lord Hardwicke, speaking of cases of this kind, "always operates by way of agreement or contract amounting in the consideration of this court to this, that one agrees with another to transfer and make good that right or interest, and like any other agreement the court will cause it to be specifically performed (not leaving the assignee to his action for damages for a breach) when the assignor is in a condition to transfer the property, or to cause it to be transferred to the assignee" (i).

(a) 2 Black. Comm. 468-9, Sweet's edit.; 6 Mees. & W. 426, there cited; *et v. supra*, p. 476.

(b) Buller, J., *Master v. Miller*, 4 T. R. 340.

(c) Heinnecc. Jur. Nat. et Gent. c. 14, § 397; 1 Fonbl. 213.

(d) *Ibid.* and 1 Roll. Abr. 419; 5 Vin. Abr. 110, there cited.

(e) As to what legal choses in action are, see Vol. i. p. 180, 181. There are equitable choses in action, as legacies, which, as will presently be noticed, are equally assignable; so the benefit of a decree or judgment may be assigned in equity, and a judgment may be assigned at law in Ireland, *O'Fallon v. Dillon*, 2 Sch. & Lef. 22.

(f) In *Lord Carteret v. Paschal*, 3 P. W. 199, it is stated (*obiter*) that a chose in action may be assigned without consideration, though, if treated only as a contract, the assignment would require a consideration; see 2 Vern. 595, 3 Ch. Rep. 50; *Anon.* 2 Freem. 145; *et v. infra*, *Edwards v. Jones*: as to Voluntary Assignments, *v. infra*, Chapter x.

(g) *Squib v. Wyn*, 1 P. W. 381; *Wright v. Wright*, 1 Ves. p. 411; *Row v. Dawson*, 1 Ves. 333, overruling *Thomas v. Freeman*, 2 Vern. 563; *Anon.* 2 Freem. 145.

(h) *Warmstrey v. Tanfield*, 1 Ch. Rep. 16; *Goring v. Bickerstaffe*, 1 Ch. Ca. 8, and the other cases cited, 1 Fonbl. 215, n. (5); and Raithby's note to *Thomas v. Freeman*, 2 Vern. 563 (though in the case itself the contrary was decided, the Lord Keeper erroneously adopting the maxim, *Equitas sequitur legem*); *Jewson v. Moulson*, 2 Atk. p. 421; *Spraggs v. Binks*, 5 Ves. 588; *Stokes v. Holden*, 1 Keen, 152-3. In that case it was attempted to deduce from this doctrine, that a contingent legacy was forfeited to the crown on the legatee being convicted of felony before the contingency happened; but Lord Langdale held, that as neither the original legatee nor the purchaser had any right immediately to receive and enjoy the property, but it was only in contingency, it was not subject to forfeiture for felony, *ibid.*

(i) *Wright v. Wright*, 1 Ves. p. 411. That

It has already been observed that the courts of law have adopted the doctrines of the Court of Chancery in regard to assignments of

was a case of meritorious consideration only, but the circumstances were peculiar. A father had by deed granted a possibility of a legal interest under an executory devise, to his younger son in consideration of natural love and affection—the heir-at-law of the father, who was otherwise provided for (Belt's note), claimed it after it had come into possession, he having the legal title.

The observations and judgment of Lord Hardwicke in this case are of so much importance in reference to the sale and transfer of possibilities and expectancies, that I have thought it best to set them forth at some length. "It is now established in this court that a chose in action may be assigned for valuable consideration, and this (*i. e.* the contingent interest, the subject of the suit,) may be released as a chose in action may; and then why may not it be put into such a shape as to be disposed of to a stranger, or to make him (*i. e.* the assignor) trustee for a stranger? This court admits the contingent interest of terms for years to be assigned for valuable consideration, though the law does not, and further permits them to be disposed of by will, as in *Wind v. Jekyl* (1 P. W. 572). But that depends on the same reason as a bequest of a chose in action, viz. that the court will not permit an executor, or administrator with the will annexed, to claim in contradiction to the will; and besides will make it good in case of a consideration, as in *Theobald v. Defay*, in the House of Lords, 1729, which was the strongest case, being an act of a feme covert, and yet it was established; and I should not doubt in the case of an assignment of a term of years, not for money, but for a younger child, this court would make it good against the other children, and the executor or administrator. But this is said to be a contingent interest or possibility of an inheritance, and there is no case of making that good; as to which there is no difference in the reason of the thing between that and the allowance of an assignment of a personal thing, or chattel real the heir must take by descent and succession from the ancestor. *Trevor's case* (*Hobson v. Trevor*, 2 P. W. p. 191, Lord Macclesfield) goes a great way: there was an agreement on marriage to settle all such lands as should come by descent or otherwise from his father, which this court carried into execution, notwithstanding an expectancy of an heir-at-law in the life of the ancestor is less than a possibility. In that case it was made good by way of agreement for valuable consideration; then how does an assignment differ from it? An assignment always operates by way of agreement or con-

tract, amounting in the consideration of this court to this, that one agrees with another to transfer and make good that right or interest, which is made good here by way of agreement. So was *Beckley v. Newland* (*infra*) which was as little to be favoured as any case whatever. I agree that to some purposes the present consideration is not so strong as for money. If the question came to be between the child so advanced for love, &c. and a creditor *bonâ fide*, the equity of the creditor will be superior to that of the child; but as against any claiming voluntarily from the father as executor or administrator, or heir-at-law, it is a consideration, and only made so in the second degree where the question is with a creditor who is a purchaser. If the father had entered into a contract for himself and his heirs with his younger son, in consideration of natural love and the advancement he was naturally bound to make for him, that he should have the lands when the event should happen, the heir would be bound, and upon a bill brought against him the court would have decreed it on the foot of the equitable consideration, and within the cases of making good defective executions of powers, and a decree of copyhold without surrender (as to this, see *Ellis v. Nimmo*, *supra*, p. 58, 285, 286, and the other cases referred to in connection with it); this is the same thing, though not in that shape, the court not laying weight on the manner but the substance." "I agree with the plaintiff," added his Lordship, in reference to the then state of the law, "that this would not have been good by a will; and I think all these cases of personal things differ from cases of real estate, in which, if not well devised in point of law, for want of a legal manner of executing the instrument or power in the deviser, the heir may claim in contradiction of the ancestor in a different manner from the executor or administrator (with will annexed), who must claim according to the will."

Beckley v. Newland, 2 P. W. 185, referred to in the last case, was this:—The plaintiff, Beckley, and Sir George Newland, who had married the presumptive heiresses of one Turgis, entered into articles, whereby they agreed that whatever should be given to either of them should be equally divided; Turgis left a considerable property to Sir G. Newland, and the plaintiff filed his bill claiming under the agreement one half. Lord Macclesfield made a decree in the plaintiff's favour, though there was no other consideration than the mutual benefit of the chance; saying the agreement to share was not disappointing the intent of the

chooses in action (a): now, if the obligor in a bond, after notice of its being assigned, take a release from the obligee, and plead it to an action brought by the assignee in the name of the obligor, a court of law will set aside the plea; so if he plead payment, unless he had no notice of the assignment (b); but the action is not considered to be the action of the *cestui que trust*, so far as that a debt due to him from the *cestui que trust* can be set off in such action (c): there is however this inconvenience at law, that the defendant in such action may give in evidence the declarations or admissions of the plaintiff on the record, to defeat the action, although such plaintiff appear to be only a trustee for a third person: evidence of admissions of the parties really interested is also admissible (d).

In ordinary cases, where the plaintiff has an easy remedy by suing in the name of the assignor, the Court of Chancery will not entertain jurisdiction, but leave the party to his remedy at law (e); and, in a late case, the Vice-Chancellor allowed a demurrer to such a bill: but if the assignor refuses to allow his name to be used, or threatens to impede the assignee in his proceedings, or is acting in collusion with the debtor, these are special circumstances, which will justify such a bill being filed (f): and the jurisdiction of the Court of Chancery is so much more effectual in such cases than that of a court of law, that there can be no doubt that in all cases where there is any complexity the jurisdiction will be sustained: the obligee, like every other trustee, whose name is used by the *cestui que trust* as plaintiff in an action at law, has a right, unless there be a stipulation to the contrary, to an indemnity against the costs of proceeding in his name (g).

As regards Possibilities:—Even prior to the late Statute of Wills, a Devise of a Possibility, coupled with an interest, and of a con-

testator, for the devisee would have power to dispose of the estate as he pleased after it came to him.

(a) Vol. i. p. 181: and see *Master v. Miller*, 4 T. R. 340-1; Mr. Justice Buller there gives a history of the law on this topic; he would have abolished the forcing the assignee to declare in the assignor's name.

(b) *Legh v. Legh*, 1 Bos. & P. 447; *Manning v. Cox*, 7 Moore, 617; *Emery v. Mucklow*, 10 Bing. p. 23; see the cases collected, Harrison's Digest, p. 1522; and Chitty on Contracts, 605.

(c) *Tucker v. Tucker*, 4 Barn. & Ad. 745; disputing *Bottomley v. Brooke*, 1 T. R. 621; and *Rudge v. Birch*, 1 T. R. 622. Of Set-off

in Equity, v. *infra*, 3rd Vol.; and *Clark v. Cort*, Cr. & Phill. 154: the statute 2 Geo. II. c. 22, § 13, governs the principle of set-off at law; *et v. supra*, Vol. i. pp. 247, 651.

(d) Smith's Leading Cases, ii. 228, ed. 1840: in the note, p. 236, those cases, in which courts of law have to take notice of equitable interests, are stated.

(e) *Keys v. Williams*, 3 Y. & Coll. 466-7; and see the cases cited by Mr. Spurrier, *ibid.* p. 463, and by the Vice-Chancellor of England in the case cited below.

(f) *Hammond v. Messenger*, 9 Simons, 327.

(g) See *Annesley v. Simeon*, 4 Mad. 390.

tingent interest, whether in real or personal estate, was good at law (a); and possibilities coupled with an interest, not naked possibilities, and contingent interests in real estate, may now be granted and assigned at law; the assignment is no longer a contract only to be carried into effect by the Court of Chancery, but an actual conveyance (b), so that in such cases the Court of Chancery has no longer any occasion to interfere: but assignments of possibilities and contingent interests in personal chattels, and assignments of naked possibilities, are still subject to the exclusive cognizance of the Court of Chancery (c).

The Assignment of choses in action and of possibilities and contingent and future interests in real and personal estate, being, as above stated, allowed to be valid in equity, gave rise to a distinct and important class of Equitable Interests. Choses in action, such as policies of insurance, and contingent interests, and possibilities, may be, and frequently are, the subjects of settlement, and indeed of every kind of disposition of which a trust estate is capable: an assignee of a bond several times removed, has the same rights as the original obligee, and such rights may be the subject of settlement or disposition (d). It is very common in settlements to introduce a covenant on the part of the husband to effect a policy of insurance, and to assign it to trustees, so that the amount, when recovered, may be settled on the wife and issue of the marriage; and not unfrequently the money to be recovered on a bond is settled in the same manner (e).

To constitute an assignment of a bond, judgment, or other chose in action, no particular words or special form is necessary; indeed the same may be said of every equitable assignment, at least where there is a good consideration (f): it is usual to introduce a power of attorney, or an agreement to permit the assignee to make use of the name of the assignor to recover the property; but where these are wanting it is considered in the nature of a declaration of

(a) See *Jones v. Roe*, 3 T. R. 93-98; and the other cases cited, 1 Fonbl. 215, n. (g), and see *Wright v. Wright*, *supra*, p. 853.

(b) See the stat. 8 & 9 Vict. c. 106; *sup.* vol. i. pp. 291-2.

(c) A term for years being an interest in a "tenement" or "hereditament," there is no doubt, I presume, that contingent interests in terms for years are within the provisions of the statute 8 & 9 Vict. c. 106: the statute 9 Geo. II. c. 36, enacts that no "hereditaments" shall be conveyed or settled, &c.; and it has

been held that the statute comprises leaseholds, see the cases collected, Bythewood's Convey. by Jarman, p. 28. As to the assignment of possibilities, &c., in equity *v. infra*, p. 865.

(d) See *Ord v. White*, 3 Beav. 365.

(e) As in *Meux v. Bell*, 1 Hare, pp. 457-459. As to who will be entitled to any Bonus that may be declared on a Policy so settled, see *Courtney v. Ferrers*, 1 Sim. 137; *Parkes v. Bott*, 9 Sim. 388. *V. sup.* Vol. i. 456.

(f) *Row v. Dawson*, 1 Ves. 332; *Malcolm v. Scott*, 3 Hare, 52.

trust (a); and the court has implied, as part of the contract, that the assigning creditor should suffer his name to be used for the purpose of recovering at law the subject of the assignment (b). An assignment of a chose in action may be made by parol (c).

A covenant for valuable consideration to assign a chose in action will operate in the Court of Chancery, as between the parties as an assignment; for this court considers what ought to be done as done, a maxim which has been fully considered in a preceding section; and if such a covenant be made to a creditor, in the absence of fraud, the creditor, on the death of the covenantor, will be entitled to the benefit of the preference thus given to him; for it is not like an attempt to give a creditor a preference not allowed by the rules of law or equity out of the general assets, which cannot be done; by the effect of the covenant the chose in action is removed from the general assets, just as, where a person is entitled to a remainder of a term, he may assign it without its being said to interrupt the course of administration (d).

But some important considerations are to be attended to, in order that an assignment of a chose in action may be good as against third persons. It was decided in *Ryall v. Rowles* (e), that debts are within the statute 21 Jas. I. c. 19, § 11 (f); therefore, in order that an assignment of a debt may be good against assignees in bankruptcy or in insolvency, all must be done that the nature of the case will permit, to complete the transfer. A chose in action does not of course admit of tangible possession or by consequence of delivery (g); but in order that a person may acquire by assignment a complete title to a chose in action as against assignees in bankruptcy or insolvency—and the same principle holds as between a prior and a subsequent purchaser or incumbrancer—everything must be done towards the obtaining of *quasi* possession that the subject admits of; the assignee must do that which is tantamount to obtaining possession, by placing every person who has,

(a) See Butler's note to Co. Litt. 232, b, note (1); *et v. supra*, 853, *et infra*, p. 867.

(b) *V. sup.* p. 854; where a person enters into a covenant with a third person, as trustee for another, the *cestui que trust* cannot institute a suit against the covenantor for a specific performance, without making the trustee a party; *Cooke v. Cooke*, 2 Vern. p. 36; *Cope v. Parry*, 2 Jac. & W. 538.

(c) *Heath v. Hall*, 4 Taunt. 328; *S. C.* 2 Rose's R. 271; *Tibbitts v. George*, 5 Ad. & Ell. 115-16.

(d) Lord Hardwicke, *Lord Townshend v. Windham*, 2 Ves. 6.

(e) 1 Ves. 348, 375.

(f) By that statute, which is re-enacted by 6 Geo. IV. c. 16, § 72, with some verbal alterations, if any bankrupt shall, by consent and permission of the true owner thereof, have in his possession, order or disposition, any *goods* or *chattels*, whereof he was reputed owner, or whereof he shall have taken upon himself the sale, alteration or disposition, as owner, the commissioners may dispose of the same for the benefit of the creditors. The decisions on this statute, as will be again noticed, might have afforded a good test as to whether all has been done that could have been done so as to make a voluntary assignment effectual (g). As to delivery, *V. supra*, Vol. i. p. 184.

within his knowledge, an equitable or legal interest in the matter under an obligation to treat it as his property: for this purpose he must give Notice to the holder of the fund. In the case of a debt, for instance, notice to the debtor is for many purposes tantamount to obtaining possession (a): if the assignee omit to give that notice he is guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired a title, in the actual possession and under the actual control of another person; but if notice be given, the notice converts the debtor into a trustee or *quasi* trustee for the purchaser (b). If a bond be left in the hands of the assignor, he may assign it again, or may show it to any creditor as an evidence of so much money due to him, and so deceive the creditor (c); and such a case is within the purview of the statute (d). In the instance of book debts, notice to the debtor alone is sufficient, for a book debt cannot, in any sense, be the subject of delivery, as in one sense, namely, by the delivery of the security, a bond debt or a policy of insurance may (e).

If shares in a company are purchased by one person in the name of another, and no express notice that the holder is trustee is given to the company; a purchaser, or mortgagee, who gives actual notice to the company—that is, to the directors or managers—will have priority: the notice which the holder has cannot be considered within the rule (f), that notice to one partner is notice to the company (g). But according to the doctrine of the Vice-Chancellor of England, notice to one of the assured, in an insurance company where all the assured are partners, is notice to the company (h).

It is particularly incumbent on trustees, in all cases where a chose in action, such as a bond or other debt or a policy of insurance, is assigned to them in a settlement or in any other way for the benefit of others, to give notice to the debtor or persons liable, for without

(a) And see *Jones v. Gibbons*, 9 Ves. 410.

(b) Sir T. Plumer, *Dearle v. Hall*, 3 Russ. 23; *et v.* p. 12; *Loveridge v. Cooper*, *ib.* p. 30; *Foster v. Blackstone*, 1 My. & K. 297; S. C. 9 Bli. N. S. 332; *Meux v. Bell*, 1 Hare, 73; *ibid.* p. 473. The debtor is a trustee in this sense, that if he pay to the original creditor, it will not be a discharge.

(c) *Ryall v. Rolle*, 1 Atk. 172-77; 1 Ves. Sen. 367, where Chief Baron Parker, referring to the doctrine of the Roman law, *sup.* p. 851, says, "After notice the debtor cannot afterwards justify payment to the assignees;" *et v. Jones v. Gibbons*, 9 Ves. 410.

(d) 21 Jac. I. c. 19, § 11, *ibid.*

(e) *Ex parte Monro*, Buck, 303.

(f) See as to this rule, *Duncan v. Cham-*

berlayne, 11 Sim. 123, *infra*, and *Feltham v. Clark*, 1 De G. & S. 307.

(g) *Martin v. Sedgwick*, 9 Beav. 338; in *Ex parte Hennessey*, 1 Conn. & L. 561; Lord C. Sugden expressed his disapprobation of *Ex parte Waithman*, 4 Deac. & C. p. 412, and see *West v. Reid*, 2 Hare, 249; particularly p. 255, where the authorities are examined, and the practice of particular offices is adverted to.

(h) *Duncan v. Chamberlayne*, 11 Sim. 126; there the fact of the assignment of a policy by one of the assured was held to be notice to all his partners; but see *Martin v. Sedgwick*, 9 Beav. 336, *supra*; *Duncan v. Chamberlayne* was there cited, and *Ex parte Hennessey*, *infra*.

such notice the debtor may pay to the obligee or person legally entitled, or to a subsequent assignee who has given notice; indeed the subsequent assignee for value is entitled to preference, for it was by the default of the persons having the prior assignment, in not giving notice, that the subsequent purchaser was drawn in to advance his money (*a*); and a trustee, to prevent any subsequent fraudulent transfer, independently of the consideration that the assignment is not complete without it, should procure the bond or policy to be delivered to him, and he ought to keep it (*b*); for any default in the performance of these requisites he will be personally liable.

Where the debtor has notice of the assignment, the title of the assignee is perfect as to him; he is, in equity, bound to pay the money to the assignee, and not to the original creditor (*c*). But want of notice to the debtor does not affect the rights of the assignee as against the assignor; as between themselves the agreement subsists, and if for valuable consideration the court will enforce it (*d*): the debtor, however, in the absence of notice may of course pay to the original creditor, or as he may direct, without reference to the right of such assignee, of which he is ignorant (*e*); and if before notice given to the debtor of a prior assignment, a person advances money upon an assignment of the debt, without notice of the prior assignment, and he perfects his title by notice to the debtor; such subsequent assignee will be entitled to priority as against all parties (*f*); and that, notwithstanding the subsequent assignee may have made no inquiry of the debtor, for the inquiry in such case would have been nugatory (*g*).

Notice to one of several obligors, or to one of several trustees, operates as effectually as notice to all, so long as such person remains a co-obligor or trustee, inasmuch as a purchaser, in order to acquire priority, must apply to all (*h*); but if the person to whom notice has

(*a*) *Wright v. Lord Dorchester*, 3 Russ. 49, n. (see 3 Russ. 58); *Dearle v. Hall, Loveridge v. Cooper, Forster v. Blackstone, Timson v. Ramsbottom*, *ubi sup.*

(*b*) *Evans v. Bicknell*, *ubi sup.*; 6 Ves. 174; *Knye v. Moore*, 1 S. & S. 65; *Meux v. Bell*, 1 Hare, 98; *Booth v. Lightfoot*, L. C. 17 Jan. 1844; *Hill on Trustees*, 456.

(*c*) *Row v. Dawson*, 1 Ves. 332; *Ryall v. Rowles*, 1 Ves. 348, 362, 367; *Langley v. Lord Oxford*, Amb. 17.

(*d*) See *Jones v. Gibbons*, 9 Ves. 407, 410.

(*e*) See *Jones v. Gibbons*, *ubi sup.*; *Priddy v. Rose*, 3 Meriv. 107.

(*f*) See *Meux v. Bell*, 1 Hare, 84-5, 95. The cases of *Dearle v. Hall, Loveridge v. Cooper* (*supra*), *Foster v. Blackstone*, 1 My.

& K.; S. C., reported as *Foster v. Cockerell*, 9 Bli. N. S. 332, have established the general rule that in all assignments of equitable interests, other than equitable estates, he who gives notice to the trustees has priority over him that does not, on the principle that without such notice the title is not complete. See 5 Hare, 20, 21, *Wilmot v. Pike*.

(*g*) See *Timson v. Ramsbottom*, 2 Keen, 49; *Meux v. Bell*, 1 Hare, 89. See on this subject, *Lewin on Trusts*, 511, *et seq.*; and *Hill on Trustees*, p. 454, *et seq.*

(*h*) It may be useful to observe that under the stat. 5 Vict. c. 5, § 4, a Distringas may be obtained to restrain the transfer of stock. See Dan. Pr. 1552.

been given has died, or ceased to be a person to whom a purchaser would, in the ordinary course apply, then the notice will not secure a preference to the person giving such notice, for it will not be presumed that the notice was communicated to the co-obligors (a). If an assignment or deposit of a policy be made before an act of bankruptcy, and notice be not given to the insurance company until after the act of bankruptcy, but before the fiat and without notice of the act of bankruptcy, still the assignment is good as against the assignees (b).

The general rule is, that the notice must be sufficient to effect its object, that object being to prevent mistakes as to the property in the chose in action (c); it must be such notice as must reach the party who has to pay (d): but any actual notice is sufficient to secure to the purchaser or mortgagee his priority over a trust fund, though it be only communicated in conversation with one of the trustees (e). Where notice cannot be given to the trustee in whose name the stock assigned is standing, he who first obtains a distringas on the stock will have priority (f). Where a sum standing in the name of trustees is given by a testator as a specific legacy, the executor not having assented to the legacy, the incumbrancer under the specific legatee who first gives notice to the executor is entitled to priority (g).

Where, in the case of a mortgage, the estate in mortgage is assigned, the debt, as before noticed, follows the estate; the estate cannot vest in one person and the right to receive the debt remain in another, so that notice to the mortgagor is not necessary, though a bond may have been given as a collateral security (h): an assignment of a trust estate in land, and a conveyance of an equity of redemption absolute, or by way of security, as has already been mentioned, requires no notice to be given to any one, because each of those subjects is an Estate (i). The interest which a creditor has by the deposit of a deed may be assigned (k).

An order given by a debtor to his creditor (l), directed to a third

(a) *Smith v. Smith*, 2 Cr. & Mees. 231, and other cases cited; *Meux v. Bell*, 1 Hare, 73, 97; *Wise v. Wise*, 2 Jones & Lat. 403.

(b) *In re Styant*, 1 Phill. 105.

(c) Sir E. Sugden, *Ex parte Hennessey*, 1 Conn. & L. p. 564, and see *Martin v. Sedgwick*, 9 Beav. 337.

(d) Sir Edward Sugden, *ubi sup.*; but see *Duncan v. Chamberlayne*, *sup.*

(e) *Smith v. Smith*, 2 Cr. & Mees. 231, the person to whom the communication was made was not the acting trustee: in *Foster v. Blackstone*, *ubi sup.*, the notice was to the solicitor.

(f) *Elty v. Bridges*, 2 Y. & C. C. 486.

(g) *Holt v. Dewell*, 4 Hare, 447, 451.

(h) *Jones v. Gibbons*, 9 Ves. 407; 1 Buck, 303; *v. sup.* pp. 655, 656.

(i) *V. int. alia*, *Jones v. Jones*, 9 Sim. 633 (see the remarks on this case, *Jarm. by Sweet*, 473-4, and *sup.* 642, 764.)

(k) *Hobson v. Millard*, 2 M. & Rob. 343, Rolfe, B.

(l) See *Lord Braybrooke v. Meredith*, 13 Sim. 275, as to exigencies of the Stamp Acts in such cases; see also *Lett v. Morris*, 4 Sim. 611. In the latter case an important question as to the right to call for production of the

person having in his hands funds of the debtor, *in specie*, or in the way of a debt due, desiring him to pay the creditor out of that specific fund, is a binding equitable assignment of so much of the fund or credit, not only against the party giving the order, but his assignees in bankruptcy or on insolvency (*a*). "If he could transfer," said Lord Thurlow, in a case of this description, "he has done it, and it being his own money he could transfer (*b*); the order being shown to the debtor, he is bound (*c*), and the transaction is complete (*d*) even as against assignees" (*e*). So a bill of exchange, drawn in respect of a particular demand in favour of a creditor, has been held to be an assignment in equity of that demand *pro tanto* to the legal holder of the bill (*f*): and it has been repeatedly decided, both at law and in equity, that where a creditor on whose behalf a stake has been deposited by the debtor with a third person, receives notice of that fact, the notice will convert the stake-holder into an agent for and a debtor to that creditor, on the ground that the creditor may have forbore to sue on the faith of the notice he has received (*g*): indeed, as a general rule, any order, writing or act, by which a fund is appropriated to any particular purpose, amounts to an equitable assignment of that fund (*h*). But in all these cases there must be an express engagement or a direction to pay out of the particular fund, amounting to an appropriation of a part of an existing fund for that purpose (*i*): and where the title depends on a direction only, in order to make the transfer effectual, the owner must have done that which puts the fund, or that part of it which is intended to be transferred,

document by the plaintiff when it is admitted in the answer, is decided.

(*a*) *Ex parte Alderson*, 1 Mad. 53; affirmed on appeal, 3 Swanst. p. 292; the debtor had there accepted the order upon him.

(*b*) *Yeates v. Groves*, 1 Ves. J. 281; this was an order to pay out of purchase-money; there was no express acceptance; 4 My. & Cr. 702; *Row v. Dawson*, 1 Ves. 333.

(*c*) *Ex parte South*, 3 Swanst. 393; *Burn v. Carvalho*, 4 My. & Cr. p. 702; in that case there was a distinct contract to give an order to appropriate the funds in question to the discharge of the debt.

(*d*) 1 Ves. J. 282.

(*e*) See the cases cited above, and the Vice-Chancellor Wigram's judgment in *Meux v. Bell*, *ubi sup.* The course of the decisions at law has been that the party receiving the order should in some way enter into a contract to apply the money as desired, or he cannot be sued at law; see *Ex parte South*, *ubi sup.*; *Williams v. Everett*, 14 East, 597.

(*f*) *Schank v. Morland*, before the Vice-Chancellor, 13 July, 1819, Mad. Pr. i. 686, 3rd ed.; and see *Lett v. Morris*, 4 Sim. 607.

(*g*) Vice-Chancellor Wigram's judgment, *Kirwan v. Daniel*, 5 Hare, 493; in that case the modern cases at law are cited. See the observations of the Vice-Chancellor in this case, p. 499, 500, on the doctrine in *Garrard v. Lord Lauderdale*, (*supra*, p. 60.) that notice to the creditor cannot enlarge the effect of the deed which *per se* gives no interest to the creditor; and see Sir J. Leach's observations on that doctrine in *Acton v. Woodgate*, (also *sup.* p. 60).

(*h*) See, in addition to the cases above cited, *Tibbitts v. George*, 5 Ad. & El. p. 116; *Collyer v. Fallon*, Turn. & R. p. 470; *Smith v. Everett*, 4 Bro. 67; *Adams v. Claxton*, 6 Ves. 231. I am now speaking of transfers for value.

(*i*) *Watson v. Duke of Wellington*, 1 Russ. & M. 605; and see *Malcolm v. Scott*, 3 Hare, 45, 55: as to where the direction amounts only to a lien, *v. infra*.

out of his control (a). An act intended to be an assignment, but which is not perfected, will not amount to an appropriation. One William Wood, who had been executor to one Byfield, and who had misapplied part of the assets, had effected a policy on his life: he voluntarily signed a written instrument, and annexed it to the policy by means of a pin, to the following effect:—The annexed policy of insurance (describing it) for securing to my executors, &c., payment of 1000*l.* upon the event of my death, is hereby agreed and intended by me to be vested in Mary Woodyear, interest to be laid out by her upon the trusts stated (which were for the benefit of Mrs. Byfield and her family); but he did not state that it was to be in satisfaction of any debt; the date was false, for Byfield was not dead at the date of the memorandum: the policy and the memorandum were kept by Wood, and no communication was made to the insurance office or any of the parties interested. Wood afterwards assigned all his effects to trustees for his creditors, and delivered the policy and the memorandum to the trustees; the question was (b) whether the written instrument amounted to an appropriation of the policy. Sir William Grant held that it did not. It was originally, said the learned Judge, Wood's own property, it had not ceased to be so, it had not been transferred; and the paper was insufficient to give to any other person a lien so as to prevent the effect of any general or special assignment; he might have destroyed it (c): he had not done all that he might have done; *he might have assigned it* immediately to a trustee upon the trusts of Byfield's will, and he professed to intend to do that; it did not purport to be a final instrument, it rested upon a mere declaration of intention, which could produce no effect whatever (d).

It is to be observed, that in most of the cases above cited in which third persons have been held to be absolutely entitled to the benefit of the assignment or appropriation in their favour, the act has been done in pursuance of some contract or engagement, and there has been an actual consideration for the assignment itself, not merely a consideration which would support such an assignment; or the directions have

(a) *Gaskell v. Gaskell*, 2 *Yo. & J.* 502; there the fund had been by the directions of the owner carried over to certain persons with the intent that they should be trustees for another; but as no notice had been given to the trustees, Lord C. Alexander considered that it was still under the control of the owner; and see *Wheatley v. Purr*, 1 *Keen*, 551.

(b) *Adams v. Claxton*, 6 *Ves.* 226.

(c) *P.* 230.

(d) *P.* 231. Sir Wm. Grant added, "I do not very well know what is meant by an appropriation of the policy to a debt; how a man, sitting in his closet, could, by writing a paper declaring that certain bonds or part of his stock should be applied to a particular debt, appropriate that property."

been given in pursuance of a promise by the debtor to a creditor, in answer to an application to pay the debt out of that particular fund (*a*); but it must be remembered (*b*), that where a remittance of bills or a consignment of property of any kind is made by the owner, not in consequence of any obligation or contract express or implied, but of his own motion, with orders to pay over the proceeds to a third person, this is not an irrevocable appropriation at law (*c*) or in equity, though the third person be a creditor (*d*): nor is a merely voluntary arrangement made by the debtor himself for payment of a creditor out of a particular fund, though communicated to the creditor, absolutely binding so that it cannot be revoked, that is, in the absence of special circumstances, as forbearance and the like on the part of the creditor so as to raise a case of contract or of fraud (*e*): but if there be no revocation, the mandatory it is presumed is bound, on the application of the party for whose benefit the remittance is made, to apply the property according to the directions he has received; and on the death of the mandatory, the property being bound by the trust would not form part of his general assets, nor would it pass to his assignees on his becoming bankrupt (*f*). Nor, on the death or bankruptcy (*g*) of the mandant, it is presumed, would the property so remitted form part of his general assets, in any case where there had been no revocation; but more especially if the mandate had been communicated to the creditor interested in its specific application; and *à fortiori* if it had been acted upon or recognized so as to make the creditor a party to the transaction (*h*).

Though there may be an assignment of a fund or of a part of a fund

(*a*) As in *Burn v. Carvalho*, 4 My. & Cr. 690; 3 Hare, 52-3.

(*b*) *V. supra*, Chap. i. Sect. iii. p. 33.

(*c*) *Taylor v. Lendey*, 9 East, 49; see 1 Mad. 184.

(*d*) *Scott v. Porcher*, 3 Meriv. 664; 3 Hare, 46. The late intelligent and accomplished Mr. Justice Story, in delivering judgment in the case of *Tiernan v. Jackson*, 5 Peters, Amer. Rep. pp. 592-602, entered into an elaborate examination of the cases relating to the right to recover, at law or in equity, under a mandate or order given for the benefit of a third person, of which a summary may be seen in his Commentaries on Eq. Jurisprudence, vol. i. 374, § 1041, *et seq.*; *et v. supra*, Vol. i. p. 458, n. (*b*); *et sup.* p. 59: and see *Wilding v. Richards*, 1 Coll. 664-5.

(*e*) See 3 Hare, 62.

(*f*) *Hassall v. Smithers*, 12 Ves. 122; *De Bernales v. Fuller*, 14 East, 590, note; and 2 Campb. 426; and see *Fitzgerald v. Stewart*, 2 Sim. 342, but that case was on demurrer,

and there was an allegation that the defendant held the money *in trust* to pay the plaintiff; *Thomas v. Tyler*, 3 Yo. & Coll. 262-3; and see *Vance v. Vance*, 1 Beav. 606.

(*g*) See *Burn v. Carvalho*, 4 My. & Cr. 690, but that, as before mentioned, was a case of precedent contract.

(*h*) See 2 Sim. 342; *Tatlock v. Harris*, 3 T. R. 182; *Kirwan v. Daniel*, *ubi sup.* The question, as to the effect of notice to the creditor for whose benefit the remittance is made, simply, without reference to any special circumstances, must remain in doubt until it is settled whether Sir J. Leach's doctrine in *Acton v. Woodgate*, supported as it is by Vice-Chancellor Wigram, *supra*, p. 860, is to be upheld: such a case as *Hassall v. Smithers*, *ubi supra*, where the bills were remitted for the specific purpose of taking up bills outstanding, perhaps affords stronger grounds for considering it as a constituted trust: in *Ex parte Heywood*, *infra*, p. 863, there was notice to the creditors.

in equity, which would not be held such at law (*a*); yet it would seem that when the transaction is such that the party does not intend to make an assignment of an existing fund or a part of it, but only to give a lien—that is, as Lord Eldon defines it, a right to possess and retain (*b*)—on a fund to be realized, the party will not have a lien in equity unless he have a lien at law (*c*).

An assignment of a contract for the sale of an estate may be made notwithstanding the statute 32 Hen. VIII. c. 9 (*d*), for the purchaser from the time of the contract is in equity the owner of the estate, and he may devise, sell or dispose of it in the same manner as if the fee were conveyed to him: there may be reasons indeed which may induce the court to refuse a specific performance, and then all his acts will be avoided; but *primâ facie* the title is in the person who has entered into the contract, and the court not only considers such a contract as lawful, but will compel the assignor to permit his name to be used for the benefit of the second purchaser (*e*).

An assignee of a chose in action, as he is entitled to all the remedies of the assignor (*f*), so he takes it subject to the same equities as it was liable to in the hands of the assignor (*g*): the assignor cannot, generally speaking, give more than he possesses (*h*); if there was any vice affecting the property assigned in his hands, it will equally affect the property in the hands of the assignee, whatever may have been the consideration for the assignment. The assignment of bills of exchange,

(*a*) *Ex parte South*, 3 Swanst. 393.

(*b*) 2 Rose, 357.

(*c*) *Ex parte Heywood*, 2 Rose, 357. There an order was given to a person to whom a cargo was remitted to pay a debt out of the proceeds, which order was communicated to the creditor; Lord Eldon held that the order did not create a lien, it gave no specific interest in the proceeds to the creditor; but he offered to the creditor an issue to try whether he had any lien on the proceeds: on the trial, Lord Ellenborough held that he had not; 1 Starkie, N. P. Rep. 143; 2 Rose, 357.

(*d*) By that statute it is enacted, That no person shall bargain, buy, or sell, or by any means obtain any pretended rights or titles, or take, promise, grant or covenant to have any right or title to any hereditaments [whether freehold or copyhold], unless the seller, &c. his ancestors, or they from whom he claims have been in possession of the same, or of the reversion or remainder thereof, for one whole year next before the said bargain and sale, &c.; the penalty is forfeiture of the value by each,

both buyer and seller: but it made it lawful for any person in lawful possession to buy in any pretended right or title. The intent of the statute was to restrain persons from transferring any disputed right to strangers; iv. Bac. Abr. 495, Maintenance, E.; and Plowd. 88, there cited: there are other statutes on the subject: the whole law is very fully gone into by the Lord Chancellor of Ireland, *Kennedy v. Browne*, 3 Ridgway's P. C. 498; and see 1 Yo. & Coll. 498-9.

(*e*) See Sugd. V. and P. 422-3, 11th ed.: and see *Wood v. Griffith*, 1 Swanst. 56, 58.

(*f*) *Ex parte Lloyd*, 17 Ves. 245; 1 Rose, R. 4.

(*g*) *Coles v. Jones*, 2 Vern. 692; *Davies v. Austen*, 1 Ves. Jun. 247; *Turton v. Benson*, 1 P. W. 496-7; S. C. 2 Vern. 765; 3 Hamil v. Stokes, 4 Price, 161; *Priddy v. Rose*, 3 Meriv. 107; *Ord v. White*, 3 Beav. 366; *Moore v. Jervis*, 2 Colh. 69; 3 Yo. & Coll. 465.

(*h*) See *Perdew v. Jackson*, 1 Russ. 26, 45, 47, 50.

or notes before they are due, is an exception to this rule; they may be enforced by an assignee for a valuable consideration, though no consideration was given by the person who assigned to him; this exception is made in favour of trade, and prevails at law and in equity (a). Length of time and other circumstances may, however, vary the rule and make the case of the assignee for valuable consideration stronger than that of the seller (b). So the assignee of a mortgage as has been noticed in a former chapter, generally speaking, takes it entirely at his risk as to what is due between the mortgagor and mortgagee, upon taking the account from beginning to end, unless the former joins in the assignment (c). If therefore, after an assignment of a mortgage, payments are made to the mortgagee, without notice of the assignment, the assignee must allow such payments; and this, though the assignment of the mortgage be registered, for the registry is not notice for that purpose (d). So where a mortgagee is in possession, without notice from a second mortgagee, he may pay the rents over to the mortgagor; and the second mortgagee, if he has been so imprudent as not to give notice, as he cannot have an account of the by-gone rents from the mortgagor, so he cannot have it from the other mortgagee, though after notice given the first mortgagee is answerable to the second (e). A statement in an assignment of a mortgage, that so much is due for principal, and so much for interest, concludes a mortgagee though not the mortgagor, unless he is a party to the assignment (f): it is therefore ill-advised to take an assignment of a mortgage without making the mortgagor a party, or being made sure as to the sum really due (g). As between the mortgagee and the persons claiming under him, they cannot, *without the privity* of the mortgagor, add to what is due, settle the account, or turn the interest into principal (h); but if a mortgagor permits an assignee to pay the assignor a sum of money, which he, with the knowledge of the mortgagor, represents to be due, he will himself be bound by the transaction (i).

A legacy may be assigned: a share of the personal estate of an in-

(a) *Anon. Com. Rep.* 49; *S. C.* 2 Eq. Ab. 85.

(b) *Lord Hardwicke*, 1 Ves. 123, *Hill v. Caillouel*; and see 1 Russ. 47.

(c) *Matthews v. Wallwyn*, 4 Ves. p. 127; *Chambers v. Goldwin*, 9 Ves. 264, 268; Sir Wm. Grant there notices the doubt which Lord Kenyon had entertained on the subject; *Norrish v. Marshall*, 5 Mad. 479, 481.

(d) *Williams v. Sorrell*, 4 Ves. 389; v.

supra, p. 656.

(e) *Berney v. Sewell*, 1 Jac. & Walk. 650, Lord Eldon.

(f) *Carew v. Johnstone*, 2 Sch. & Lef. 296.

(g) *Matthews v. Wallwyn*, 4 Ves. 127.

(h) *Ib.* 128; and see *Ashenhurst v. James*, 3 Atk. 271; the rule it seems was not so settled in 1690, see *Gladwyn v. Hitchman*, 2 Vern. 135.

(i) *Chambers v. Goldwin*, 9 Ves. 270.

testate not ascertained may also be assigned even without consideration (a); but a mere expression of an intention to give, communicated to the executors, will not in this or in any other case entitle the donee to come to the court to have the gift completed (b). Where an assignment is made of a legacy charged on land in a register county the assignment is treated as an assignment of money charged on land and of money only; it is not therefore affected by the policy of the registration laws, by which conveyances of interests in lands in these counties are required to be registered (c).

Where a legacy is assigned, the executor cannot set off a debt due to himself from the legatee which was incurred without reference to the legacy (d). If an executor assigns a legacy given to him, the assignee takes it subject to the equities which attached on the executor; and therefore, if the executor, though subsequently to the assignment, waste the assets, the assignee can only take so much of the legacy as remains after satisfying the breach of trust (e).

As regards the assignment of Possibilities and Contingent Interests. The alteration of the law in regard to Contingent Interests and Possibilities coupled with an interest in real Estate has already been noticed (f). A naked possibility or expectancy of an heir to his ancestor's estate, or even of the anticipated rights of a person as next of kin, may be the subject of contract in equity, which will be equivalent to an Assignment of the property if and when it shall fall into possession (g). Thus,

(a) See *Petre v. Espinasse*, 2 My. & K. 496, sup. 55: it is analogous to an equitable estate.

(b) In *Cotteen v. Missing*, 1 Mad. 176, Ann Lee Missing being entitled to a residue under a testator's will, the executors wrote to her stating that in their opinion 500*l.* ought to be given by her to Charlotte Missing one of the daughters of the testator; she wrote in answer, "With respect to Charlotte, as you and Mr. Missing say she ought to be allowed 500*l.* I will readily consent to it. I am willing to do anything that is right." Ann Lee Missing, afterwards Ann Lee Lace being dead Charlotte Missing claimed this 500*l.* as a gift. Sir T. Plumer held that the letter was only an intention to give not perfected. To make a complete gift there must be not only a clear intention, but the intention must be executed and carried into effect (*ibid.* 185); here nothing was said as to who was to pay the money, or when it was to be paid, she might have intended to enforce terms, *ibid.* 186: there was another question; namely, revocation by the subsequent marriage. V. *inf.* Chap. x. Sect. iv.

(c) *Malcolm v. Charlesworth*, 1 Keen, 73.

(d) *Whitaker v. Rush*, Amb. p. 407. The ground of the decision, deduced from the principles of the Roman law, was that there was no connection between the demands and no presumptive evidence of an agreement or intention that the one should be set off against the other, so that the debt could not even have been set off against the legatee, *ib.* 408.

(e) *Morris v. Livie*, 1 Yo. & Coll. C. C. 383.

(f) *Sup.* p. 855, and Vol. i. p. 291-2.

(g) *Hobson v. Trevor*, 2 P. Wms. 191; *Beckley v. Newland*, 2 P. Wms. 182. In *Jones v. Roe*, 3 T. R. 88, Lord Kenyon held that the case of an heir, dealing in respect of his hope of succession, is a void contract. Lord Eldon, in *Carleton v. Leighton*, 3 Meriv. 671, (1805,) and *Harwood v. Took*, (1804.) Mad. Pr. 549, 2nd edit., expressed a similar opinion; but from the subsequent expressions of Lord Eldon, as to the effect of *Beckley v. Newland*, and *Hobson v. Trevor*, 3 Meriv. 671-2, it is to be presumed that Lord Eldon only meant that no action at law would lie

in a late case it was admitted that the prospective right of a mother under a settlement, to a sum of money, as next of kin of her daughter at her death, depending upon the double contingency of the daughter dying without issue, and the mother surviving, might be assigned for valuable consideration, and that such assignment would be enforced in the Court of Chancery (*a*). An expectancy or contingent interest may be Sold, and the Court of Chancery after the event has happened will enforce the sale (*b*). A subject to be acquired may be the subject of contract and may be claimed in equity by a purchaser for value under that contract (*c*); thus an assignment of freight to be earned is good in equity, and the assignee for value may enforce it against the assignor, and the party to pay it, when it becomes due (*d*). In like manner an assignment for value of the oil, head matter, and other future cargo of a whale ship will be enforced by the Court of Chancery (*e*), though at law such an assignment is invalid; for at law the thing assigned must have an existence actual or potential at the time of the contract (*f*): and if the assignee does all that he can do to perfect his title, and to gain the only possession the subject is capable of, namely, by sending notice (*g*) to the master and especially if he afterwards procures a delivery of the cargo, the title of the assignee will be good against third persons; thus it cannot be defeated by a judgment creditor, on a judgment obtained subsequently to the assignment, nor by the assignees in bankruptcy of the assignor (*h*): it is fully established that a contract to charge property to be subsequently acquired will be enforced in the Court of Chancery (*i*).

upon such a contract, not that such a contract might not be enforced in equity, thus furnishing another instance of a contract being capable of being enforced in equity, in which no damages could be obtained at law; see 1 Fonbl. 216, note (*k*), *et v. infra, et supra*, Vol. i. p. 646, n. (*b*); and see *Wethered v. Wethered*, 2 Sim. 183; *ibid*, 192; and *Smith v. Baker*, 1 Yo. & Coll. C. C. 229. The case referred to by Mr. Maddock, p. 549, note (*f*), depends upon the same principle as *Stokes v. Holden*, (Rolls,) 1 Keen, 153, *supra*, p. 852; and see Mr. Merivale's note, 3 Meriv. 672.

(*a*) Admitted *Meek v. Kettlewell*, 1 Phill. 347, on appeal; as to which case see the next Chapter, and see *Grey v. Kentish*, 1 Atk. 280. and *Chauncy v. Graydon*, 2 Atk. p. 621, and *Higden v. Williamson*, 3 P. Wms. 132, there cited.

(*b*) *Hobson v. Trevor*, *Beckley v. Newland*, *ubi sup.*; *Wright v. Wright*, *sup.* p. 853; recognized 2 Anstr. 539; *Wethered v. Wethered*, 2 Sim. 183; *Harwood v. Tooke*, *ibid*. 192.

(*c*) *In re Ship Warre*, 8 Price, 269, note; *Curtis v. Auber*, 1 Jac. & W. 526; *Douglas v. Russell*, 4 Sim. 524, 535, affirmed on appeal, 1 My. & K. 488. In this case the doctrine that "*Equitas sequitur legem*" was again attempted to be revived, 4 Sim. 533.

(*d*) *V. supra*, p. 775.

(*e*) *Langton v. Horton*, 1 Hare, 549, 556-7; *S. C.* 5 Beavan, 9, on a point of construction.

(*f*) *Robinson v. Macdonnell*, 5 Maule & S. 236. A man may at law sell the wool to be shorn from the sheep he then has, but not from those he is about to buy.

(*g*) See *Dearte v. Hall*, 3 Russ. 22, before referred to, in which case Sir T. Plumer has thoroughly expounded this principle in its bearing on almost all cases that can occur of equitable assignments for valuable consideration.

(*h*) See 1 Hare, 551; 4 Sim. 536.

(*i*) Lord Cottenham, *Wellesley v. Wellesley*, 4 My. & Cr. 579; *Lyde v. Mynn*, 4 Sim. 505; *S. C.* 1 My. & K. 683.

From the cases above referred to, it will be seen that although the Court of Chancery is said only to act upon the person, yet in these instances as in almost every other instance of the exercise of its equitable jurisdiction in regard to property, the court in effect for all beneficial and equitable purposes binds the property itself. "Whatever," says Lord Thurlow, "is the agreement concerning any subject, real or personal, though in form and construction purely personal and suable only at law, yet in this court it binds the conscience: this maxim I take to be universal, that whenever persons agree concerning any particular subject, that, in a court of equity, as against the party himself and any claiming under him, voluntarily or with notice, raises a trust" (a), and this effect is further secured by the operation of the equitable maxim, that what is agreed to be done for good consideration is considered as done as against all those whose consciences are affected (b).

It is to be observed that there are some subjects which on grounds of Public Policy cannot be assigned; such are the full pay and the half-pay of an officer in the army (c); the same rule applies to the salary of any public officer whose services are due to the Crown or to the public, though those services may not yet have been required. The true distinction is, said Mr. Baron Parke, that a man may always assign a pension given to him entirely as a compensation for past services whether granted to him for life or during the pleasure of others; but where the pension is granted not exclusively for past services but as a consideration for some continuing service, although the amount of it may be influenced by the length of services which the party has performed, it is against the policy of the law that it should be assignable (d). But prize money is not in the nature of military pay, and is therefore assignable (e).

(a) *Legard v. Hodges*, 1 Ves. J. 478, affirmed by Lord Loughborough, 4 Bro. 421; *Kennedy v. Daly*, 1 Scho. & Lef. 373, 380; but see the qualifications, Turn. & R. 469.

(b) *Sydney v. Sydney*, 3 P. Wms. 276. V. *supra*, Chap. vi. Sect. iv. p. 251.

(c) *Collyer v. Fallon*, Turn. & R. p. 474; *Priddy v. Rose*, 3 Meriv. 102, and the cases cited in the note p. 93; *Stone v. Lidderdale*, 2 Anst. 533; *Davis v. Duke of Marlborough*, 1 Swanst. 79.

(d) *Wells v. Foster*, 8 Mees. & W. 151; in this case and *Davis v. Duke of Marlborough*, all the leading cases are cited; and see *Grenfell v. Dean and Canons of Windsor*; *Fiestel v. King's College*, *ubi infra*.

(e) *Alexander v. Duke of Wellington*, 2

Russ. & M. 51; not however *pendente lite*; see *Stevens v. Bagwell*, 15 Ves. p. 156; and see *Tunstall v. Boothby*, 10 Sim. 549; and *Grenfell v. The Dean and Canons of Windsor*, 2 Beav. 544, and the other cases cited in *Fiestel v. King's College*, xi. Jurist, 506, 10 Beav. 499, *et seq.*, where Lord Langdale held that the emoluments of a fellowship were assignable, but see *Berkeley v. King's College, Cambridge*, before the Vice Chancellor of England, *ibid.* 602. The following cases may also be referred to: *Flarty v. Odum*, 3 T. R. 681; *S. P. Palmer v. Bate*, 2 Brod. & Bing. p. 673; as to the office of clerk of the peace, *Ex parte Cossens in re Worrall*, 1 Buck. B. C. 541, as to that of town clerk, as being connected with the administration of jus-

Alimony is a creature of the Ecclesiastical Court, and the Court of Chancery will not exercise any jurisdiction over it, excepting in granting a *ne exeat regno* (a); therefore although where a married woman having a separate estate gives her bill for a debt she has contracted, the Court of Chancery will give the holder a remedy against her income settled to her separate use by preventing her from receiving her separate income whilst the creditor remains unsatisfied (b), a bill drawn by a married woman who has obtained a sentence for alimony cannot be made effectual in the Court of Chancery against her alimony (c).

It was observed in the former volume, and has been repeated in this also, that the only subject of the jurisdiction of the Court of Chancery is property, and it is in respect of some definite property to which the assignor has a title or in the natural course of events may have a title that the court entertains jurisdiction: a right which can only produce property by means of a successful litigation is not a subject which generally speaking the court will recognise as property for the purposes now under consideration. As regards a chose in action indeed, which is admitted to be assignable, a litigation may ensue for the purpose of enforcing the demand, but the litigation is not an essential consequence of the assignment; it is not to be assumed that the party to pay will resist a demand which is founded on a civil contract or obligation; the title is such as *primâ facie* at least would be recognised by third persons, not merely by the party insisting upon it (d): thus in the case above adverted to of the assignment of a bond, it is assumed that the bond is a valid bond, and consequently that there is no doubt as to there being a debt, though the amount may be in dispute; the debt may be paid without suit, so that such an assignment does not necessarily involve the necessity of a suit being instituted (e).

The kinds of possibilities also which have been referred to as capable of assignment in equity have reference to certain property which in

tice; as to the office of assistant parliamentary counsel, *Cooper v. Reilly*, 2 Sim. 560; 1 Russ. & M. 560; and see 5 & 6 Edw. VI. c. 16; and as to the offices in King's Bench and Common Pleas, abolished by 6 Geo. IV. c. 82, 83, and the late acts as to offices in Exchequer, 11 Geo. IV. & 1 Will. IV. c. 58, and 2 Will. IV. c. 110; see *Clarke v. Richards*, 1 Yo. & C. 351.

(a) *Stones v. Cooke*, 7 Sim. 22; 5 My. & Cr. 241.

(b) *Stuart v. Lord Kirkwall*, 3 Mad. 387; *Murray v. Barlee*, 4 Sim. 82; S. C. on appeal, 3 My. & K. 209, 225.

(c) *Vandergucht v. De Blaquiére*, 5 My. & Cr. 243, *et v. sup.* p. 540.

(d) See Lord Abinger's judgment in *Prosser v. Edmonds*, 1 Yo. & Coll. 496, *inf.* 873.

(e) See 1 Yo. & Coll. 497-9, where this illustration is put differently, but the meaning is the same.

the existing state of things on a possible natural contingency will come into possession (a); or which, as in the case of a mere expectancy—for instance, what may be obtained under a will—may possibly come into possession by an undisputed title; but a right to avoid the effect of a legal instrument on equitable grounds—for instance, to set aside a release obtained by fraud,—though there may be the strongest grounds for presuming that the litigation will be successful, is not such a possibility or such a chose in action as can be assigned even in the view of the Court of Chancery; it is only by litigation that the right can be constituted, and the property acquired (b).

Care however must be taken even in cases otherwise unobjectionable that the bargain be not such as to bring it within the common-law doctrines of maintenance (c), or champerty, which is a species of maintenance. Maintenance in general, so far as relates to the present subject, signifies an unlawful taking in hand or upholding of quarrels or sides to the disturbance or hindrance of common right, and is twofold—1. Where one stirs up quarrels and suits in the country in relation to matters wherein he is no way concerned; this kind of maintenance is punishable by fine and imprisonment at the king's suit, whether the matter in dispute in any way depend in plea or not: or 2. Where one officiously intermeddles in a suit depending in any court which no ways belongs to him, by assisting either party with money or otherwise in the prosecution or defence of any such suit; of this second kind of maintenance (and that which more particularly refers to the present subject) one instance is, where a third person interferes and maintains one side, on an agreement or understanding that he is to have part of the thing in dispute, which is called Champerty (d). By the common law all unlawful maintainers are not only liable to render damages in an action at the suit of the party grieved, but may also be indicted and fined and imprisoned (e); maintenance is also made an offence by several early statutes (f).

(a) See *Prosser v. Edmonds*, 1 Yo. & Coll. 481. It is to be observed that in *Williams v. Protheroe*, (3 Yo. & J. 135,) in error, it was held, that an agreement, by which a purchaser of an estate was to have the benefit of certain suits commenced by the vendor to recover rent due previous to the purchase, and that the purchaser should have the benefit of whatever should be recovered for dilapidations, and for which purpose the purchaser was to be at liberty to use the vendor's name, the purchaser paying the expenses, was not void for champerty, and no objection was taken to the

agreement *per se*.

(b) See *Prosser v. Edmonds*, 1 Yo. & Coll. 481. So it has been held in America, as it would be no doubt here, that a mere right of action for a tort is not assignable: Story on Eq. 400.

(c) V. *supra*, Vol. i. p. 686.

(d) Bacon's Abr. title *Maintenance*, vol. iv. p. 488, 6th edit.; see *Hartley v. Russell*, 2 Sim. & St. 252.

(e) Bacon's Abr. *Maintenance*, C., p. 492.

(f) *Ibid.* D., p. 493; and see 2 Inst. 208. Lord Chief Justice Best seems to have thought

Maintenance and champerty are still discouraged both at law and in equity (a), because they promote litigation and lead to oppression. The court in examining into agreements in reference to the objection of champerty does not confine itself to the question whether the agreement falls within some of the old definitions of champerty, but looks to see whether the transaction amounts to champerty in the sense in which at this day champerty is forbidden by law (b). There is no doubt that where there is an agreement by which one party gives to a stranger (c) the benefit of a suit upon condition that he prosecutes it, it is maintenance; but the mere assignment of the subject of a suit cannot be considered as maintenance (d). Some cases have been decided on the ground that the transaction savoured of maintenance or champerty (e). In *Wood v. Downes*, which was the case of an agreement between an attorney and his client, by which the plaintiff sold to the defendant, his solicitor, an estate of which he was not in possession (f), but to recover which legal proceedings were contemplated, Lord Eldon "assuming, as he might infer, that the deed would give the defendant, the solicitor, a benefit of some amount," regarding it as an agreement executed between attorney and client, it could not, said his Lordship, be enforced; and farther, upon the doctrine of champerty, if the defendant had not been an attorney it could not be permitted to stand (g). So in a case where a bond was given at the instigation of the attorney who was prosecuting a suit for the obligor, for 4000*l.* with a defeazance that in case the obligor did not recover an estate or half of it in the suit that he was then prosecuting, the bond should be delivered up, Lord Northington ordered it to stand as a security for the money

that the law which was necessary to be upheld in early times, in the then state of society, (v. *supra*, Vol. i. pp. 342, 686, 688,) might now be relaxed: see *Williams v. Protheroe*, 3 Y. & Jer. 135.

(a) *Wallis v. Duke of Portland*, 3 Ves. 502; and 15 Ves. 156. *Skapholme v. Hart*, Finch, 477, is one of the earliest cases: a counsellor took a bond from his client, conditioned to surrender one moiety of the estate when recovered, before he would engage in the suit; it was ordered to stand as a security only for moneys actually advanced; and that has been the course ever since, when the obligor has come for relief to the Court of Chancery.

(b) *Hunter v. Daniel*, 4 Hare, 429; stated *infra*.

(c) The only relations who can advance money to another, in order to the carrying on a suit, according to Hawkins's P. C. 540, 6th

edit., are a father, a son, or heir apparent, (see *Burke v. Greene*, 2 Ball & B. p. 521,) a master may also make advances to his servant; 4 Bla. Comm. 135. V. *supra*, Vol. i. p. 686. note (c).

(d) Leach, Master of the Rolls, *Harrington v. Long*, 2 My. & K. p. 593; and see *Stevens v. Bagwell*, 15 Ves. 156.

(e) There was a solicitor in the case in most of them; and see *Stone v. Yea*, Jacob, 436; *Bayly v. Tyrrell*, 2 Ball & B. 362.

(f) This is an additional objection, being contrary to the Statute of Hen. VIII., cited *supra*, p. 863; and see *Burke v. Greene*, 2 Ball & B. 521.

(g) Lord Eldon, *Wood v. Downes*, 18 Ves. 122-3; but see Sir J. Wigram's observations on this case, 4 Hare, 431; and see *Conry v. Caulfield*, 2 Ball & B. 268.

actually advanced, "As the defeazance," said his Lordship, "is unconscionable and savours of champerty" (a).

It is not maintenance to purchase an interest in land which is the subject of a suit (b); but in a case where the assignment of a debt proved in a cause contained an indemnity from the purchaser to the seller against the expences which had been incurred or might be incurred by the seller in the prosecution of the suit, and the vendor's name was to be continued as plaintiff in the cause, it was held that the transaction amounted to maintenance (c). A person may clearly assign his equity of redemption in securities held by a third person, even *pendente lite*, without incurring the pains of maintenance (d).

In a late case (e) on the subject of the sale of interests the subject of litigation; the plaintiff and the defendants were mortgagees, the defendants having the prior title under the same mortgagor: on his death a stranger instituted proceedings at law and in equity to recover the property under a title paramount to that of the mortgagor; pending such proceedings, the plaintiff and the defendants entered into an agreement by which the latter agreed to sell to the plaintiff all their interest under their securities for a certain price, and the plaintiff was to indemnify the defendants the prior mortgagees against the past and future costs of the suits and proceedings (f): it was held that the agreement was unobjectionable on the ground of champerty, as the plaintiff had a common interest with the defendants in resisting the proceedings which had been instituted; and notwithstanding the case of *Harrington v. Long*, it was decided that the clause of indemnity, and the fact that the names of the defendants were to be continued to be used in the suits, did not affect the agreement with champerty. So that it may now be considered that such a clause of indemnity will not be sufficient to invalidate a simple case of a purchase of the interest of another (g); nor where it is necessary for the prosecution of the suit, that the name of the vendor should be continued to be used, as it must be where he has the legal estate subject to the contract, will that now be considered as an objection. In the case of a purchase, pend-

(a) *Strachan v. Brander*, 1 Eden, 308.

(b) 2 My. & K. 593; *Hunter v. Daniel*, 4 Hare, 431, *infra*.

(c) *Harrington v. Long*, 2 My. & K. 590; Sir E. Sugden adds to his quotation, *sed qu.*, (p. 423,) and Sir J. Wigram, 4 Hare, p. 430, doubts whether the decision is reconcilable with that in *Hartley v. Russell*, cited in the next note, and he adds, "It is not easy to understand why, in that case, the vendor, in whom the legal interest was, and who was

trustee for the plaintiff, should not have been allowed to join as plaintiff in the suit;" *ibid*. See 2 Sim. & St. 252-3, on this point.

(d) *Hartley v. Russell*, 2 Sim. & St. 252; *Booth v. Creswicke*, *sup.* 668.

(e) *Hunter v. Daniel*, 4 Hare, 420; it is to be noticed that here the purchaser was a solicitor.

(f) See the clauses in the agreement, pp. 422-3.

(g) *V. supra*, n. (c).

ing the suit, of a plaintiff's interest under similar circumstances, the regular and proper course is not to let the suit go on in the name of the assignor the assignee paying the expences, but that the purchaser should file a supplemental bill making the assignor a defendant.

Where a number of persons having a common interest in the same thing by the same title unite in a defence, it cannot be called maintenance: champerty is out of the question; it wants that which constitutes the offence, *alienam litem*. But though the court will not be very strict in observing unguarded expressions, yet it will take care not to encourage such combinations; it might operate materially to impede the course of justice if persons uniting in this manner against an individual, could carry it beyond the immediate purpose in which they are jointly interested. Where the rector threatens to attack the farm moduses in which the occupiers in the parish are jointly interested, that will not justify an agreement to assist any one whom he may attack, whether interested in that common defence or not (*a*). A person hearing or believing that he has an interest in the subject of dispute and *bonâ fide* acting in the suit—for the authorities go as far as this,—may lawfully assist in the defence of that suit (*b*).

In *Prosser v. Edmonds* (*c*), before referred to, the question arose whether or not a party who either becomes a purchaser for a valuable consideration, or who takes an assignment in trust of a mere naked right to file a bill in equity to set aside a transaction for fraud, or on any other merely equitable ground, shall be entitled to become plaintiff in equity in respect of the title so acquired: Lord Chief Baron Abinger decided that he could not; it was but the purchase of a mere right to recover, a dealing for a suit in Chancery (*d*). All our cases, said his Lordship, of maintenance and champerty, are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce; there are many cases where the acts charged

(*a*) Sir Thos. Plumer, Master of the Rolls, *Stone v. Yea*, Jac. 434-5: that was a bill filed for contribution under such an agreement under seal, after a great lapse of time, (though less than twenty years,) which for that and for the reasons in the text, was dismissed with costs. One of the questions raised by Sir T. Plumer, in the case of *Cholmondeley v. Clinton*, (2 Jac. & W. 135-6,) was whether a devisee and heir-at-law could join in a suit claiming an equity of redemption, on an allegation that a ques-

tion having arisen as to which was entitled, they had agreed to join and divide the subject-matter between them; he seemed to think it was champerty.

(*b*) *Hunter v. Daniel*, 4 Hare, 432; Hawkins, Pl. C. i. p. 456, 8th edit., there cited; and see *Findon v. Parker*, 11 Mees. & W. 682; *Pechell v. Watson*, 8 Mees. & W. 691; *Flight v. Leman*, 4 Adol. & Ell. N. Rep. 883.

(*c*) 1 Yo. & Coll. 496.

(*d*) See *Bayly v. Tyrrell*, 2 Ball & B. 363.

may not amount precisely to maintenance or champerty, yet of which upon general principles and by analogy to such acts, a court of equity will discourage the practice (a): in this case the assignor was in possession of a mere naked right; he could obtain nothing without filing a bill; it was therefore clearly within the principle of public policy, and his Lordship allowed a demurrer to the bill (b).

(a) See *Strachan v. Brander*; and *Wood v.* 498-501.

Downes, *supra*: *Powell v. Knowler*, 2 *Atk.* 226; *Stevens v. Bagwell*, 15 *Ves.* 156; and see *Kenney v. Browne*, 3 *Ridgw. P. C.* 462,

(b) *Prosser v. Edmonds*, 1 *Yo. & Coll.* 500; *et v. supra*, p. 868.

CHAPTER X.

OF THE TRANSFER OF EQUITABLE ESTATES AND INTERESTS AND CONTINGENT INTERESTS AND POSSIBILITIES, BY CONVEYANCE AND ASSIGNMENT AND DECLARATION OF TRUST, AND OF CONTRACTS AND PROMISES AS REGARDS SUCH INTERESTS, AND OF THE EFFECT OF WANT OF CONSIDERATION OR OF VALUABLE CONSIDERATION.

SECTION I.—*Of Conveyances and Assignments of Equitable Estates for Valuable Consideration.*

Of the Alienation of Trust Estates and Equitable Estates and Interests.

As regards Equitable Estates in Fee, Fee Tail, for Life and for Years, and Estates in Remainder.

A Trust Estate is not now considered as a Chose in Action, but an Estate.

Devises of Trusts are considered by the Court of Chancery as distinct Substantive Devises.

Attorney-General v. Lady Downing, Wilm.

Legal Estate follows Equitable as its Shadow.

Unless it come into the hands of Purchaser for Valuable Consideration, without Notice.

Negligence, &c. of Trustee not permitted to disappoint Interests of Cestuis que Trust.

Lapse of Legal Estate has no Influence upon the Trust—If no Trustee appointed Court of Chancery assumes the Office.

The Principle that the Equitable Estate is a distinct Substantive Estate has been acted upon in various ways.—Instances.

Court will act upon it exactly as if it was a Legal Estate.

The Husband of a Woman seised in Fee of an Equitable Estate of Inheritance is entitled to an Estate by Curtesy.

Prior to the Fines and Recoveries Act an Equitable Estate Tail in a Trust might be barred by a Recovery with an Equitable Tenant to the Præcipe.

A Feoffment or Bargain and Sale, or even a Will, was sufficient to bar the Issue in the time of Lord Clarendon.

Always held that a Fine was sufficient.

The Requisites for making the quasi Tenant to the Præcipe for suffering a Recovery of the Equitable Estate.

Conveyance by Person having Equitable Interest without Possession sufficient. Equitable Disseisin.

If Equitable Tenant in Tail had aliened for an Estate of Freehold by way of Mortgage he might suffer a Recovery of his Secondary Equitable Title.

Equity of Redemption ; also an Estate in the Land.

Any Conveyance shall have the same Effect on an Equitable Estate as Legal Conveyance on a Legal Estate—Lord Nottingham.

Act for barring Entails, 3 & 4 Will. IV. c. 74.

Equitable Estate Tail.

Tenant in Tail must convey by one of the Modes of Assurance pointed out by the Act. Policy of the Legislature in requiring a Deed analogous to a Legal Conveyance.

No Difference in Equity between Legal Interests in and the Trust of a Term belonging to a Wife, as regards Husband's Power of Alienation.

Of the Merger of the Equitable in the Legal Estate.

THE general doctrines in regard to the creation of trust or other equitable estates and interests in land and personal property assignable at law and in choses in action and other subjects not assignable at the common law, having been stated, and the nature of such estates and interests having been adverted to, it is proposed to recur to the subject of the alienation of equitable estates or interests in land and personal property which may be so created, by the persons beneficially entitled, or, as they are denominated in ordinary legal language, the *cestuis que trust* (a); first, where there is a valuable consideration, and secondly, where there is no consideration. The passing of equitable interests in choses in action for valuable consideration has already been adverted to, it remains therefore as regards this description of property only to advert to voluntary assignments, which will be the subject of one of the following sections of this chapter.

It will be proper first to ascertain in what light the interest of the *cestui que trust* is viewed by the Court of Chancery, as regards trust or equitable estates in fee, in fee tail, for life and for years, in possession and in remainder. A trust or equitable estate is not now what it was once considered, a chose in action, it is a present interest or, as has been frequently before observed (b), an Estate. Trusts, said Sir Thomas Clarke, are here considered, as between the *cestui que trust* and the trustee and all claiming by, through or under them, or in consequence of their estates, as the ownership or legal estate; whatever would be the rule of law, if it were a legal estate, is applied in equity to a trust estate (c).

The legal estate follows the trust or equitable estate as its shadow, into whose hands soever the legal estate may descend or be conveyed, except it pass to a purchaser for valuable consideration without no-

(a) V. *supra*, Vol. i. pp. 506-7: see, on this subject, Lewin, p. 495.

(b) V. *int. al. sup.* 764; *et v. sup.* 23, 24.

(c) Sir Thomas Clarke, M. R., *Burgess v. Wheate*, 1 Eden, p. 223. There are but two species of Estates, the legal and the equitable

estate, Lord Rosslyn, *Burnaby v. Griffin*, 3 Ves. 276. Many such expressions might be cited by other Judges, all showing that the interest of the *cestui que trust*, in real estate, equally as the equity of redemption of a mortgagee (v. *supra*, p. 642), is an Estate.

tice (a). It is considered that the individuals named as trustees are only the nominal instruments to execute that intention; so that neither the negligence of the trustee, or accident, or any other circumstance, with the exception above adverted to, will be permitted to disappoint the interests of those for whose benefit the trustee is called upon to execute it (b). The persons having the equitable estate may, without the intervention of the trustees, or the possibility of their preventing them from exercising their ownership, act as if no trustees existed (c). The lapse of the legal estate never has the least influence upon the trusts to which it is subject: if the individuals named as trustees fail either by death, or by being under disability, or by refusing to act, the court will provide a trustee: if no trustees are appointed at all, the Court of Chancery assumes the office in the first instance (d): if the trust cannot be executed through the medium which was in the primary view of the testator, it must be executed through the medium of the Court of Chancery (e). Therefore the trustee is in fact a mere machine; and for whom he shall be trustee depends entirely upon the will of his *cestui que trust*, whether he was such on the original creation of the trust, or has become such by devolution or by transfer.

The principle that the equitable estate is a distinct substantive estate, has been acted upon in various ways. "My principle is this," said Lord Alvanley, "that equitable estates in this court are considered to all intents and purposes as legal estates; if a man has an equitable interest he is supposed to act upon it, and this court will act upon it exactly as if it was a legal estate" (f). An equitable estate of in-

(a) *Adair v. Shaw*, 1 Scho. & L. p. 262; *Mansell v. Mansell*, 2 P. W. 681; Lord Chief Justice Wilmot, *Attorney-General v. Downing*, Wilm. R. p. 23. "I take it to be a first and fundamental principle in equity," says Lord Chief Justice Wilmot, "that the trust follows the legal estate wherever it goes, except it come into the hands of a purchaser for valuable consideration without notice. I never heard any distinction made, nor has any case been cited to prove that a trust, fit and proper to be executed against a trustee, should be suffered to fall to the ground, or remain unexecuted against an heir-at-law, where there was no trustee. The lapse of the legal estate never has the least influence upon the trusts to which it is subject. Trust estates do not depend upon the legal estate for an existence. A court of equity considers devises of trusts as distinct substantive devises, standing on their own basis, independent of the legal estate or of one another, and the legal estate is nothing but

the shadow which always follows the trust estate in the eye of a court of equity."—Wilm. R. 22; Lewin, 577-8; *et v. supra*, p. 23, n. (c).

(b) Lord Eldon, *Brown v. Higgs*, 8 Ves. p. 574, *v. supra*, p. 52.

(c) Lord Alvanley, in his judgment in *Brydges v. Brydges*, 3 Ves. p. 126, which was commended by Lord Eldon, and see *Selby v. Alston*, 3 Ves. 341.

(d) *Attorney-General v. Lady Downing*, Wilm. R. 21, 22.

(e) *Attorney-General v. Lady Downing*, Wilm. *ubi sup.*; *et v. supra*, pp. 33, 51, 81, 368.

(f) Lord Alvanley, *M. R., Williams v. Owens*, 2 Ves. J. 603. The question was one of revocation; it was this: a person, in marriage articles, executed on his marriage, covenanted to convey an estate, of which he was seised in fee, for the benefit of himself for life, remainder to the issue of the marriage, with

heritance in the wife always conferred a tenancy by the curtesy (a). Prior to the act for creating a substitute for fines and recoveries (b), an equitable estate tail in a trust estate might have been barred by an equitable recovery, that is, by a recovery to which no person but those who were entitled to equitable estates equivalent to those which had the estate been legal would have enabled them to have suffered a recovery, were parties; it being only necessary that there should be a good equitable tenant to the *præcipe* (c). It was indeed held, in the time of Lord Clarendon, and even afterwards, that a feoffment or bargain and sale was sufficient to bar the issue in an entail of a trust estate (d), and even in some cases an agreement or a will (e): it was always held that a fine would bar the issue (f).

The requisites for making the *quasi* tenant to the *præcipe* were determined by the nature of an equitable estate, as distinguished from a legal estate. Thus, as regards the deed to make a tenant to the *præcipe*: at law possession could not pass by conveyance from a person who had not himself the possession; but, as regards the conveyance by a person having an equitable interest only, said Sir W. Grant, it was not the object, nor could it be the effect of the conveyance to transfer the possession, but only to *pass the equitable interest*; the only inquiry therefore was, whether there was in the party such a *quantum* of equitable interest as entitled him to suffer an equitable recovery (g): so, although a recovery could not be suffered by the owner of a legal estate tail without obtaining the concurrence of the person who had the legal freehold, yet the analogy was not followed where an equitable tenant in tail had aliened for an estate of freehold by way of mortgage; for the tenant in tail might suffer a recovery of his secondary

remainder to his own right heirs, and then devised the estate, in the event of his having no issue: he afterwards conveyed the legal estate to the trustees, according to the articles: the question was, whether the conveyance revoked the will: it was held it did not; and see *Viscountess Cranbourne v. Delahay*, 2 Freem. by Hovenden, 170.

(a) *Watts v. Ball*, 1 P. W. 107; *Chaplin v. Chaplin*, 3 P. W. 234; *Casborne v. Scarfe*, 1 Atk. 603; see on this subject, *Parker v. Carter*, 4 Hare, 400.

(b) *V. supra*, Vol. i. p. 166, 167.

(c) *Brydges v. Brydges*, 3 Ves. p. 127; Lord Alvanley, *Wykham v. Wykham*, 18 Ves. 417; Preston on Conveyancing, vol. i. p. 22, 3rd edit.

(d) Dict. Lord Nottingham, *North v. Williams*, 2 Ch. Ca. 63; *S. C.* 1 Vern. 13; *Lord Rosslyn, Fletcher v. Tollet*, 5 Ves. 12; *Bur-*

naby v. Griffin, 3 Ves. 277; and his Lordship said he did not know why that had not been adhered to; and see *Viscountess Cranbourne v. Delahay*, 2 Freem. 170.

(e) See the cases referred to, Lewin on Trusts, p. 499.

(f) *Goodrick v. Brown*, 1 Ch. Ca. p. 49; *Washborne v. Brown*, *ibid.* 213, 439.

(g) Sir W. Grant, *Lord Grenville v. Blyth*, 16 Ves. p. 230; but seisin, by perception of rent, was so far material, that in the absence of it, there might be such an equitable disseisin as the Statute of Limitations, by analogy, would have operated upon; *Cholmondeley v. Clinton*, 2 Jac. & W. pp. 147, 155, 165-6; *supra*, Vol. i. p. 551-3; *et v. Mad. Pr. and P.* i. 575, n. (t); but this doctrine is superseded, at least for the most part, by the new Statute of Limitations.

equitable title without the concurrence of the mortgagee (a). Lord Nottingham gave effect to an equitable recovery on the broad ground, "that any conveyance or assurance made by *cestui que trust* should have the same effect or operation upon the trust estate as it would upon the estate in law, in case the trustees had executed their trust" (b), meaning, as I presume, had given him a corresponding legal estate.

By the act 3 & 4 Will. IV. c. 74, passed in August, 1833, which provided a substitute for fines and recoveries, it is enacted, § 40, 41, that every disposition of lands under that act, by a tenant in tail thereof, shall be effected by some one of the assurances (not being a will) by which such tenant in tail would have made the disposition, if his estate were an estate at law in fee simple absolute (c). Whether the estate tail be legal or equitable, vested or contingent, still the tenant in tail, or would-be tenant in tail, must be treated for the purposes of this act as having a legal estate in fee simple in the lands, and must convey by one of those modes of assurance which the law has appropriated to the transfer of a freehold interest (d). The act, says Mr. Hayes, in requiring a legal conveyance, as well of *estates* in the land, as of unsubstantial rights and *equities* in respect of the land, may be thought to have strained the application of technical forms beyond technical reasoning; but it was the policy of the legislature, whilst abolishing the old solemnities, and substituting more simple modes of assurance, still to exact the observance of ceremony, and to prevent settlements framed with caution and deliberation for the purpose of preserving estates in families, from being annulled by instruments unadvisedly prepared or inadvertently executed (e).

Another instance of an equitable interest being treated as an estate may be given in the power of the husband over the wife's trust of a term. We have before observed that there is no difference in equity between the legal interest in, and the trusts of, a term belonging to a wife, as regards the husband's right of alienation: equitable interests of the wife of the same description as legal interests which might be absolutely assigned by the husband at law so as to be binding on the wife without consideration, may be assigned by the husband without

(a) *Nouaille v. Greenwood*, T. & R. p. 29; Lord Eldon.

(b) *North v. Williams*, (1681,) 1 Vern. 13; S. C. 2 Ch. Ca. 63, 78; 1 Eq. Abr. 255: and see *Viscountess Cranbourne v. Delahay*, 2 Freem. p. 170; and *Villirs v. Beaumont*, 1 Vern. p. 100, stated *infra*; *Carpenter v. Car-*

penter, and *Washbourne v. Downes*, 1 Vern. 439.

(c) Or as if an estate in fee simple absolute occupied the very place of the estate tail, Hayes' Introd. to Convey. i. p. 156.

(d) Hayes' Introd. *ubi supra*.

(e) *Ibid*.

consideration so as to bind the wife, though not so as to preclude her from her Equity to a settlement (a).

As regards the equity of redemption of a mortgagor, though not strictly coming under the head of trust, that also, as has already been mentioned, is an Estate. A mortgage in fee by a person seised of a legal estate, though without doubt it was a revocation at law before the passing of the stat. 1 Vict. c. 26, was not a revocation of a previous devise of the equitable interest, the equity of redemption over which the mortgagor had a disposing power was still held to pass (b).

If the analogy to the law is still to be followed, namely, that where a person has such an interest in equity as that, if legal he could assign it at law he may assign in equity; then, as contingent interests and possibilities, coupled with an interest, in real estate, are now assignable at law by deed (c); corresponding equitable interests ought now to be assignable directly by deed, if the act does not actually of itself authorize such assignments.

It should be observed, that if the *cestui que trust* of the equitable estate shall acquire the legal estate, the equitable estate will, generally speaking, merge in the legal estate, and no longer exist; but in order to operate a Merger, the equitable and the legal estate must be of the same quality; an estate tail and the fee simple are not of the same quality, and therefore an equitable estate tail will not merge in the fee (d). I admit, said Lord Alvanley (e), that where a person has the same interest in the legal and equitable estate he ceases to have the equitable estate, and has the legal estate, upon which this court will

(a) *Sir Edw. Turner's case*, 1 Vernon, 7, and the cases in Raithby's note; *Mitford v. Mitford*, 9 Ves. 97, 98, and *Donne v. Hart*, 2 Russ. & M. 364; *et v. supra*, p. 475. So an equitable extent, that is under a decree, is equally assignable by the husband as a legal extent would be, *Lord Carteret v. Paschal*, 3 P. W. 200: but if the intent and object of the alienation be only to give a security to a mortgagee, the wife surviving will be entitled to the equity of redemption, *Clark v. Burgh*, 2 Coll. 230. It should be observed that Mr. Macqueen, as stated by him in his late valuable Publication on Husband and Wife, p. 82, has ascertained that the doctrine, which is usually supposed to have been established in *Sir E. Clare's case*, against the wife's equity to a settlement in such event, did not, apparently, come into question in that case; and see as to this case, 5 My. & Cr. 107; *et v. sup.* p. 475, n. 484, 485. At p. 295 of Mr. Macqueen's work there is an important note on the case of

Stiffe v. Everitt, 1 My. & Cr. 37; *supra*, p. 476.

(b) *Williams v. Owen*, 2 Ves. J. 598, the stat. 1 Vict. c. 26, s. 23, has put an end to all such constructive revocations.

(c) See the stat. 8 & 9 Vict. c. 110; *supra*, Vol. 1, p. 221. A deed may not be necessary to pass an equitable interest, but as evidence of a concluded final transaction it must be important: it will be remembered that by analogy to the law a deed was necessary to declare the uses of a grant of a rent or the like, *supra*, Vol. i. p. 446, *et v. ib.* p. 453, though a deed, as it has been held, has no greater efficacy than a mere writing where the thing itself is not assignable, as in the instance of a mere expectancy, *Meek v. Kettlewell*, *infra*.

(d) *Per Vice-Chancellor, Merest v. James*, 6 Mad. 118; *Broune v. Blake*, 1 Molloy, 382. See on this subject, Lewin, pp. 18, 19.

(e) *Brydges v. Brydges*, 3 Ves. 125 a.

not act, but leaves it to the rules of law; but it must always be understood, with this distinction, that it holds only where the legal and equitable estates are co-extensive and commensurate; but I do not by any means admit that, where a person has the whole legal estate, and a partial equitable estate, the latter sinks into the former, for it would be a disadvantage to him: there is no absurdity in saying that a person may have the whole legal estate, and a limited interest in the beneficial interest in that estate, as there is in saying he has the whole legal fee and a legal remainder (a).

Assuming then that an equitable interest of the *cestui que trust* in real estate corresponding with a legal interest which might pass by deed, will equally pass by deed as would the corresponding legal interest; in principle, it would seem that there can be no distinction whether the conveyance or assignment be with or without consideration; indeed, as we have seen, this has been expressly decided as regards the assignment by the husband of the equitable estate of his wife in a term, excepting as respects the wife's equity to a settlement. The analogy has indeed been acted upon as regards equitable interests in property passing at law not by assignment, but by delivery or transfer (b); but the subject of voluntary transfers of equitable estates and interests requires a distinct consideration.

(a) Lord Eldon, *Wykham v. Wykham*, 18 Ves. p. 418, highly commends this judgment. So a legal and an equitable estate will not unite, so as to bring the rule in *Shelley's* case

into operation; v. *supra*, p. 24, n.

(b) V. *supra*, pp. 864, 865, note (a), and see *Sloane v. Cadogan*, and other like cases which are cited and observed upon in the next chapter.

SECTION II.—Of Voluntary Conveyances, Assignments, and Transfers of Equitable Estates and Interests in Property, capable of being Conveyed or Transferred at Law.

Of Voluntary Conveyances.

State of Law as regards Transfer of Property without Consideration.

Voluntary Assignments of Legal Interests.

Where a Person executes a perfect Conveyance passing the Estate he cannot revoke it.

Such a Deed not revocable by Will.

Particularly if in favour of Children.

Sear v. Ashwell.

Where Sum of Stock transferred to Trustees and a Trust of it declared, it is binding—no Locus Pœnitentiæ.

Voluntary Settlement followed by Marriage cannot be impeached.

Questions sometimes arise whether the Deed is to be considered as a Definitive Act.

Parol Evidence may be given to show that a Deed was not intended as an Irrevocable Act.

Subsequent Instructions, &c. not admissible.

Where a Counterpart executed that is primâ facie Evidence that it was not to be revocable, also where One Part executed and delivered to Third Person.

Where the Deed is kept in Donor's Possession it is important, as a Basis for Evidence, to show that it is not final.

Sir Thomas Plumer's Statement of the Result of the Authorities.

Cecil v. Butcher.

But where Locus Pœnitentiæ is reserved and no Evidence of Repentance, the Deed, as it is presumed, will operate.

Though Instructions, however explicit, are revoked by Death.

Keeping a Deed which passes the Estate not of itself sufficient to enable him to revoke.

Law, as stated by Justice Bayley, as to Effect of keeping Deed, formally delivered, in the Possession of the Donor.

Doe v. Garnons.

As to passing of Chattels.

Revocation.

Deed or Contract between Husband and Wife, which is in substance a Gratuitous Settlement, may be revoked.

In cases where Legal Estate passes the Court of Chancery is not bound to interfere, and will not where Fraud or Improper Practices have taken place.

Where there are Two Voluntary Deeds he who has the Advantage of the Law may keep it.

Additional Note—As to Voluntary Deeds void against Creditors under 13 Elizabeth.

As regards voluntary conveyances and transfers of equitable estates; it may perhaps be stated as a general rule, that where a man makes a perfect conveyance of an estate in lands or hereditaments,

that is, where he executes and delivers a deed of conveyance as his final act, the estate in the property, if equitable, at once passes to the grantee, equally as it would on a conveyance of a legal estate; the grantor cannot revoke such a deed, certainly not where an estate at law has passed, or in any manner get rid of it, so as to transfer the property to another volunteer, unless he has reserved to himself a power of revocation: and where such a deed is destroyed by the donor, if secondary evidence of the contents can be given, the deed will be set up against all volunteers (a): such a deed is not revocable by will, for if it were there would be no difference between a deed with a power of revocation and one without it (b): more especially such a deed will be binding if made in favour of a child (c).—This doctrine is analogous

(a) In *Villers v. Beaumont*, 1 Vern. 100, A. D. 1682, a man possessed of a trust of a term for three lives, by a deed, [Raithby's note (2),] signed, sealed and executed, (as it is stated, at an ale-house,) granted and assigned the term to the plaintiffs, his cousins, for the payment of his and his mother's debts, but to permit him to hold the same for his life; he delivered the deed to a creditor. Five months afterwards, he being dissatisfied with the settlement, made his will, devising the estate, subject to the payment of his debts, to his half-brother the defendant, Lord Beaumont. The question was whether the will or the deed should prevail. The Lord Chancellor (Nottingham) said there was no colour in this case; if a man will improvidently bind himself up by a voluntary deed, without reserving to himself a power of revocation, he must lie down under his own folly. (*Leech v. Leech*, 1 Ch. Ca. p. 249, is to same effect; and see *Garrard v. Lord Lauderdale*, 2 R. & M. 453; and *Brookbank v. Brookbank*, (1691,) 1 Eq. Ab. 168; and 2 My. & K. 510; (it is there put not upon the Creation of a Trust as well as on Conveyance.) "If you relieve him," added Lord Nottingham, "you must consequently establish this proposition, 'That a man cannot make a voluntary disposition of his estate but by will only, which would be absurd'" (and see *Allen v. Arme*, 1 Vern. 365; *Bale v. Newton*, 1 Vern. 463). In this case, by analogy to the law, the deed was treated as a conveyance of the estate, in the same manner as a recovery suffered of a trust estate in tail was treated as a bar to the entail; v. *supra*, p. 878.

The Vice-Chancellor Wigram (1 Hare, 475) seems to have considered that the opinion of the Vice-Chancellor of England was that assignments of equitable interests only amounted to an agreement, referring *inf. et. al.* to *Holloway v. Headington*, 8 Sim. 324; but that observa-

tion I presume had reference only to choses in action or the like; though what was the nature of the property that was assigned in *Holloway v. Headington*, is not stated in the Report. It was admitted in the argument on the appeal in the late case of *Meek v. Kettlewell*, 1 Phill. 346, that an equitable estate, corresponding with a legal estate, might be effectually assigned without consideration equally as might a legal estate at law; and see *Collinson v. Patrick*, *supra*, p. 56, note; *Clavering v. Clavering*, Prec. Ch. 235; 2 Vern. 473 (1704), by Sir N. Wright, Lord Keeper, affirmed in Dom. Proc. *ibid.* in *notâ*; *Lady Hudson's* case, cited 2 Vern. 475; and the dict. of Lord Keeper Bridgman, *Barlow v. Heneage*, Prec. Ch. 211, are to the same effect: other cases are cited, in *Dillon v. Coppin*, 4 My. & Cr. 661; see *Hayes*, *Introd. to Convey.* i. 201, on this subject.

(b) Lord Hardwicke, *Bolton v. Bolton*, 3 Swanst. 414, note; *Clavell v. Littleton*, Prec. Chan. 305, to same effect. In *Boughton v. Boughton*, 1 Atk. 625, Lord Hardwicke established a voluntary deed, by which the donor charged his estates with various sums of money in favour of his sister, her two sons, and gave 4000*l.* a piece to each of his children; though the donor had kept the deed in his possession, and devised away the estate, it being a question between two sets of volunteers. Lord Hardwicke in this case cited with approbation *Naldred v. Gilham*, 1 P. W. 577, *infra*, *et. v. supra*, p. 199.

(c) In *Sear v. Ashwell*, 3 Swanst. 411, A. D. 1730, one Atkins intending to marry again, made a settlement by granting to trustees a term of 500 years, by way of mortgage, to secure 300*l.* to his eldest son, and 200*l.* a piece to his other sons (a reasonable settlement, as the Lord Chancellor said); after his second marriage he burnt it: it was set up from a copy, the ground there stated was that being made

to that which has before been adverted to in treating of the creation of trusts, namely, that where the legal estate in property or interest is transferred, and a trust of it declared, the trust so declared is irrevocable; thus, where a person *transfers* a sum of stock or hands over money to trustees, and declares a trust, and there is nothing upon the face of the transaction (a), or from contemporaneous evidence, to show that it was intended to be revocable, he takes from himself all *locus pœnitentiæ*: the *cestuis que trust*, though unborn at the date of the transfer and declaration of trust, will acquire a perfect title: and even if the donor should procure a retransfer by the trustees, and, where it is in writing, should cancel the instrument and by will make a provision for the same *cestuis que trust*, the settlement is binding; and unless the subsequent provision be expressed to be substitutionary, the *cestuis que trust*, if strangers (b), will take both; they will have their election if it be expressed to be in substitution (c): and stock not being within the statute 27 Elizabeth, a purchaser from the donor cannot avoid the voluntary settlement or gift (d).

Questions not unfrequently arise as to whether a deed purporting to be an actual conveyance or a binding obligation is to be considered as a definitive act, so as to give a complete title to the donee or obligee. The mere execution of a conveyance or other deed, whether it relate to legal or equitable property, is not of itself conclusive that it was intended to take effect in all events; parol evidence may be given of the circumstances under which it was executed, and of the manner in which it has been dealt with, in order to show that it was not intended as a final and irrevocable act (e); but subsequent instructions or declarations, unconnected with acts or declarations which took place at the time, cannot be received in evidence (f).

Where a counterpart of a deed is executed, and one part is delivered,

by a father for the benefit of children for whom he was bound to provide, it was therefore good against every one but creditors by specialty.

(a) *V. supra*, p. 59, *et infra*, p. 886.

(b) Namely, if the gift be not by way of Portion, as to which, *v. supra*, p. 427, *et seq.*

(c) *Ellison v. Ellison*, 6 Ves. 656; *Pulvertoft v. Pulvertoft*, 18 Ves. 84; *Smith v. Lyne*, 2 Y. & Coll. C. C. 350; the settlor in that case had delivered a copy of the deed to one of the *cestuis que trust* in a sealed envelope; and see *Bill v. Cureton*, 2 My. & K. 503, 510, Sir J. Pepsy: *Petre v. Espinasse*, 2 My. & K. 502, *supra*, p. 55, is a stronger case, for in that case the legal interest was in a third person,

the assignment only operated on the equitable interest; *v. supra*, pp. 52, 53; *et v. supra*, p. 220; *George v. Howard*, 7 Price, p. 661; *Leche v. Lord Kilmorey*, Turn. & R. 207, is rather a peculiar case of a trust of personal estate being carried into effect in substance.

(d) See 2 My. & K. 512; but Sir J. Leach, in *Petre v. Espinasse*, (which was the case of an assignment available only in equity,) intimates a doubt on this subject; 2 My. & K. p. 502.

(e) *Stratford v. Powell*, (1807,) 1 Ball & B. 14, 21; *et vide Ward v. Lant*, Prec. Ch. 182; *Johnson v. Smith*, 1 Ves. 314; and see *Hill v. Gomme*, *infra*.

(f) *Clavell v. Littleton*, Prec. Ch. 305.

that is *primâ facie* evidence of an intention that it should not be revocable; and where one part only is executed, and that is delivered to a third person, so as to put it out of the power of the donor, it will, in the absence of any circumstances showing a contrary intention, be treated as absolute (a). Where one part only is executed, and that is kept in the possession of the donor, this circumstance may be important, as the basis whereon to rest evidence of an intention to reserve a power to revoke, or, as it has been called, a *Locus Pœnitentiæ* (b). Sir Thomas Plumer, who examined all the leading cases on this subject, considered it to be established by the preponderance of authority, that in a case where a voluntary deed is made without the knowledge of the grantee, when it is made for a special purpose for which it was never required to be made use of (c), and when it has been kept in the hands of the grantor (or his agent (d)) without ever having been acted upon, a court of equity will not give any relief upon it, it being considered as an imperfect instrument: the question in such cases, said Sir T. Plumer, is, whether there is not then a *locus pœnitentiæ* (e).

Very much must, of course, depend upon the circumstances of each particular case. If it should appear that a deed was kept by the donor only that he might secure to himself during his life a *locus pœnitentiæ*; if he should die without having done anything indicative of an altered intention; then (as I presume) the act would be considered as consummated and complete as against all persons claiming as volunteers under the donor: but if the deed should appear to have been executed only as a preparatory measure, and in contemplation of something more being done by the donor in order that it might take effect;

(a) *Uniacke v. Giles*, 2 Molloy, 268; and see *Cotton v. King*, 2 P. W. 358; there one of the deeds which was enforced, was a covenant to transfer stock which had not been transferred, see *King v. Cotton*, 2 P. W. 674; but the daughters had recovered at law upon the covenant.

(b) *Naldred v. Gilham*, 1 P. Wms. 577; *Disher v. Disher*, *ibid.* 204, *supra*; and *Duke of Norfolk v. Brown*, *ubi supra*, p. 198-9. In that case, *v. sup.* p. 198, it is highly probable that the presentation was kept in the donor's possession, to be delivered or not as the Duke should think fit on a vacancy happening; and see *Ward v. Lant*, Prec. Ch. 182; *Barlow v. Heneage*, Prec. Ch. 211; *et vide* *Leaffès v. Lewen*, Prec. Ch. 370; *Gilb. Eq. Rep.* 32; *Cecil v. Butcher*, 2 Jac. & W. 574; see *Hill on Trustees*, p. 46, *et seq.*

(c) See *Birch v. Blagrove*, Ambl. p. 264;

Roberts v. Roberts, Daniel's R. 143, is apparently *contra*, the deed never having been used; but the deed was complete, and the intended purposes attempted to be carried into execution, and the deed had been actually delivered to the donee, so that the donor had put it out of his power, *Sir T. Plumer*, 2 Jac. & W. 577.

(d) *Cotton v. King*, 2 P. W. 358.

(e) *Cecil v. Butcher*, 2 Jac. & W. 573, 574, 578; in the case itself, *Sir T. Plumer* retained the bill for a year with liberty to bring an action. *Sir A. Hart*, 2 Molloy, 264, states that this case was re-heard before *Lord Eldon*, but the result is not stated. In one case, *Hughes v. Stubbs*, 1 Hare, p. 479, the court held that the donee might have been compelled to give up the deed, the purpose being at an end; indeed this would seem to follow, see *Searle v. Law*, 15 Sim. 100.

or if it should appear to have been executed only to take effect in case some event should happen or not happen, that would not be a case of reservation of a *locus penitentie*: in such case there would need no revocation; and, in the event of the person executing the deed dying in the interim, it could not take effect. Where the matter rests on directions or instructions only, they will clearly be revoked or become ineffectual by death, however explicit they may be (a), more especially if the property is left under the dominion of the presumed grantor (b).

But the keeping a deed, so executed as to pass the estate, in the donor's possession, is not of itself sufficient to enable the donor to revoke it by cancellation or by will (c), for the estate having passed, it would require the active interference of the Court of Chancery to revest the estate; and it is no ground for such interference that the act was foolishly or inconsiderately done (d). In one case such a deed was set up against a devisee, though the party claiming under it had obtained possession of it by stealth (e): but in another case where a voluntary settlement was executed, which the donor kept in his possession, and he afterwards burned it and made another settle-

(a) *Coningham v. Plunkett*, 2 Yo. & Coll. C. C. 245; *Whitechurch v. Bevis*, 2 Bro. 559. So where a cheque is drawn upon a banker, if the drawer dies before the cheque is paid, the authority to pay is revoked or annulled, in equity as it is at law, *Tate v. Hilbert*, 2 Ves. J. 112.

(b) See *Smith v. Warde*, 15 Sim. 63.

(c) *Clavering v. Clavering*, 2 Vern. 475; *Barlow v. Heneage*, *ubi sup.* This was a voluntary settlement by a father on his daughter, (*qu.* immediate) he had not only kept possession of the deed, but received the rents down to his death; *Boughton v. Boughton*, 1 Atk. 625; *Sear v. Ashwell*, 3 Swanst. 411, case of younger children, and see the dictum of Sir Wm. Grant, *Antrobus v. Smith*, 12 Ves. 46.

(d) Lord Nottingham, *Villiers v. Beaumont*, 1 Vern. 100; and see *Follett v. Delaney*, xii. Jur. 551, *sup.* p. 221, n.; but see *Naldred v. Gilham*, *infra*.

(e) *Brackenbury v. Brackenbury*, 2 Jac. & W. 391. In *Doe dem. Garmons v. Knight*, 5 Barn. & C. 691, Bayley, J., stated the law to be that where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show he did not intend it to operate immediately, it is a valid and effectual deed, and that the delivery to the party who is to take by it is not essential, *ibid.* p. 692: but in that case there

was the further circumstance that the deed had been delivered to a third person, though without the privity of the donee. If A. makes an obligation to B. and delivers it to C. to the use of B. it is the deed of A. immediately, but B. may refuse it, and by that the bond will lose its force, Buller, J., citing *Baker's case*, 3 Co. 26 b. So of a gift of goods and chattels, if a deed be delivered to the use of the donee the goods and chattels are in the donee immediately before notice or agreement; but the donee may refuse, and by that the property and interest shall be divested, Gould, J., *Wankford v. Wankford*, 1 Salk. 301; see 1 Fonbl. 206-7. But if a man deliver a chattel to one for the use of another, he may revoke it at any time before it is delivered over, Dict. Dyer, 49 a & b: the case was that a man had placed a sum of money in the hands of another for the use of and to be delivered to a woman on her marriage; before her marriage he revoked the gift; and it was held that he might do so, *ibid.* 49 b (and see *Tate v. Hilbert*, 2 Ves. J. 112); but if there had been any consideration the depositor could not have revoked, *ibid.* However, as regards acceptance by the donee, "The law," says Bayley, J., in *Doe v. Knight*, citing Lord Ellenborough, 11 East, p. 623, "will presume, if nothing appear to the contrary, that a man will accept what is for his benefit;" see, on this subject, Hill on Trustees, p. 78, *et seq.*

ment in favour of another person, and the original donee surreptitiously obtained a copy of the first settlement; Lord Macclesfield reversed a decree of the Master of the Rolls, who had set up the copy, and he left the party to obtain what he could at law, saying the donor might have reserved to himself a *locus pœnitentiæ* (a).

It is to be observed that the Court of Chancery will not remedy a defect or supply an omission in a deed in favour of a stranger where there is no consideration, even in the plainest case, and when it has arisen from mere mistake, and though the correction would not be inconsistent with the deed (b).

The general rule is, that where there are two voluntary conveyances, he that hath the advantage at law ought to keep it (c); there is no equity to assist the one against the other (d).

An irrevocable transfer of equitable interests, whether in real or in personal estate, may be effected, as has already been noticed, by means of a declaration of trust on the part of the *cestui que trust*, that his trustee shall be trustee for the intended donee (e). A definite and final declaration of trust is considered as equivalent to a transfer of the legal estate or interest at law (f); and it is clear upon the authorities, as an abstract proposition, that in a case of personal property, a declaration of trust may be made without writing (g). But if a person entitled to property which is capable of a legal transfer, as stock, or tolls, or shares in a concern the title to which may be transferred in a particular way by the constitution of the concern or by custom, voluntarily executes what *purports to be an actual assignment* of such property, nothing will pass, though it be by deed: the deed is not an assignment; and as it is not intended to be a declaration of trust, it will not operate as such (h); this subject, however, will be more particularly adverted to in the succeeding sections. Where a trust is constituted, though without consideration, there is, as regards equitable interests, a cessation of property in the donor, and he is not a necessary

(a) *Naldred v. Gilham*, 1 P. W. 577, 1719; and see the dict. *Cotton v. King*, 2 P. W. 358. *King v. Cotton*, *ibid.* 674; and see *Uniacke v. Giles*, 2 Molloy, 268.

(b) *Pickering v. Keeling*, 1 Ch. Rep. 78; *Benham v. Newcomb*, 2 Ventr. 365; *Lee v. Sir R. Henley*, 1 Vern. 37, *ib.* 40, the claimants were nephews: as to a wife or child unprovided for, *v. infra*, and *v. supra*, p. 285, note (d).

(c) Dict. Lord C. J. Treby, *Bath and Montague's case*, 3 Ch. Ca. 88.

(d) Lord K. Somers, *Bath and Montague's case*, 3 Ch. Ca. 123.

(e) *V. sup.* 52, *et seq.* and p. 883, and see *Searle v. Law*, *ubi infra*; and *Newton v. Askew*, Rolls, June, 1848.

(f) *Collinson v. Patrick*, 2 Keen, 134; *v. supra*, pp. 51-58.

(g) Vice-Ch. Wigram, *M'Fadden v. Jenkyns*, 1 Hare, p. 462; *Nab v. Nab*, 10 Mod. 405; *Fordyce v. Willis*, 3 Bro. 577; *Bayley v. Boulcott*, 4 Russ. 345; *Benbow v. Townsend*, 1 My. & K. 506.

(h) *Searle v. Law*, 15 Sim. 95, and the cases there cited, as to which see Section iv. *infra*.

party in a suit by the *cestui que trust* against the trustee to have it carried into execution (a); this subject has already been noticed in the fourth Section of the first Chapter of this volume, to which I would refer (b).

The subject of voluntary Assignments of equitable interests in stock held in trust, will be considered in the fourth Section of this Chapter, where also some observations on the subject generally will be introduced.

The effect of the statute of the 13th Elizabeth in the avoidance of voluntary conveyances as against creditors and purchasers, has already been considered (c).

(a) *Reed v. O'Brien*, 7 Beav. 32, 35; but, as a general rule, all the *cestuis que trust* must be parties, *ibid*.

(b) *V. sup.* p. 52-58.

(c) See the additional note below.

ADDITIONAL NOTE.

Voluntary Deed—when void as against Creditors.

In a late number of the Jurist (xiii. Jur. No. 364) the leading cases relating to the question whether a voluntary deed, which is executed by a person who is indebted at the time, can prevail as against creditors, looking to the provisions of the statute of the 13th Elizabeth (namely, *Townshend v. Windham*, 2 Ves. 1; *Kidney v. Coussmaker*, 12 Ves. 136; *Whittington v. Jennings*, 6 Sim. 493; *Ede v. Knowles*, 2 Yo. & Coll. C. C. 178; *Townsend v. Westacott*, 2 Beav. 340; and *Skarff v. Soulby*, xiii. Jur. 89), are discussed. The writer comes to this conclusion, "That the true principle to be collected from the cases is this: that in order to set aside a voluntary settlement under the 13th Elizabeth, it must be shown that the settlor was at the time in such circumstances that inability to pay his debts was actually existent or reasonably to be apprehended by him, so that a presumption must arise that the settlement was made with intent to hinder creditors; that indebted or not indebted, and the extent to which the settlor was indebted, are merely evidence from which the court will conclude that such a presumption does arise; and that a trifling debt due at the time of the settlement and remaining unpaid, if it were shown that at the time of the settlement the settlor was abundantly solvent, would not be sufficient to set aside the deed;" which appears to me to be a correct exposition of the law. See also *Martyn v. Macnamara*, 2 Conn. & L. 554. On this subject, *v. supra*, p. 290: as to the effect of the statute 27th of Eliz. in annulling voluntary conveyances as against purchasers for valuable consideration, *v. supra*, p. 288, *et infra*, 893.

SECTION III.—*Voluntary Contracts as affecting Equitable Estates and Interests.*

Voluntary Bond not to be relieved against in Equity, if no Fraud.

But it is not to take place of Real Debts, though by Simple Contract, though it shall take place of Legacies.

More especially if entered into in favour of a Child.

Voluntary Covenant in favour of Natural Children enforced.

Williamson v. Codrington.

Court of Chancery will so far assist Volunteer as to enable him to put it in Suit at Law.

Fletcher v. Fletcher.

Clough v. Lambert.

WE have already fully considered what is the effect of a contract for valuable consideration (*a*), as regards every kind of interest, whether legal or equitable: it is proposed now to consider the doctrines of the Court of Chancery, which have already been adverted to, in regard to mere contracts or promises, and imperfect assignments relating to such interests where the transaction is not founded on a valuable consideration.

It is to be observed, that if a man enters into a bond without any consideration, yet if no fraudulent practices were used in obtaining it, the bond is binding in law, and will not be relieved against in equity (*b*); a voluntary bond will not be paid in a course of administration, so as to take place of debts incurred for a valuable consideration, though by simple contract only; but it will take precedence of legacies (*c*): a voluntary bond in favour of a child has especial claims for its being enforced. Where a wife was induced to give up a voluntary bond, which had been given by her husband to her upon certain lands being settled upon her as an equivalent; on her being

(*a*) What ought to be done considered as done; *supra*, pp. 253-293, where the doctrine of the Court of Chancery as to strangers to the contract is considered, p. 280 to 288, and where the doctrine as to the rights of creditors and purchasers as against voluntary settlements has been incidentally considered, p. 288 to 293.

(*b*) Dict. *Wright v. Moor*, 1 Ch. Rep. 84; 1 Eq. Abr. 84; *Cray v. Rooke*, Forrest. 155; and see *Crompton*, 49 b.

(*c*) *Jones v. Powell*, 1 Eq. Abr. 84; *Cray v. Rooke*, Forrest. 155-6; *Fairebeard v. Bowers*,

2 Vern. 202; *Eales v. Gee*, Barnardist. 399; in that case a bond, entered into by the eldest son, pursuant to a promise (without consideration) to the father, to secure a sum of money to his younger brothers and sisters, was held not to be voluntary; *Boughton v. Boughton*, 1 Atk. 626; *Hill v. Spencer*, Ambl. 643; a voluntary bond, given to a common prostitute, stands on the same footing as any other; *ibid.*; but not if it were given to her as *premium pudicitiae*; dict. *Clarke v. Periam*, 2 Atk. 337, 340; though the order in that case was made by consent; *Lomas v. Wright*, 2 My. & K. 775.

afterwards evicted from such lands, she was held to be entitled in equity to recover upon the bond against the husband's estate (a): a voluntary settlement followed by marriage cannot be revoked (b).

Lord Hardwicke enforced in equity a voluntary covenant in favour of natural children, under the following circumstances (c). Sir W. Codrington executed a conveyance of a plantation, negroes, stock, &c. in America, to trustees in trust for his natural children, with a clause binding himself, his heirs, &c. to warrant and for ever defend the said plantation, &c. to the donees; he in his lifetime sold the estate, but it did not appear that he intended thereby to deprive his natural children of the benefit of the provision for them. The sale was not attempted to be impeached as regards the purchaser; but Lord Hardwicke held that the trustees might recover upon the clause of warranty, as a covenant at law, for the value of the property: and on a bill filed he decreed the value of the plantation as it stood at the time of the sale, to be paid to the children, without sending them to law (d); though his Lordship admitted (e) that a jury would not have been bound to give damages *ad valorem*, but might have mitigated them according to circumstances. The same distinguished judge specifically enforced a voluntary bond with a penalty, in favour of children against volunteers (f).

But the general rule is that the court will not enforce the performance of a voluntary contract; that is, where something is sought beyond what, if anything, may be recovered under it at law. "I have no doubt," said Lord Cottenham, in a late case, "that the court will not execute a voluntary contract, and my impression is, that the principle of the court to withhold its assistance from a volunteer, applies

(a) *Beard v. Nutthall*, 1 Vern. 427; the releasing the arrears due on a voluntary bond is a valuable consideration; see *Hepburn v. Brown*, 2 Dow. P. C. 342; and *Stiles v. Att.-Gen.* 2 Atk. p. 152; *Gilham v. Locke*, 9 Ves. 612; *Tanner v. Byne*, 1 Sim. 160.

(b) *Brown v. Carter*, 5 Ves. 864; *Roddy v. Williams*, 3 Jo. & Lat. 17; as to the doctrine in regard to promises made in consideration of marriage, see *Greene v. Cramer*, 2 Con. & Law. 54, and *De Reil v. Thomson*, 3 Beav. 469.

(c) *Williamson v. Codrington*, 1 Ves. Sen. 511, 1750: and see *Bolton v. Bolton*, *infra*, and *Lewin*, 707; and see *Clavell v. Littleton*, Prec. Ch. 305, *et v. supra*, p. 853.

(d) 1 Ves. 514-16.

(e) *Ibid.* p. 516.

(f) A father entered into a covenant, in a penalty of 25,000*l.*, to settle his estates equally amongst his children. The covenantor devised

his estates in a manner inconsistent with his covenant. Lord Hardwicke held that as there was a kind of consideration (*v. supra*, p. 853), the covenant ought to take place of all other voluntary settlements, as was the will, but not of debts; and he decreed that the estates should be divided amongst all the children, not simply leaving them to enforce the covenant at law; *Bolton v. Bolton*, 3 Swanst. 414, note, (1739); *Williamson v. Codrington* was acted upon by Sir J. Wigram, in *Fletcher v. Fletcher*. As the assistance of the court was not required to render the covenant effectual, and nothing was sought beyond giving effect to the legal obligation, that case is not at variance with Lord Thurlow's doctrine in *Evelyn v. Templar*, cited by Lord Eldon in *Pulvertoft v. Pulvertoft*, *v. supra*, pp. 282, 285, or with Lord Cottenham's general declaration in *Jeffreys v. Jeffreys*, see the next note; but *Bolton v.*

equally, whether he seeks to have the benefit of a contract, a covenant, or a settlement" (a); though the court will not interfere to prevent the party from recovering what he can at law (b). But though, as regards voluntary obligations, the Court of Chancery will not generally interfere (c), yet the court will so far assist the volunteer claiming the benefit of a voluntary bond, that if by reason of the obligor having kept the bond in his possession, it shall have come into the hands of his executors, and they and the obligees in trust omit or decline to act upon it; the court (at least when the fact of possession by the donor can be accounted for, as where it is not intended to operate till the donor's death), having all parties before it, will give such directions as shall enable the *cestui que trust* of the money secured by the bond, to have its legal validity tried at law; or if that should be declined by the representatives of the testator, the court will act upon the bond according to its tenor in the administration of the estate of the obligor (d).

Following out the principle that a contract will not be enforced at

Bolton is not so easily to be reconciled: however the full amount of the penalty might have been recovered at law, and the estates must have gone in satisfaction in the whole or in part: so that in substance the covenant was literally enforced: *et v. supra*, p. 283, note.

(a) *Jefferys v. Jefferys*, 1 Cr. & Phill. 141, stated *infra*: and see *Sowerby v. Gutteridge*, L. C. 13 November, 1848. In *Bellingham v. Lowther*, 1 Ch. Ca. p. 243, stated *infra*, an attempt was made to distinguish between a covenant and a voluntary imperfect conveyance, on the ground that there was no tie in the latter case, so that the rule governing such cases ought not to be applied to a covenant to do an act where there is a tie; but it did not prevail: though that case was not decided on the broad ground that a voluntary covenant will not be enforced.

(b) *Ward v. Audland*, 8 Beav. 202.

(c) Lord Thurlow, *Evelyn v. Templar*, *ubi supra*.

(d) *Fletcher v. Fletcher*, 4 Hare, p. 67. In this case *Ellis Fletcher* executed in due form a deed, dated 1st Sept. 1829, by which he covenanted, for himself, his heirs, &c., with five trustees, that in case his two natural sons, John and Jacob, or either of them, should survive him, his heirs, executors, &c., should pay to them, or such one as should attain 21, a fixed sum, namely, 60,000*l.* The deed was never communicated to the trustees, or to the natural children, who were infants, and the deed, which it will be observed was not to operate till the donor's death, was kept in his own possession. *E. Fletcher*, in 1834, made

his will, giving the whole of his real and personal property amongst the two natural children and his three legitimate children. Jacob died under 21, and John, the surviving natural child, filed a bill to have the 60,000*l.* paid to him out of the assets of *E. Fletcher*. The surviving trustee named in the deed, stated that he had never accepted the trust, and declined in any way to interfere, excepting under the direction of the court. The deed was in the possession of the executors, and they declined to sue without directions, so that, as the deed could not be put in suit, John could not obtain the benefit of it without the aid of the court. The Vice-Chancellor Wigram held that the court was bound to interfere, so far as to direct that the name of the trustee should be used for the purpose of suing upon it, if it should be required that it should be established as a valid instrument at law, and that if necessary the executors should produce the deed for this purpose; and the parties having, under those circumstances, waived a trial at law, the Vice-Chancellor declared that the deed constituted a good debt at law, and ordered payment out of the testator's assets. This covenant, according to the doctrine of the juriconsults, would have been a mere solicitation; see *Pothier*, tom. v. p. 5, § ii. 4; See also *Clough v. Lambert*, 10 Sim. 174, where the Vice-Chancellor of England enforced against the executors a covenant under seal, entered into by a husband with trustees on the part of his wife on separation; but in that case the deed had been acted upon in the donor's life.

the instance of a volunteer; where a person, as has been noticed in the preceding section, without consideration, signs or executes an instrument by which he intends to pass the property in a subject capable of immediate transfer, and that instrument is not effectual to pass the property, but something is required to be done in order to complete the transfer; in such case neither he, nor his representatives (a), can be compelled by the court to do the act necessary for its completion; although, as it seems, the donor may have given a power of attorney to complete the act, at least if it be not put in operation during his life: the transaction is incomplete, and it cannot be enforced, even though a child be the subject of the intended gift (b). We may therefore consider it as established, that

(a) For the general rule is, that the personal representative stands in the place of the donor, and if the party could not enforce it against the one he cannot against the other, Lord Chancellor Hart, *Unicke v. Giles*, 2 Mollor, p. 269: Vice-Chancellor Wigram, *M'Fadden v. Jenkins*, 1 Har. 460, and cases there cited: there may be, as after stated, an exception to this rule, in the case where a person has executed an instrument effectual in itself, but has reserved a *locus penitentia* personal to himself till his death.

(b) *Antrobus v. Smith* (1805), 12 Ves. 39. That case was shortly as follows:—Gibbs Crawford, being entitled to ten shares of 100l. each, in the Forth and Clyde Navigation, wrote on a receipt for one of the subscriptions, and signed this memorandum: "I do hereby assign to my daughter Anna Crawford, all my right, title and interest of and in the inclosed call, and all other calls of my subscription in the Clyde and Forth Navigation;" it was not delivered, but it was kept in the donor's possession, and was found in a pocket book, with other papers relating to his estate: the testator continued to act as owner, and afterwards gave a large sum to this daughter. The plaintiff in the suit sought to have this imperfect gift completed, it being in favour of a daughter. Sir Wm. Grant said, "If it was to be presumed that he had delivered it, and that it had been delivered back, coupling this with the subsequent provision made for the daughter, it would be conclusive against the plaintiff," (p. 44). And the bill was dismissed. Sir W. Grant observed, in his judgment, that Mr. Crawford did not, as had been urged, constitute himself a trustee—he meant a gift: for he says he assigns the property, but it was a gift not complete: the property was not transferred; "There is no case in which a party has been compelled to perfect a gift, which in the mode of making it he has left imperfect. There is *locus penitentia* as long as it is incomplete,

and Mr. Crawford did repent, (*ibid.* p. 46). If it could be executed now it might have been executed against Mr. Crawford himself, for which no authority can be found," (p. 47); and see the judgment of Lord Langdale, in *Ward v. Audland*, 8 Beav. p. 202. *Dillon v. Coppin*, 4 My. & Cr. 647, was a most favourable case, to induce the court to complete an imperfect gift in favour of a child. The donor had three daughters; he had advanced to two, on their respective marriages, but not to the third, Mrs. Coppin, who was also married. The father executed a deed-poll, attested by two witnesses, which purported to be an assignment to his daughter, for the benefit of herself, her husband and children, of some East India stock and Globe shares, which, it was proved, could only pass by transfer (as to this, see *Antrobus v. Smith*, *supra*); he kept the deed in his possession, as it would appear, in order that he might have the control over it during his life, but died intestate, without revoking it; he signed a memorandum, desiring that the deed should be delivered to his daughter immediately on his death; and he had, in the deed, directed his representatives to do all that was necessary for perfecting the title. Most of the cases in regard to meritorious consideration, including *Ellis v. Nimmo*, after stated, were cited, pp. 664-5-6: Lord Cottenham decided that the stock and the shares formed part of the intestate's general estate: Mrs. Coppin, as administratrix, had transferred the stock to herself, on the trusts of the deed-poll. In *Bellingham v. Louther*, 1 Ch. Ca. 243, a person covenanted to surrender certain copyhold premises to another, for the benefit of the brother of the covenantor and his issue, and had given a power of attorney to make the surrender, but the covenantor died before the surrender was made, so that the power of attorney was revoked: Lord Nottingham refused to compel the covenantor to perform his covenant. In *Jefferys v. Jefferys*, 1 Cr. & P.

where a person voluntarily signs or executes any instrument by which he purports to convey or assign property of any kind or description to another, the transaction being in the form of a transfer or intended transfer of the property to that other; if the transfer be not complete, that is, if anything that might have been done by the donor for the completion of the transfer has been left undone, whether the donor contemplated the doing it or not, it is at most a contract only, and the Court of Chancery will not complete it, either as against the party himself, or those claiming under him, even in favour of a child (a).

The point that the court will not lend its assistance to compel the completion of an agreement or stipulation on the part of a father as against the father to grant or convey in favour of a child, was not finally settled till very lately.

Lord Keeper Wright, in *Watts v. Bullas* (1702) (b), made good a defective voluntary conveyance to the brother of the half-blood against the *heir*, on the ground that as the consideration of blood would raise an use at law, so should this imperfect conveyance raise a trust in equity, in respect of the consideration of blood. The authority of this case was controverted by Lord Hardwicke, as pursuing the maxim as regards uses too far (c); but his Lordship seemed to admit, that when confined to a wife and children, the doctrine was reasonable, and might be adhered to.

The question whether the claims of a child afforded the meritorious consideration which Lord Thurlow considered essential (d), and which Lord Hardwicke, in numerous cases, appears to have considered valuable though in a second degree (e), came directly before Lord Chancellor Sugden in 1835. In that case (f), a father signed a paper to which no person was named as a party but himself (so that it was a mere pollicitation), by which he agreed to grant an annuity charged on an estate in favour of his daughter. The

141 (1841), *supra*, p. 890, a person had entered into a voluntary covenant, dated Sept. 1834, to surrender certain copyholds, for the benefit of his daughters; he died some years afterwards, having by his will, dated Aug. 1836, in violation of the covenant, devised part of the copyhold premises to his wife, who had been admitted; he had therefore taken advantage of his *locus penitentiae*: Lord Cottenham declined to enforce the covenant, on the ground that it was voluntary.

(a) *Et v. infra*, *Edwards v. Jones*: that case, which is a very material one, relates to assignments of choses in action, and will be introduced in the next section.

(b) 1 P. W. 60.

(c) *Goring v. Nash*, 3 Atk. p. 189, stated *supra*, p. 283. Defects in surrenders of copyholds, and in the execution of powers, are now only supplied in favour of creditors, a wife, and children: *Goodwyn v. Goodwyn*, 1 Ves. p. 228; *Byas v. Byas*, 2 Ves. 164; *Tudor v. Anson*, *ibid.* 582, v. *supra*, p. 285, note.

(d) *Colman v. Sarrel*, 1 Ves. J. 52; and see 3 Bro. C. C. 14; *supra*, p. 58.

(e) *Supra*, p. 853, *Wright v. Wright*; *Bolton v. Bolton*, *sup.* p. 889, *et v. sup.* p. 284.

(f) *Ellis v. Nimmo*, Llo. & G. temp. Sugd. p. 339, *et seq.*

father refused to carry the agreement into execution; in fact, as far as he could, he revoked it. The daughter and her husband filed a bill against the father to compel him to perform it: the Lord Chancellor, on the ground that the claims of a child were a sufficient consideration to induce the court to support a covenant to stand seised, and to aid a defective conveyance or surrender (a), was of opinion that in the absence of authority to the contrary, they might be considered as a sufficient consideration to support an agreement *in fieri*; and he decreed a specific performance of the promise as a contract. This case has not been expressly overruled, but (b) the cases of *Dillon v. Coppen*, and *Jefferys v. Jefferys*, have overruled it in effect (c).

In the following case, which is peculiar in its circumstances, an obligation was implied and specifically enforced, at the instance of a stranger:—the defendant *executed* a deed, purporting to convey to the plaintiff, his female servant, lands of the value of 22*l.* a year; when she came to inquire where the lands were, the defendant laughed at her, and said they were *in nubibus*, in fact the whole was a fiction: the Court of Exchequer ordered the defendant to convey to the plaintiff lands of that value (d).

The question as to who are to be considered as purchasers under a settlement, and who as mere volunteers, in reference to that character generally and in reference to the statute of the 27th of Elizabeth, has been discussed in a preceding part of this volume (e); but as the following case, from Sir E. Sugden's late valuable work, is material as regards that point, I therefore here insert it.

A person being tenant in tail under his father's will, with successive remainders to his two brothers in tail, by articles before marriage agreed to settle the estate in strict settlement, making himself tenant for life, with remainder to the sons of the marriage in tail. After the marriage he suffered a recovery, and executed a settlement ac-

(a) See particularly *Thompson v. Attfeild*, 1 Vern. 40, recognized by Lord Hardwicke; *Saltern v. Melhuish*, Amb. 251; *Fothergill v. Fothergill*, 2 Freem. 256.

(b) *Withy v. Mangles*, 10 Cl. & Fin. 215.

(c) As in this case an attempt was made to enforce the contract against the father himself, and as he had in fact revoked it, the cases as to aiding defective surrenders, which proceed upon a continued intention to benefit the child, were not directly applicable, see *Lloyd & G.* p. 348. The implied reversal does not necessarily decide that there was not sufficient consideration to have supported it, if unrevoked, as against other volunteers (*v. sup.* p. 284, 853, 882, n. (b), 889, and see *Uniacke*

v. Giles, 2 Moll. 265); but Lord Cottenham's doctrine appears to embrace that case. Mr. Lewin, Appendix, iii. p. 705, has collected and observed upon the cases on Meritorious consideration.

(d) *Carey v. Stafford*, 3 Swanst. p. 427. Chief Baron Gilbert said it was not like the ordinary case, where the volunteer may be left to get what he can at law: "for here nothing at all is given, and therefore no remedy can be at law;" from Hale, B.'s, judgment, *ibid.* it is clear that the court was influenced by the consideration that the plaintiff had been seduced, and that a scandalous trick had been played off upon her; see *Knye v. Moore*, 1 Sim. & St. 64.

according to the articles, adding remainders to his two brothers successively for life, with remainders in like succession to their sons in tail male, remainder as he should appoint; he then mortgaged the premises in fee. Lord Manners held that the limitations to the brothers (being volunteers) were void as against the mortgagee, he being a purchaser *pro tanto*: this decree was affirmed in the House of Lords, Lord Eldon holding that the brothers took new estates under the settlement, and that there was no substantial difference in such cases between tenant in tail and tenant in fee (a).

(a) *Cornick v. Trapaud*, 6 Dow. p. 60; Sugd. Law of Prop. p. 148: *et v. supra*, p. 288, 293, *et infra*, 887.

SECTION IV.—*Voluntary Assignments of Choses in Action, and of Contingent Interests and Possibilities in Personal Chattels.*

Choses in Action, and Contingent Interests in Personalty considered as Property.

How far capable of Gift—What amounts to a Gift.

Transfer of Chose in Action by Declaration of Trust.

Trust Created by Directions given to the Debtor.

Voluntary Transfer by Assignment.

Assignment followed by such Acts as would give a Title against Assignees.

Whether Notice may be dispensed with.

Fortescue v. Barnett.

Assignment of Equitable Interest in Stock.

Sloane v. Cadogan.

Assignment of Bond by Writing not under Seal.

Edwards v. Jones, before Lord Cottenham.

Assignment by Deed.

Blakely v. Brady, before Lord Plunket.

Ward v. Audland, before Lord Langdale.

Remarks on the preceding Cases.

Declaration of Trust the only sure way of effecting a transfer in Equity.

Voluntary Assignments of Contingent Interest and Possibilities in Personal Estate.

Meek v. Kettlewell, before Sir J. Wigram and Lord Lyndhurst.

Gift inter vivos cannot be set up as a Donatio Mortis Causâ.

What will and what will not amount to a Release in Equity, there being no Consideration.

WE have now to consider the most difficult part of the subject; namely, by what means an effectual gift of a chose in action and of a contingent interest or a possibility may be effected.

A right to recover a debt or sum of money from another, whether recoverable by the party himself or by some other person as his trustee, is admitted to be Property: and a contingent right to money or other valuables, whether recoverable at law or in equity, which must depend upon the nature of the subject, even though the right may rest in possibility only, is also recognised as property; for every such interest which does not cease with the death of the party entitled, will pass to the representatives of such party, and may be disposed of by will (a); and contingent interests and possibilities coupled with an interest of every kind in tenements and hereditaments, may, as has been

(a) 1 Vict. c. 26, § 3.

already noticed, be conveyed by deed (a), and all such interests in personal estates may, without question, be the subject of contract for valuable consideration. A mere expectancy may also be the subject of contract for valuable consideration, though whether any thing shall be obtained under such contract must, from the nature of the subject-matter, depend upon chance (b); so that in this way at least such an interest may be effectually transferred to another.

It is one of the incidents of property that a person may give it away as well as sell it, hence it has never been explicitly denied that a person has a right to give away any interest, whether legal or equitable, which is recognised at law or in equity as property (c). However, the obstacles which have, in some instances, been thrown in the way of the donee recovering that which has been intended to be given to him, where he has to resort to the Court of Chancery, have, in effect, almost amounted to a denial of the right to give: the great difficulty is as to what is to be considered as amounting to a gift in fact, and to this question I am about to direct the reader's attention by submitting to him some of the leading authorities.

As regards choses in action:—It is to be observed that a debtor, by contracting the debt, does not in any sense become a trustee; his contract is to pay to his debtor, and it is only by his own acts that he can become strictly a trustee for another; though, as we have seen, after notice of an assignment, he makes himself liable, if he pay to his original debtor (d). Generally speaking, as we have seen in a former chapter (e), an effectual assignment of a debt cannot be made, unless by way of declaration of trust as after mentioned, at least as regards third persons, without notice to the debtor; this notice is in effect, on the part of the assignor, the substitute for delivery, and on the part of the assignee of the taking of possession, which is essential to pass an interest in personal property; and if it had been held that no gift of a chose in action should be considered as complete, unless notice

(a) 8 & 9 Vict. c. 106; Vol. i. p. 291, *et supra*, p. 879.

(b) *V. infra*, p. 912, *Lythe v. Milne*, 1 My. & K. 683-93; and the cases there cited. In that case the grantor of an annuity covenanted for value, to charge it on such property as he might derive under the will of a person then living: after the grantor had obtained his certificate he became entitled to a legacy under the contemplated will: it was held to be charged in equity with the annuity; and see *Bennett v. Cooper*, 9 Beav. 252, 254-5; *Phipson v. Turner*, 9 Sim. 245.

(c) The interests I am speaking of are

those in which there is an existing right, though depending as regards the enjoyment of its fruits on a contingency, and some specific property which is the subject of such right: the interest of an heir or an expectant legatee is of a different character; it is only in the way of enforcing a contract that the subject can in any way be affected in these instances; there is neither a right nor a subject on which a gift can operate during the life of the ancestor or testator.

(d) *Sup.* p. 858.

(e) *V. sup.* p. 856, 857.

were given to the debtor or person liable, at least an intelligible rule of easy application in most cases would have been established: but, as we shall see in the following pages, in some cases notice has not been treated as a requisite, as between the parties, where what has been considered as equivalent to delivery has been effected in another manner (a). Where the right to recover the debt is vested in one as trustee for another, in principle, as between the parties, notice to such trustee of an assignment of the equitable interest in the debt by the *cestui que trust*, can no more be requisite in such a case, than it is in the case of an assignment of an equitable interest in any other property (b): such notice being given by the donor, may be cogent evidence of a definitive intention to give, but cannot in principle be essential to constitute the gift.

It seems to be agreed, as a general rule, that if a person effectually declares himself or his debtor, to be trustee for another of the money or property to be recovered, whether in writing or (as trusts of personal estate are capable of being created without writing (c),) by acts and declarations of a decisive and definitive nature sufficiently proved, the transaction will be binding against him and his representatives (d);

(a) V. *infra*, p. 906.

(b) V. *supra*, p. 856, 857.

(c) See *Bayley v. Boulcott*, 4 Russ. 347; *Bill v. Cureton*, 2 My. & K. 503; *Jones v. Croucher*, 1 Sim. & S. 315; and 1 Hare, 461; and the other cases there cited. In *Benbow v. Townsend*, 1 My. & K. 506, (1833,) a person lent 2000*l.* on the security of a copyhold estate, and took the security in the name of his brother. He received the interest, telling the mortgagor at the time that he should himself receive the interest, but that the principal would belong to his brother. Sir J. Leach said, "But in this case, the trust being of personal estate, the case is not within the Statute of Frauds, or the doctrine of resulting trusts under that statute, but the property will belong to the brother after the testator's death, by force of the testator's declaration that the 2000*l.* should after his own death be the property of his brother Job," p. 510; and see *M'Fadden v. Jenkyns*, additional note No. 1, to this Section.

(d) "You may constitute one a trustee for a volunteer," Sir Wm. Grant, *Sloane v. Cadogan*, Sugden, V. and P. appendix. In *James v. Bydler*, 4 Beav. 600, (1841,) John Betts executed a post-nuptial settlement, by which he assigned to trustees certain bonds and promissory notes for securing 600*l.* in trust for himself for life, then for his wife, after their deaths for their children; and he covenanted that his executors, twelve months

after his death, should pay to the trustees 300*l.* additional on the same trusts. The bonds and promissory notes were delivered to the trustees, but the notes were not indorsed to them, and no notice was given to the debtors. One of the trustees afterwards handed over two of the securities (p. 603) to the settlor, who recovered 200*l.* upon them, the remaining 400*l.* could not be recovered. The settlor signed two memorandums, by which he acknowledged that this sum was money held in trust for his children, and that he had laid it out in part in the purchase of a copyhold estate. Being pressed by the trustees he deposited with them the title deeds of the purchased estate, by way of security for the 200*l.* Lord Langdale held that this last transaction was one which rested on a valuable consideration, and his lordship established it to the extent of 200*l.* against his devisees and representatives, he having devised the estate upon trust for other persons, namely, his children by a second marriage. Lord Langdale considered that as regards these sums, the memoranda signed by him affected them with a trust which he was not at liberty to dispute, p. 606, and that his subsequent dealing with these funds was not to be considered as a mere voluntary matter, though in doing so he did not appear to have been acting under the notion of any liability, p. 603. The bill was so framed as to have embraced the remaining 400*l.* and the 300*l.* covenanted to be paid;

and this whether the property be recoverable by the party himself or by a trustee for him. The doctrine, said the Vice-Chancellor Wigram, is not confined to cases where the legal interest is conferred or acquired in pursuance and execution of an antecedent agreement or direction leading to the uses or trusts of that property, it extends to all cases where the transaction is complete (*a*): that is, where the declaration by the party entitled, whether legally or equitably, shows a definitive intention by that act, at once to denude himself of all beneficial interest in the subject in favour of another.

If a person by a written instrument or by word directs the debtor to hold the money due, in trust for a third person, and such direction is, at least with his sanction, communicated to the debtor and to the donee, an effectual trust is created in favour of the donee; it is the same in effect as if the donor had declared himself to be a trustee of the debt for the donee; especially where the debtor has acted upon such direction by payment of interest to the donee without objection, for this leaves no room to doubt that the transaction was final and complete: such a transaction is binding on the party himself, and by consequence on his representatives (*b*); both are volunteers, and the donee has a specific paramount claim.

Where the transaction has been in the form of an Assignment, not being a declaration of trust, it has created greater difficulty; such cases have frequently arisen in respect of policies of insurance. In the case of *Adams v. Claxton* (*c*), Sir William Grant seems to admit that a policy of insurance may be effectually assigned, but the question is, What acts will amount to such an assignment as that the Court of Chancery will feel itself bound to support or enforce it by making the legal holder of the policy a trustee for the donee without looking to the subject of consideration? It is quite clear, as a general rule, that where a person shows the clearest intention to give, but leaves the gift imperfect, let the subject of it be what it may, the Court of

but this does not appear to have been pressed. As regards conveyances of equitable estates and interests in real estates, a deed under seal may be necessary to keep up the analogy to the law; (but see Hayes' Introduction to Conveyancing, p. 98, and Hayes' Elementary View, 71; *sup.* Vol. i. 506;) but as regards a declaration of trust of personal estate, it would seem to make no difference whether the instrument be under seal or not, excepting that a deed evinces a more fixed determination (see 1 Hare, 474, as to the efficacy of a seal). As regards Assignments by deed as distinguished from Assignments by writing merely, *v. infra*,

p. 908.

(*a*) Vice-Chanc. Wigram, *Meek v. Kettlewell*, 1 Hare, 470, observing upon *Colman v. Sarel*, 3 Bro. 12; *Ellison v. Ellison*, 6 Ves. 656, and *Pulvertoft v. Pulvertoft*, *v. sup.* p. 52, 53.

(*b*) *M'Fadden v. Jenkyns*, 1 Hare, 458, 1 Phillips, 156-7-8, additional upon No. 1, to this Section; and see *Ex parte Pye*; *Ellison v. Ellison*; *Fortescue v. Barnett*, *infra*, *Sloane v. Cadogan*, *inf.*; *Roberts v. Lloyd*, 2 Beav. 376; *Wheatley v. Purr*, and *Collinson v. Patrick*, all cited *supra et infra*.

(*c*) 6 Ves. 226; *sup.* p. 861.

Chancery will not interfere at the instance of a volunteer to make it perfect (a); but where every thing has been done in regard to a voluntary assignment of a chose in action, that is considered to be requisite to complete the title on an assignment for value as against assignees or subsequent purchasers (b), perhaps it may be stated, that without doubt the donor and his representatives would be held to be bound and to be trustees for the donee: but a voluntary assignment of a policy has been supported without all these requisites having been complied with.

John Barnett, shortly after the marriage of his sister Mary, then White, by *indenture* made between himself, Henry White and the said Mary wife of Henry White, and Thomas White and the plaintiff Fortescue as trustees, assigned a policy of assurance for 1000*l.*, to the trustees in trust for Henry White and wife for life, then for their children; Barnett covenanted to pay the premiums: there does not appear to have been any power of attorney to the trustees to receive the money. Barnett *kept the policy*, and *did not give notice* to the insurance company, but he *delivered the deed* to one of the trustees: he afterwards received a bonus, and then for a sum of money surrendered the policy to the office; if he had any *locus penitentiæ* he exercised it: the bill was filed by Fortescue against the grantor himself, to enforce the voluntary assignment. Sir John Leach, Master of the Rolls, decided that the assignment was binding, and that Barnett was liable to pay the amount which would have been received if the policy had not been surrendered, and the amount of the bonus; though Barnett swore that he considered that he was to have the control of the policy during his life, and to have power to revoke (c), but no evidence was given to show that such power was omitted to be inserted by mistake or otherwise: in effect Barnett was held to be constructively a trustee for the donee (d). The ground of the decision was that nothing (at least nothing essential) remained to be done by the grantor (e): the gift, that is of all the

(a) *Antrobus v. Smith*, 12 Ves. 39, Sir W. Grant, stated *sup.* Sect. iii. p. 891.

(b) *V. supra*, p. 858, 859.

(c) In *Naldred v. Gilham* Sir Jos. Jekyll's decree was reversed, because Mrs. Gilham thought there was a *power of revocation in the deed*, which she had kept; see 5 Barn. & C. p. 691.

(d) *Fortescue v. Barnett*, (1834,) 3 My. & K. 36. Though that fact is not noticed in the argument or judgment, Barnett had treated Mrs. White as having a direct interest in the policy, by procuring her consent to the surrender, on an understanding that the amount

of the premium should be paid to Mrs. White, Barnett making at the same time a provision in his will for Mrs. White and her children, her husband being then dead (see p. 39): so that Mrs. White might have altered her habits of life on the strength of Barnett's assurance.

(e) Assuming this to be the fact, (which it was not, as the policy had not been delivered to the trustee, and no notice had been given to the insurance company,) Lord Cottenham recognised it in *Edwards v. Jones*, 1 My. & C. 239, *inf.*; his Lordship also recognised *Sloane v. Cadogan, infra.* on the same principle, *ibid.*, but unwillingly, see 1 Hare, 475.

donor's *beneficial interest*, was considered as complete, notwithstanding the retention of the policy. Sir J. Leach observed that, if the trustees had *given notice* to the office, implying that such was their duty, Barnett would not have been able to have defeated his grant (*a*); but the not giving notice to the office could not, in his opinion, affect the *cestuis que trust*—at least, the infant children (*b*).

The case of *Sloane v. Cadogan*, before Sir William Grant (*c*), which has been already noticed, and which relates to the assignments of equitable interests in stock and the like (a very material case on the subject of the completeness of the gift whatever may be the subject), is so pointedly referred to in the next case to which we have to direct our attention (*Edwards v. Jones*), and it has been the subject of so many varying opinions (*d*), that it is proper here to introduce it.

William Bromley Cadogan was entitled to one-fourth of 20,000*l.* on his father's death. By indenture, 26th May, 1798, he assigned all his *interest* in this fund (being then reversionary) to trustees, on certain trusts which had run out, with the ultimate trust in favour of his father, Lord Cadogan, with a power of revocation. William Bromley Cadogan did not exercise the power of revocation (*e*), and died, having left the residue of his property to the plaintiff, his wife. One question raised was, whether this deed was operative to pass William Bromley Cadogan's interest in one-fourth of the fund to Lord Cadogan. The 20,000*l.* having been lent to Lord Cadogan, who was dead, the fund was actually in the hands of his executors, so that they did not require any assistance from the court to obtain the fund, but Sir William Grant does not appear to have considered this to be material. Sir E. Sugden, for the plaintiff, admitted that Mr. Cadogan, by executing the deed, had done all he could, but he insisted that was not enough: he had not made and *could not* make, an *actual* transfer. This argument, it may be observed, amounts to this; that an equitable interest in property of this description cannot be assigned so as to become actually vested in another, and that every attempt to do so is but a contract, only to be carried into execution where there is a consideration; to which the Vice-Chancellor of England, as before observed in *Holloway v. Headington*, appears to have given his sanction (*f*). If a man, continued Sir E. Sugden,

(*a*) Lord Cottenham, 1 My. & C. 239, seems to have founded on this allegation the assumption that the office would have recognised the assignee as the person entitled to the policy, which Lord Langdale, in *Ward v. Auldland*, 8 Beav. 212, does not consider to be warranted by any of the facts in the case.

(*b*) 3 My. & K. p. 43: holding, therefore, that notice is *not essential* to complete the gift.

(*c*) Appendix to Sugd. V. and P. p. 1119.

(*d*) See particularly *supra*, p. 56, note.

(*e*) Sugd. App. p. 1123.

(*f*) See this case in the additional note, No. 2, to this Section.

is seised of the legal estate, and agrees to make a voluntary conveyance, it cannot be enforced; can it make any difference that the legal estate happens to be outstanding (a)? Sir William Grant, in giving judgment, said, "The court will not interfere to give perfection to the instrument, but you may constitute one" (that is your own trustee) "a trustee for a volunteer" (that is, looking to the facts, *constructively* by assigning your interest, which is saying in effect that the assignment is good). "As against the party himself and his representatives, a voluntary settlement is binding" (Sir Wm. Grant, it will be remembered, is referring to an equitable interest); "here the fund was vested in trustees: Mr. W. Cadogan had an equitable reversionary interest in that fund, and he has assigned it" (viz. his equitable interest) (b) "to certain trustees; and then the first trustees are trustees for his assigns, and they may come here" (that was more, as it happened, than they required), "for when the trust is created, no consideration is essential:" and the bill of the plaintiff, who was a general legatee, was dismissed (c).

The most important case in relation to the point immediately before us is that of *Edwards v. Jones* (d). Mary Custance, being eighty years of age, but in full possession of her faculties, five days before her death, signed the following indorsement on a bond given to her for 300*l.* by one Williams: "I, Mary Custance, hereby assign and transfer the within bond or obligation, and all my *right, title and interest* thereto, unto and to the use of my niece, Esther Edwards, with full power for her to sue for and recover the amount, and all interest now due and hereafter to become due thereon" (e). The instrument itself therefore showed an evident intention on her part to assign all her *interest* in the bond, and evidence was given

(a) To this the answer appears to be, that in the first case he has not done *all that he could have done*: if the legal estate is outstanding all that he *can do* by way of conveyance is to assign his equitable interest.

(b) The Vice-Chancellor of England, in *Beatson v. Beatson*, (1841,) 12 Sim. 294, assumed that Sir Wm. Grant had said that Mr. Cadogan had assigned the *fund itself*; v. *supra*, p. 56, note.

(c) Lord Cottenham, in *Edwards v. Jones*, 1 My. & Cr. 239, adverts to the fact that no attempt was made in that case to call in aid the jurisdiction of the court, and see Sir S. Romilly's argt., Sugd. V. and P. 1126; in fact all that was actually done was to *dismiss the bill* as to the fund in question. His lordship also in *Edwards v. Jones*, said, upon the principle stated by Sir W. Grant, (that the transaction

constituted the old trustees, trustees for the *cestuis que trust* under the deed), the case was free from all possible question, for there was no attempt in that case to call in aid the jurisdiction of this court (*See qu.*, v. *infra*). The Vice-Chancellor Wigram in the course of the argument in *Fletcher v. Fletcher*, *supra*, stated that he did not consider that *Sloane v. Cadogan* had ever been overruled.

(d) *Edwards v. Jones*, 1 My. & Cr., 226, (1836,) on appeal; this case is also referred to *sup.* p. 285.

(e) It is to be observed that a power of attorney merely to sue, does not require to be under seal; that is necessary only where a deed is to be executed, *Berkeley v. Hardy*, 5 Barn. & C. pp. 355, 359. Could the donor have *restrained* the donee from suing on the power of attorney? see 7 Ves. 28, and *infra*, p. 905.

to the same effect (a). Mary Custance had another bond from the same person for securing 123*l.*; both were kept by her together. Immediately after signing the indorsement, Mary Custance delivered both the bonds to Esther Edwards, the plaintiff, who still had them in her possession at the filing of the bill by her; no notice had been given to the obligor (b), not from any intentional omission, but apparently because the donor desired that her sister might not be apprized of the transaction; and after the death of Mary Custance, her executors, under the supposition that the bonds had been lost, persuaded the obligor to give a fresh bond. The bill mistakenly claimed the bond as a *donatio mortis causâ*, but that failing, it was claimed, at least on the hearing of the appeal, as a gift. The Vice-Chancellor of England, on the original hearing, dismissed the bill with costs. Lord Cottenham, on appeal, held that the transaction neither amounted to a *donatio mortis causâ*, nor to a gift. His Lordship relied chiefly upon Sir William Grant's judgment in *Antrobus v. Smith* (c). "Every word of that judgment," said his Lordship, "applies directly to the circumstances of the present case; it is impossible, indeed, to distinguish the two cases." His Lordship, though objecting to some of the expressions of Sir J. Leach, did not dispute the decision in *Fortescue v. Barnett*, which was urged upon him as governing the case then before him; if, said his Lordship, as Sir J. Leach held, that transaction was complete, and it was not necessary to come to the court in order to constitute a trust—if a trust was created—then the decision was right: and his Lordship recognized *Sloane v. Cadogan*, which, it is to be observed, was also a case of an assignment, not a declaration of trust, as a case where the act was complete, and such as constituted the donor a trustee for the donee (d). However, his Lordship considered that in the case before him the transaction was not complete; that the relation of trustee and *cestui que trust* was not created, and he therefore, and looking to the case made by the bill, confirmed the decision of the Vice-Chancellor of England (e).

(a) See 1 My. & Cr. p. 229. Sir James Wigram, V. C., in *Meek v. Kettlewell*, observes upon the case of *Edwards v. Jones*, "That the most distinct evidence of intention to pass an interest may not be conclusive."

(b) But which, as the assignment and the bond had been delivered, according to *Fortescue v. Barnett*, *supra*, (at least unless the cases are to be distinguished by the assignment in the one having been by deed,) was not necessary; besides the donor had a reason for not giving notice (1 My. & C. 229).

(c) 12 Ves. 39; v. *supra*, p. 891, and which is also referred to *supra*, p. 56, 58, *in notis*. "There is no case," said Sir Wm. Grant in that case, "in which a party has been compelled to perfect a gift, which in the *mode of making* if he has left imperfect."

(d) 1 My. & Cr. 238, *et v. sup.* p. 899, 900.

(e) It is to be observed that the bill sought to establish the gift as a *donatio mortis causâ*, and charged that the *testatrix* intended it as such, see 1 My. & Cr. 234, which was wholly inconsistent with its being an absolute gift, as

The next case that particularly requires attention arose in Ireland. In *Blakely v. Brady* (a), Matthew Reilly being entitled to 1620*l.*, due to him from one Mitchell on a note of hand, by deed assigned all his interest in the said 1620*l.* and the note to the plaintiff, as trustee for the donor for life and afterwards upon trust for certain other persons; the plaintiff was irrevocably appointed Reilly's attorney to sue, and to give receipts; the deed was delivered to the plaintiff: whether any notice was given to the debtor does not appear; no point was made on that subject by either party. Matthew Reilly then died intestate. The administrator of Reilly having brought an action on the note, the plaintiff filed the bill. Lord Plunket, chiefly on the authority of *Fortescue v. Barnett*, held that the gift was complete, and not resting in contract; nothing, he said, remained to be done (b): the plaintiff came there because the property, by the grant of administration, was in the defendant as administrator, but he was administrator *in trust*. It is clear, said his Lordship, that you may constitute a trust for a volunteer; the only difference between this case and *Sloane v. Cadogan* (c), the authority of which his Lordship recognized, was this, that in the present case the law had created the trust, and in *Sloane v. Cadogan* the trust was created by the act of the donor; and

was now contended in the argument: as to this point, see *Walter v. Hodge*, 2 Swanst. 97.

As this decision, so far as affects the question as to gifts *inter vivos*, was founded on *Antrobus v. Smith*, I have put together what appear to me to be some material features of distinction between the two cases. In the one case, that before Sir William Grant, which is shortly set forth in the preceding section, *supra*, p. 891, the language of the instrument was equivocal; in the other precise, leaving no doubt as to its object (see 1 My. & Cr. 235): in the one the instrument was not delivered to the donee, nor the fact communicated to him; in the other the instrument and the bond were delivered to the donee and with a view to a gift: in the one case the donor expressed his intention not to complete the assignment; in the other there was an absence of all intention to revoke, even by will: in the one case the subject (if the intention was to assign it) was capable of an effectual legal transfer, and the bill prayed that the canal share might be assigned to the plaintiff; in the other it was not: in the one case there were simply words of assignment; in the other the donee was empowered to recover in the name of the donor: in the one case there was no reason assigned why notice had not been given to the company; in the other there was a sufficient reason why notice was not

given to the debtor; though his Lordship did not advert to the want of notice as a material feature. No doubt I am labouring under some mental incapacity or misapprehension; but I confess I can neither follow the distinctions taken by the eminent judge who decided this case between it and *Fortescue v. Barnett*; nor can I bring myself to think that it is supported by *Antrobus v. Smith*.

(a) *Blakely v. Brady*, 2 Drury & Walsh, 311 (1839), L. C. Plunket.

(b) Page 326. This was in answer to the objection, that if you want the assistance of this court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have the assistance of the court, *Ellison v. Ellison*, 6 Ves. p. 661. Lord Plunket distinguished this case from *Edwards v. Jones*, by this, that in that case there was no assignment, that is, no assignment by deed, but a mere memorandum indorsed on one bond which was attached to another bond which latter bond clearly was not intended to be given to the plaintiff, and that the bill was dismissed on the ground that the transaction was not complete. But the Vice-Chancellor Wigram seems to consider that a deed has no more effect than a simple writing in these cases, *Meek v. Kettlewell*, 1 Hare, 474.

(c) *Supra*, p. 900.

he accordingly declared that the deed ought to be established, and the trusts performed (a).

In a late case, *Ward v. Audland*, 1845 (b), the question as to the validity of an assignment of choses in action by deed arose before Lord Langdale, and all the preceding authorities were cited or adverted to. The case was this:—William Whitelock, a single man without children, being entitled *inter alia* to a policy of insurance on his life in the Norwich Union, and to a sum of money secured by mortgage for a term of years, executed an *indenture* made between himself of the first part, his niece Margaret Ward and her husband and Jos. Ward as trustee, of the third part; by which, without describing any particular property, he assigned to J. Ward, *inter alia*, all sums of money then owing to him, and all (c) securities for the same, and all other his personal estate, together with the mortgage-deeds and writings relating to the premises, upon trust for himself for life, and after his death for his two nieces, with benefit of survivorship in the event of either dying without issue (d), and for their children in the event of their dying before him leaving issue. By the same indenture he assigned all lands (not specifying them) vested in him by way of mortgage, and he appointed Jos. Ward and his *heirs* his attorney to receive the debts, &c. and to do all acts, &c., and he covenanted for himself, his heirs, executors, and administrators, for further assurance (e). The deed was executed by Whitelock and by Joseph Ward, and was *delivered* to Jos. Ward; but Whitelock continued in possession of the property assigned, and of the deeds and policies, and received the interest due on the mortgage, and no *notice* was given by him or by Jos. Ward the trustee of the assignment, to the mortgagor, or to the insurance office. Mary Hervey, one of the nieces, died, leaving two children; and then William Whitelock made his will, by which he gave specifically the mortgage and policy of insurance (*inter alia*) to Audland and Mason, as trustees upon trusts (which were inconsistent with the indenture), for the benefit of the children of Mary Hervey. The bill was filed by Jos. Ward, and the surviving niece and her

(a) 2 Dr. & Walsh, 329, the Lord Chancellor thought that the full power of attorney contained in the assignment ought alone to govern the case, *ibid.* 328; there was a power of attorney in *Edwards v. Jones*, which, if it was meant to be revocable, was not revoked during the life of the donor. Would the gift in *Edwards v. Jones* have been supported if it had been by deed? *v. infra*.

(b) *Ward v. Audland*, 8 Beav. 202; and see C. P. Cooper's Rep. (1838), p. 147, and 8 Sim.

571 (1837); in that case all the leading authorities with the exception of *Blakely v. Brady* were cited.

(c) C. P. Coop. R. 147. In Mr. Beavan's report the words "policies of insurance and other," are here inserted by mistake.

(d) C. P. Coop. Rep. 148.

(e) N.B. though moneys on mortgage were mentioned, the policy was not, and of course it could not have been the subject of the first trust for his life.

husband claiming to have the trusts of the deed as regards the mortgage and policy of insurance carried into execution. By the decree a reference to the Master was directed to inquire as to the property, and he, by his report, found that the *policy* and *mortgage were included* in the indenture. The executors of Whitelock had received the money due on the policy, which the bill sought to recover from them. The plaintiffs insisted, that as regards the choses in action, this was not an agreement, but an *assignment* (a): they also insisted that at law the trustee might have proceeded to recover (during Whitelock's life) all the choses in action then recoverable (b); could the trustee, it was asked, by omitting to sue, or to give notice to the insurance company, alter the rights of the parties (c)?

The Master of the Rolls, Lord Langdale, in giving judgment, said the intention of Whitelock was to *assign* the property to the plaintiff, the trustee, absolutely upon trusts to be executed by him, *not to create himself a trustee* (d). If the property was *legally* vested in the plaintiff, the trustee (which, as to the policy, of course it could not be,) he might recover it at law. "If the property was not legally and effectually vested in the plaintiff, then, as the deed was voluntary, this court could afford no assistance to the plaintiff in recovering it, and under these circumstances the only question between the parties is, What is the legal effect of the instrument?" "The debt and policy of assurance," continued his Lordship, "are choses in action not assignable at law, and it is plain that the whole estate and interest of the assignor did not, and *could not*, pass to an assignee; and I apprehend, that in the case of a voluntary deed, neither the assignor nor his executor could be compelled to permit the assignee to use his name for the recovery of the debt (e). The assignment was deficient, because it did not vest in the assignee all that the assignor possessed, and *intended* to pass" (f). "Mr. Whitelock," said his Lordship, "intended to make a gift by assignment, and not to declare a trust to be executed by himself" (g). Lord Langdale, in noticing *Fortescue v. Barnett*, following Lord Cottenham (h), said, it was clear that Sir John Leach did not in that

(a) C. P. Coop. Rep. 154, 156.

(b) Citing *Winch v. Keeley*, 1 T. R. 619; *Morley v. Freer*, 6 Bing. 547; *Legh v. Legh*, 1 Bos. & P. 447, and other cases, 8 Beav. p. 208, note (c); C. P. Coop. 158.

(c) See *Fortescue v. Barnett*, *supra*.

(d) So it was in *Fortescue v. Barnett*; *et v. supra*, p. 899.

(e) According to the language of the judgment the court ought not to interfere where an actual transfer does not take place, *sed v.*

infra, 906-7.

(f) But this could not be done as regards the policy, excepting that notice might have been given to the insurance company, *v. infra*.

(g) 8 Beav. 211. According to this dictum it would seem that a person cannot make himself trustee by the operation of any act he may do, without intending that he should by that act become a trustee, but see *Fortescue v. Barnett*, *supra*.

(h) See *Dillon v. Coppin*, 4 My. & C. 670.

case intend to alter the rule of the court, which was previously established, namely, that the transaction must be complete. But whether either of those learned Judges considered that Sir John Leach was right or was wrong in treating the transaction as complete in that case, is not, at least to my apprehension, to be collected with any certainty from their printed judgments. Lord Langdale then said it appeared to him that the voluntary assignment by deed of a policy of insurance, retained in the hands of the assignor, and without notice given to the company, though accompanied by a covenant for further assurance, could not be considered as a complete and effectual assignment to be acted upon and enforced by the assignee, without any further or other act done by the assignor. This case may stand without the aid of *Edwards v. Jones*, for the essential requisite of delivery of the policy was wanting as well as the want of notice to the company; though both were capable of this explanation, that the donor had secured to himself the beneficial interest for his life (a).

But although, if *Fortescue v. Barnett* and *Blakely v. Brady* are to be followed, notice to the debtor is not necessary, as between the donor and donee—though until such notice be given the debt is in fact to a certain extent under the dominion of the donor (b)—delivery of the deed, or instrument of gift, and of the bond or other security, seems to be absolutely necessary to make it a complete transaction (c). The equity of the claimant under a voluntary assignment of a chose in action, said Lord Chancellor Hart, depends altogether upon the purpose for which the deed was made, and how the party executing it has dealt

(a) *Meek v. Kettlewell*, decided in 1842, was cited. As to the mortgage, which was a mortgage in fee (C. P. Coop. 159) of copyholds, it was admitted that no case had been made; it was a legal mortgage, the legal estate might have been transferred; as it was all had not been done that might have been done, therefore that was within the rule: in *Jefferys v. Jefferys*, *supra*, a trust created by transmutation of possession was enforced, the covenant not. It appears that Ward, the plaintiff in *Ward v. Audland*, subsequently applied to prove under the covenant for further assurance in a suit for the administration of Whitlock's estate, and was sent to law, where he recovered the value of the furniture and other goods and chattels assigned, but with leave for the defendant to move to enter a verdict for nominal damages, see *Hervey v. Audland*, 14 Sim. 531, 537.

(b) *V. supra*: the propriety of notice being given is apparent from Sir J. Leach's observations in *Fortescue v. Barnett*, that if

the insurance company had had notice they would not have paid the money; in *Edwards v. Jones*, the obligor, for want of such notice, gave another bond to the personal representative of the obligee, on which the debt might have been recovered. The distinction may perhaps be that notice, as a species of delivery, is requisite, where the property in the debt is intended to pass; without it a trust only can be created, the property remaining as it is. It is on the ground that the debt, until notice, remains in the order and disposition of the bankrupt, that the statute is held to give the debt to the assignees.

(c) *Uniacke v. Giles*, 2 Molloy, 257; and see *Antrobus v. Smith*, 12 Ves. 44-5; *Ward v. Audland*, 8 Beav. 212: retaining possession of a deed of gift is evidence of an intent to keep the control, and therefore in some cases is treated as evidence of fraud, *Hall v. Hall*, 2 Vern. 277, and the cases in the note; *et v. supra*, p. 884.

with it : if the deed is regularly executed and delivered over to a trustee, and so put out of the control of the party, showing a design to divest the power of revocation, then no doubt the party is bound (a).

The foregoing cases, together with those which are cited in the preceding pages of this volume (b), are, I believe, all the important cases on the subject of voluntary assignments and transfers of equitable interests, and of choses in action. On a review of these authorities, as regards equitable estates and interests, all of them seem to agree in the general proposition, that if the transaction be complete, whether as an assignment or as a declaration of trust, the party is bound, and by consequence so are his representatives; but what particular acts are necessary to make the transaction complete, cannot be extracted with precision as applicable to any particular case: it can only be said generally, that nothing must remain to be done to complete the purpose which the party has in view; and that purpose must be the complete divesting of the interest which is intended to be transferred: if, as it has been said, what has been done is equivalent to a transfer of the legal interest (c), that will be sufficient. As regards choses in action, this much perhaps may be stated to be clear, that if a person, with a view to confer the beneficial interest in a chose in action, in which he has the legal interest, on another, makes an assignment in writing, particularly if by deed, and delivers the assignment and the security to the donee or to a trustee for him, showing an intention to put both the one and the other and consequently the debt out of his control, and also gives notice to the debtor, so as to make the debtor a *quasi* trustee for the donee, then the transaction is complete and binding, and the donor becomes a trustee of the legal interest, which must of course remain in him, for the donee; a clear and explicit verbal declaration, accompanied by the delivery of the securities and notice, would, it is presumed, be equivalent to an assignment in writing: but in cases not embracing all these ingredients the authorities are not uniform, and particularly there is, as above mentioned, authority (*Fortescue v. Barnett*) for saying that such a transaction may be complete, if by deed, although no notice should have been given to the debtor or person from whom the money is to be recovered.

In the above-cited case of *Ward v. Audland*, the several authorities

(a) *Uniacke v. Giles*, 2 Molloy, 267. In this case, which related to a chose in action, the Lord Chancellor considered that the donor intended the assignment to be in the nature of a testamentary gift, and that the donor intended to preserve her power till her death,

and that she had executed such power by destroying it.

(b) *V. supra*, p. 52 to p. 58, *et v.* p. 285.

(c) *Collinson v. Patrick*, 2 Keen, p. 123; but see *Beatson v. Beatson*, 12 Sim. p. 281, *supra*.

before adverted to were reviewed by Lord Langdale. His Lordship endeavours to reconcile the authorities, as I understand his judgment, by holding that where a person executes any instrument, even a deed, which purports to be an *assignment of property* which is not assignable, for instance, the money due on a Policy of Insurance, without doing that which amounts to a *quasi* delivery, namely, giving notice to the debtor or person to pay, no title will pass to the donee; for no title passes which is available at law, and in equity all that the Court could do would be to declare that the donor was trustee of the money for the donee, which would be contrary to his intent, which was to pass all his interest, not to make himself a trustee.

If this is to be considered as the rule, it is at least intelligible and capable of application: in principle, however, the same doctrine might be held to apply to the case where notice has been given to the person to pay, namely, to the debtor or insurance company; for still the donor's name must be used to recover the money, and so far therefore he must be treated as a trustee.

Where the donor assigns to the donee his *interest* in, or the right to recover the money, as such a form of assignment involves the right to use the donor's name to recover the money, then Lord Langdale's objection will not apply; for when the beneficial interest only of the party is assigned, it is not contrary to the apparent intent that he should be a trustee; and it is possible to contend, on the authority of *Blakely v. Brady*, that where the assignment is of the donor's interest only, and of *Fortescue v. Barnett*, where the assignment embraces the security and also the donor's interest in the debt and security, the transaction is complete and binding if it be by deed: but not if it be only by writing signed but not sealed as in *Edwards v. Jones*, at least according to Lord Plunket's interpretation of that case. Whether this be a satisfactory state of the law or not, is of course not the question, if the authorities have so settled the law.

So where the subject of the gift is vested in a trustee, where, for instance, it is a legacy or share of a residue as in *Petre v. Espinasse* (a), or a reversionary interest in a sum of stock as in *Sloane v. Cadogan*, Lord Langdale's objection will not apply; for it is not in any way contrary to the ostensible intention to contend that such an assignment converts the trustee of the donor into a trustee for the donee, or to assimilate it to an express declaration that the trustee should be a trustee for the donee (b): to avoid the authority of those cases, it

(a) 2 My. & K. 496; *supra*, p. 55.

(b) "If A. is trustee for me of 1000*l.*, I

may assign my interest to B., and then A. is trustee for B.;" Lord Lyndhurst, *Meek v.*

must be contended, as I understand the Vice-Chancellor of England actually does contend, that an assignment of an equitable interest, such as was the subject of the assignment in each of those cases, can only amount to a contract (a).

From the dicta in the judgment of the Vice-Chancellor Wigram, in *Meek v. Kettlewell*, after stated, it might seem that in cases of the latter description there are yet two other requisites that may be deemed necessary in order to make an assignment of such an interest effectual, namely, notice of the assignment to the trustee and his acceptance; and also, where the subject is of such a nature as to make it practicable, that some act should be done in affirmance of the donee's title, as payment of interest to him by the trustee: but to hold that these are requisites would, contrary to the ordinary principle, put it in the power of the trustee to determine whether the act should be binding or not: however, the cases put by the learned Judge (b), are only, as I conceive, intended as instances of what would probably be considered as effectual transfers.

It will be remembered that where the transaction is such that the donor, having some interest that is capable of legal transfer, clearly intends to part with the whole of his interest, so that the donee shall stand precisely in his situation, and the instrument which he signs or executes does not amount to a transfer; the transaction is not incomplete merely, it is abortive: the court cannot act upon the donor in the character of a trustee, for that would be contrary to the intention: if it be anything it is a contract; and when once the transaction is reduced to that, its completion cannot be enforced either against himself or against his representatives, unless there be a consideration (c). On the whole, it appears that the only sure way short of a legal transfer, where that is practicable, of effecting a voluntary transfer to a stranger in any of these cases, is by the party entitled signing a declaration, (a deed does not appear to be necessary,) declaring a trust in favor of the intended donee (d).

As regards Voluntary Assignments of Contingent Interests, Possi-

Kettlewell, MS.: this was said by his Lordship in answer to the argument that assignments of equitable interests in personalty must be considered as contracts. In *Jones v. Croucher*, 1 Sim. & St. 315, a voluntary assignment of a vested reversionary interest in stock was held to be binding as against a subsequent assignee for value.

(a) See the additional note, No. 2, p. 915; *et inf.* p. 912.

(b) 1 Hare, 471.

(c) *V. supra*, p. 57, 58, and see *Searle v. Law*, 15 Sim. 95: there the turnpike-road securities and shares were delivered to the person to whom the abortive assignment in trust was made: *Ex parte Pye*, 18 Ves. 149, 150; all the early leading cases are cited in *Meek v. Kettlewell*; see also 284, 285, *supra*, as to Covenants.

(d) See *Searle v. Law*, 15 Sim. 100; *Collinson v. Patrick*, 2 Keen, 134; *Wheatley v. Purrr*, 1 Keen, 558, and *supra*, p. 53, *et seq.*

bilities and Expectancies in personal chattels, such as stock in the funds and the like—

It has been noticed, in a preceding Section, that as possibilities coupled with an interest, and contingent interests in real estate, are capable of being granted at law without consideration, probably it would now be held, by analogy, if not upon the words of the act, that corresponding equitable interests are capable of being granted in the same way in equity, namely, by deed (*a*), or by declaration of trust. As regards corresponding interests in personal estate: a writing, signed by the party, and delivered to the donee, declaring that the trustee of the donor should stand possessed of the donor's interest in the property as trustee for the donee, would probably also be held to be sufficient to transfer such an interest: but whether such an interest is capable of assignment by any act short of such a declaration, is matter of doubt.

In the late case of *Meek v. Kettlewell*, the doctrine as to contingent or expectant interests in personal estate, was fully entered into by the Vice-Chancellor Wigram and by Lord Chancellor Lyndhurst. The principal defendant in this case by deed dated 10th September, 1839, assigned to the plaintiff, the husband of the defendant's daughter, for his own use, all her reversionary or expectant interest, which she would take under a settlement as next of kin of her daughter in the event of her surviving her daughter and the daughter dying without issue (*b*), in a sum of 7900*l.* part of 11,000*l.*; which sum had been devised to trustees in trust for the daughter and her issue, and in default of issue for her next of kin. The subject therefore was a mere possibility not coupled with an interest, for on the death of the mother, the defendant, before her daughter, of course it would not have been transmissible. There was an irrevocable power of attorney to the plaintiff to sue and give receipts, and a covenant for further assurance. The deed was delivered to the plaintiff: in December, 1839, he at the request of the mother the grantor, signed a memorandum indorsed on the deed, in which he agreed to give up to the mother 3000*l.* part of the 7900*l.*; it did not appear that any notice had been given to the trustees either of the deed or the indorsement. The daughter died without issue in 1840; and then a bill was filed by the plaintiff the grantee, against the mother and the trustees of the fund. The defendant, the mother, insisted that the deed could not operate as an assignment.

(*a*) *V. supra*, 879, 895-6.

(*b*) This expectancy was not of such a description as is referred to by Lord Eldon in *Carleton v. Leighton*, 3 Meriv. 670, *v. sup.* p.

614, *n.*, for in the event of the daughter dying first without issue the mother's title could not have been intercepted; that of the heir of course may.

and that it was not a binding declaration of trust; and that was the question in the suit. The Vice-Chancellor Wigram, after observing that no notice had been given to the trustees, and that the assignment had not been acted upon by the grantor (meaning, I presume, that she had not given notice of it to the trustees, for she had clearly recognised it by requiring the indorsement above referred to to be made), said, that in his opinion the facts established did not constitute the relation of trustee and *cestui que trust* between the plaintiff and the trustees of the fund. It might perhaps have reasonably been expected, said that learned Judge, that when the beneficial owner of the fund had done that which unequivocally amounted to a declaration on his part that an interest in his property should thereby become vested in another, and the person in whom the legal interest was and also the intended *cestui que trust*, had notice of that declaration, the court would as against the party making the declaration have fastened upon it, and held that he had thereby actually created that trust which in the case of volunteers the rule of the court requires and acts upon; it was however impossible to say that the reported cases support that proposition: and after referring to *Edwards v. Jones* (a), his Honour said he considered himself bound by that case in the absence of a formal declaration of trust (whatever the effect of such a declaration might have been) (b) to hold, that whether a trust has been created or not must be determined upon principles of strict law, and not merely upon the intention, for the most distinct evidence of intention to pass an interest may not be conclusive. His Honour thought the instruments in this case being under seal made no difference, and that this case was less favourable than many where such claims had been rejected, as the intended donor had nothing but an Expectancy; and the learned Judge dismissed the bill without costs, saying however that he did not mean to express any opinion as to what the effect of a formal declaration of trust might have been, or what might have been the effect of the assignment if the donor had had more than an expectancy, and if, in addition to the facts which here took place, notice had been given to the trustees and they had *accepted* it; he decided only that a voluntary assignment of a *mere expectancy* not communicated to those in whom the legal interest is, did not create a trust in equity within the cases relied upon by the plaintiff (c). Lord Lyndhurst on appeal

(a) See, as to this case, *supra*, p. 56, note.

(b) *V. supra*, p. 909, *Searle v. Law*.

(c) 1 Hare, 475-6. The learned judge seems

to have followed Sir E. Sugden and the Vice-Chancellor of England in their disapproval of *Sloane v. Cadogan*, (Append. to Sugd. V. and

supported this decision, on the ground that being an expectancy only it was not assignable in equity, though if there had been a consideration a court of equity would have given effect to the attempted assignment as a contract: as it purported to be an assignment, added his Lordship, it could not be treated as a declaration of trust, relying on *Antrobus v. Smith* and *Edwards v. Jones*, which have been stated in a preceding page. This decision would perhaps have been more satisfactory had his Lordship rested it on the first ground, without referring to *Antrobus v. Smith*, which related to property capable of legal transfer, which that in the case before him was not (a). Lord Lyndhurst's judgment, as will be seen, equally as that of the Vice-Chancellor Wigram, leaves open the question whether such an interest can be transferred by way of declaration of trust.

A claim to property on the ground of its having been a *donatio mortis causâ* must fail if it appear to be a transaction of present gift (b). A party making a *donatio mortis causâ* does not part with the whole interest, save only in a certain event, and it is of the essence of such a gift that it shall not otherwise take effect (c); but words of absolute gift, if accompanied by expressions showing that the intention was that the property should be enjoyed only in the event of the death of the donor, will be sufficient to constitute a *donatio mortis causâ* (d).

It may here be observed that Acts and Declarations may amount to what, in the Court of Chancery, will be considered as equivalent to a release of a debt; but a mere acquittance, not amounting to a release at law, unaccompanied by any act, is not sufficient to induce the Court of Chancery to deprive the creditor or his representatives of the right of enforcing their legal remedies against the debtor (e).

P.); *v. supra*, p. 900. The case of *Hinde v. Blake*, 3 Beavan, 237, (1840.)—which arose upon an assignment of a mere possibility, (anticipated share as next of kin of a lunatic,) for the benefit of creditors, which had come into possession—decided nothing, as the assignor submitted to be bound by the deed, and Lord Langdale's observation, that he was inclined to think there was a sufficient consideration, the trustees having paid moneys on the faith of it, does not necessarily imply that the creditors could have enforced it, of themselves, or through the trustees.

(a) 1 Phillips, 347; the counsel in support of the appeal (pp. 345-6), admitted, seeming to assume that the Vice-Chancellor Wigram's judgment had thrown some doubt upon the sub-

ject, that an equitable estate, which, if clothed with the legal estate would be assignable at law, was assignable—not merely capable of being the subject of contract—in equity; which admission would now include equitable estates in contingencies and possibilities in real estate coupled with an interest; *v. supra*, p. 909.

(b) *Tate v. Hilbert*, 2 Ves. J. 111.

(c) *Edwards v. Jones*, 1 My. & Cr. 235.

(d) *Gardner v. Parker*, 3 Mad. 184; *Lawson v. Lawson*, 1 P. W. p. 441 (1 My. & Cr. 234).

(e) In the case of *Tuffnell v. Constable*, 8 Sim. 69, the testator had signed a memorandum acquitting the plaintiff of 700*l.* out of 1700*l.* due to him on bond, verbally stating that in consideration of such release he had

revoked a legacy of 700*l.* given by him to the plaintiff by his will; but the connection between this revocation and the release was not proved. The plaintiff was sued upon the bond, he filed a bill to be relieved offering to pay the difference. The Vice-Chancellor of England refused to interfere, saying the plaintiff gave no consideration for the alleged release, and that as he was a volunteer, he had no right to come into equity (p. 70); which was equivalent to refusing him the benefit of the alleged release. The claim was endeavoured to be supported as cognizable in equity on the authority of *Eden v. Smyth*, (Lord Rosslyn) 5 Ves. 341; but there the Court had jurisdiction in respect of the legacy, and the evidence, by accounts, letters, and the memorandums in the testator's handwriting, proved that the testator did not consider the debt as part of his estate. But in *Flower v. Marten*, 2 My. & Cr. 474, where the bill was filed solely to obtain the delivery up of a bond, it was decreed on the authority of that case (which was a bond from a son-in-law,) and *Wekett v. Raby*, 2 Bro. P. C. 386, that the bond should be delivered up, as it was clear on the evidence, not of declarations merely, but of conduct, that the testator did not intend that it should be enforced. In *Gilbert v. Wetherell*, 2 Sim. & Stu. 258, the testator had directed the promissory note to be burned, and made verbal declarations, p. 256. The case of *Wekett v. Raby* was as follows: Mr. Piggot a short

time before his death, said to his wife, who was his executrix and residuary legatee, he had Raby's bond which he did not deliver up, as he might live to want it, but added "when I die he shall have it, he shall not be troubled or asked about it." On the death of Mr. Piggot, Raby asked the widow to give up the bond, on which she did not deny that the directions had been given to her, and told Raby he might be easy, for it was safe in her hands, and that if she married she would give it up to him. Lord Macclesfield, and afterwards the House of Lords held that the executrix, who had married and sought to put the bond in suit, was trustee of the bond for Raby, p. 488, and she was ordered to deliver it up; this may be considered in the nature of a *locus penitentiae* reserved to be exercised only during life. In *Richard v. Syme*, 2 Eq. Ca. Abr. 617; *S. C.* Barnard. p. 90, the facts appear to have been that the mortgagee said to the mortgagor, "Take back your writings," namely, a mortgage and bond; "I freely forgive you the debt;" the mortgagor accordingly took them, and it was alleged the mortgagee at the same time made a verbal statement to the mother of the mortgagor, to the effect that he had intended to forgive the debt. Lord Hardwicke considered that by the parol declaration, if proved, the debt would be extinguished, and that the heir of the mortgagee would become by construction of law trustee for the mortgagor.

ADDITIONAL NOTE.—No. I.

Difference between the Effect of a Declaration of Trust, and Attempt to assign—Vice-Chancellor Wigram's Judgment in M'Fadden v. Jenkyns, 1 Hare, 462.—Supra, p. 987, 988.

The Vice-Chancellor Wigram endeavours to explain the different view which is taken of a declaration of trust and an attempt to assign thus:—"There may be difficulty," said his Honour, "in reconciling with each other all the cases which have been cited. Perhaps they are to be explained on the principle that a declaration of trust purports to be, and is in form and substance, a complete transaction; and the court need not look beyond the transaction itself or inquire into its origin, in order that it may be in a position to uphold and enforce it (1): whereas, an agreement, or an attempt to assign, is in form and nature incomplete, and the origin of the transaction must be inquired into by the court; and where there is no consideration, the court, upon its general principles, cannot complete what it finds imperfect." "There is a close analogy for this reasoning," continued his Honour, "in the case of suits to enforce demands arising out of illicit dealings between parties. If, in such cases, the court finds an account rendered or other act done by one of the parties, upon which account or act the court can proceed without investigating the origin of

(1) So where a gift by way of transfer is complete—requires nothing more for the donor to do, as in *Fortescue v. Barnett*, the same doctrine seems to apply.

the demand, it will do so (1): but it will not so proceed when the form of the transaction is such as to oblige the court to go into the original transaction out of which the demand arises."

The facts were these:—Thomas Warry lent 500*l.* to the defendant Jenkyns; Thomas Warry then died: the defendant, George Warry, who was his personal representative, brought an action against Jenkyns to recover the 500*l.*; the plaintiff filed the bill, alleging and showing (for the purposes of the motion then before the court) that Thomas Warry, shortly after the loan, sent a *verbal message* to Jenkyns, desiring him no longer to consider the money as due to him, Warry, but to hold it upon trust for the plaintiff. Jenkyns acquiesced in this direction; the transaction was communicated to the plaintiff [N. B. it was to take effect immediately]; and Jenkyns, during Warry's life, paid 10*l.*, part of the debt, to the plaintiff, in part execution of the trust; the trust was considered as complete. This decision was affirmed, Nov. 4, 1842. On the hearing before Lord Lyndhurst, 1 Phill. 153, though it was not denied that the person having the legal estate may declare himself to be trustee for another, it was insisted that the rule did not apply [where the legal title to the fund was not in *the trustee*, but in a third person, as it is stated in the report, p. 156, but it must mean,] where the person, having the legal interest, declares that the debtor shall hold the debt in trust for another, not that he will himself be a trustee. "The distinctions on this subject," said the Lord Chancellor, "are undoubtedly *refined*, but it does not appear to me that there is any substantial difference between such a case and the present. The testator (who had the legal interest), in directing Jenkyns to hold the money in trust for the plaintiff, which was *assented to* and acted upon by Jenkyns, impressed, I think, a trust upon the money which was complete and irrevocable. It was equivalent to a declaration by the testator that the debt was a trust for the plaintiff," p. 157-8. The assent was so far material, that Jenkyns, till such assent, was a debtor only, not a trustee: from the language of the judgment, I presume that, but for this assent and the subsequent act, the direction might have been revoked by Warry; would it, if unrevoked, have been binding on his executors? *V. supra*, p. 897.

ADDITIONAL NOTE.—No. II.

Voluntary Assignment—Holloway v. Headington.—V. supra, p. 900.

In *Holloway v. Headington*, 8 Sim. 324 (1837), the husband and the wife had assigned to trustees certain property, but of what it consisted is not stated, to which the wife was entitled, and contracted to assign all other property, to which the husband might become entitled in right of the wife, to trustees in trust for the wife, for her separate use for life, after her death for her husband for life, and after the deaths of the survivor, for the children of the marriage as the wife should appoint; and in default of appointment, in trust for all the children of the wife living at her death by her then present or any future husband. The husband and wife afterwards parted, and the wife, living separate, filed a bill against her husband and the trustees, to have the trusts of the settlement carried into execution. The Vice-Chancellor of England refused to interfere, and dismissed the bill on the original hearing, and again on a re-hearing, observing

(1) *Davenport v. Whitmore*, 2 My. & Cr. 177; see p. 189, and the cases there cited. But does not that case proceed on the contract being good as to the freight and bad as

to the ship? p. 190; *Prouting v. Hammond*, 8 Taunt. cited p. 191, seems directly to support Sir J. Wigram's conclusion.

that no reason was given why the agreement should have been entered into at all; that the parties appeared to have been dealing "quite at random;" it was not clear what the parties meant, "whether the wife or the husband, or both of them, should be bound;" that children by a future husband were preferred to grandchildren by her present husband: the whole transaction was vague and unreasonable. Whatever legal rights the trustees had acquired, were of course untouched by that decree. It was in this case that the Vice-Chancellor expressed his doubts as to the authority of *Ellis v. Nimmo*, on which the plaintiff relied, as establishing the general proposition that meritorious consideration was sufficient, saying that Lord Plunket, on rehearing, had rejected Lord C. Sugden's reasons for his judgment. The Vice-Chancellor Wigram, in noticing this case, 1 Hare, 474, said he understood the Vice-Chancellor of England, whose great experience as a conveyancer gave peculiar value to his opinion on such a subject, always held that a voluntary assignment in a legal form, unaccompanied by any other acts, is not to be regarded as effectual to pass an equitable interest: that it is a mere agreement; see 1 Hare, 474, 475; v. *supra*, p. 909. This view of the Vice-Chancellor of England's opinion is confirmed by the case of *Beatson v. Beatson*, stated *supra*, p. 56, of this volume.

ADDITIONAL NOTE.—No. III.

Assignments of Policies of Insurance—Voluntary Covenant for further Assurance.

Since the text was printed off I have been made acquainted, through the kindness of Mr. Jackson, of St. Helen's Place, that a Bill for making life policies of assurance assignable at law now waits for the third reading in the House of Commons. The Bill, as amended by the Select Committee, was printed the 8th of June instant.

The same gentleman has referred me to the ultimate decision of the case of *Ward v. Audland*, in the Court of Exchequer, referred to *supra*, p. 906, n. (a): the plaintiff had judgment for the value of the furniture; see 16 Mees. & W. 862: and this decision was considered by the parties as also concluding the question as to the covenant for further assurance of the choses in action assigned: it is therefore a very important decision. In the argument of this case Mr. Baron Parke took occasion to say, "No doubt the plaintiff might have recovered in trover. In *Irons v. Smallpiece* (2 Barn. & Ald. p. 557), it was held that the verbal gift of a chattel without actual delivery does not pass the property to the donee, Abbott, C. J., saying, 'By the law of England, in order to transfer property by gift, there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee;' that is not correct;" 16 Mees. & W. p. 670: the passages *supra*, Vol. i. p. 184, and Vol. ii. p. 896, therefore require correction in reference to this statement of the law.

I also learn, from the same gentleman, that, by the constitution of some of the insurance offices, ("The Amicable" is one; Bye Laws, § xxv. § 1.) assignments of policies are recognised and registered. Lord Cottenham probably referred to this practice in his observations on *Fortescue v. Barnett*, noticed in note (a), p. 900, *supra*. I presume that a voluntary assignment of a policy in "The Amicable" would clearly not be effectual without its being registered; for it would come within the principle of *Antrobus v. Smith*; v. *supra*, p. 891. But most of these questions are likely to be put an end to by the Bill to which I have above referred.

CHAPTER XI.

OF THE DUTIES AND LIABILITIES OF TRUSTEES, AND SOME OTHER MATTERS CONNECTED WITH THEIR OFFICE.

Ostensible Principle that Trustees and Executors not to be discouraged from acting.

General Rules to which they must conform.

Person who has accepted a Trust can only be discharged by administering it.

He must execute it with Fidelity and reasonable Diligence.

Executor who has proved, liable for Breaches of Trust by his Co-executor, in which he has acquiesced.

Trustee cannot of himself denude himself of the Trust.

Trustee must be always ready with his Accounts.

Interest on Balances in the hands of a Trustee.

Trustees and Executors liable for Omissions as well as Acts.

Investment of Trust Moneys.

Liability of Trustees who have power to invest in Real or Government Security, and they do neither.

What is a proper Investment on Mortgage.

General Rule that Trustees and Executors are only liable for their own Acts and Receipts.

Summary as to Liability of Trustees and Executors in regard to Joint Receipts.

When Executors and Trustees have merely committed an Error in Judgment, they will not be liable.

So where they have acted from Moral Necessity.

Money placed with Banker.

Handed to Co-executor for Express Purpose.

Money remitted for Purposes of Convenience.

Result of the Authorities stated by Lord Cottenham.

Clough v. Bond.

Trustees doing Acts under a Void Trust.

Relief to Trustee who acts under the Sanction of adult Cestui que Trust.

Concurrence.

Acquiescence.

Trustee robbed of Trust Property.

Distinction between Character of Trustee and Executor as regards the Statute of Limitations.

Condition imposed not to insist on Breach of Trust.

Allowance to Trustees for Expences.

Costs of Trustees and Executors.

Costs of Trustees appearing separately.

Where several Trustees have been jointly guilty of Breach of Trust—Parties.

Of opening Accounts as between Trustee and Cestui que Trust.

Appointment of New Trustees, under the Stat. 1 Will. IV. c. 60, § 22.

Disability of Trustee to purchase the Trust Property.

Any Profit made by the Trustee accrues for the Benefit of the Cestui que Trust.

Not allowed to make a Profit of which he alone could take the Benefit.

Solicitor appointed Trustee.

Powers annexed to the Office of Trustee.

Disclaimer.

Trustees for Preserving Contingent Remainders.

Additional Notes :

No. I. *Sir A. Hart's Exposition of the Rule as to Interest on Balances.*

No. II. *The Rule as to Executors and Trustees joining in Receipts, as laid down by Mr. Justice Story.*

No. III. *Practical Points—Admission of Assets—Charge and Discharge.*

I PROPOSE to close this division of the Equitable Jurisdiction of the Court of Chancery by taking a general view of the duties and liabilities of trustees, noticing also the general liabilities of executors (*a*).

It is continually repeated by every judge, that it is never the inclination of the Court of Chancery to discourage persons from acting as executors and trustees (*b*), or to throw difficulties in their way (*c*): however, the court has established certain rules, chiefly founded on public policy, for the guidance of trustees, in conformity to which they are bound to act; and, to use the language of the late Mr. Justice Story (*d*), the Court of Chancery requires, in most cases, that a trustee should act, particularly in the investment of the trust fund, with all the scrupulous circumspection, caution and wisdom, with which the court itself, from its long experience and superior means of information, is accustomed to act;—a doctrine certainly somewhat perilous to trustees, and startling to uninstructed minds: it is, to adopt the language of Lord Bacon, substituting for the private conscience of the trustee the general conscience of the realm, which is Chancery (*e*).

(*a*) The general doctrines only can be here noticed; the particulars are amply detailed by Mr. Lewin and more recently by Mr. Hill, in their respective works, to which I would refer the practitioner; *et v.* Vol. i. p. 458; and *sup.* 46-7.

(*b*) *V. supra*, p. 48; Lord Eldon, in *Massey v. Banner*, 1 Jac. & W. p. 247, says, "The principle applying to all these cases of trustees, executors, receivers, and assignees, is properly expressed in these terms, 'that the court does not expect them to take more care of the property entrusted to them than they would do of their own;' but it is material," he adds, "to ascertain the meaning of this:" and his Lord-

ship proceeds to examine *Wren v. Kirton*, 11 Ves. p. 377, and other cases; see Mr. Vesey's note, 2 Ves. p. 679; and see *int. al.* *Walker v. Symonds*, 3 Swanst. 64. However, the decrees, which the court, in pursuance of its fixed and paramount rules, felt bound to pronounce in the cases of *Knatchbull v. Fearnhead*, 3 My. & Cr. 122, and *Urch v. Walker*, 3 My. & Cr. 708, *v. infra*, might deter any one from acting in any way as executor or trustee.

(*c*) *Freeman v. Fairlie*, 3 Meriv. 42; *Tebbs v. Carpenter*, 1 Mad. 298.

(*d*) § 1273.

(*e*) Referring to Bacon on Uses, by Rowe, p. 10. Lord Harcourt made a difference be-

Where a person has expressly accepted the trust, or done such acts as are only referable to his character of trustee or executor, which is constructively an acceptance of the trust, as a general rule he can only be discharged by administering the trust himself, or putting the administration in the hands of the Court of Chancery (*a*).

Every person who accepts a trust is bound to execute it (*b*) with fidelity, and with reasonable diligence; it is no excuse to say that he had no benefit from it, but that it was merely honorary: the Court of Chancery looks upon all trusts as honorary, and as a burthen upon the honour and conscience of the party intrusted; and for the execution of which he is even precluded, as is more particularly noticed hereafter, from receiving or making any benefit or advantage whatsoever (*c*).

If a person who is appointed Executor prove the will (*d*) he becomes liable for the performance of the duties of the office, and for any consequences arising from a breach, to which he may be considered as a party or privy: if he is also appointed trustee, the taking probate is an acceptance of the entire trust (*e*). If he sanction or acquiesce in a breach of trust committed by his co-executor, more especially where it is contrary to the duties expressly imposed on the executors by the will, he is answerable: there may be no corrupt motive, no receipt of money which has been misapplied may be attributable to him; by proving the will he has undertaken the duty of seeing that the trusts imposed upon the executors are performed, which, by standing by without interference whilst the co-executor is dealing with the property in contravention of those directions, he has not fulfilled: and this

tween the case where the claim was by a creditor, who has a legal claim, and a legatee who only has a right in equity; *Churchill v. Lady Hobson*, 1 P.W. p. 243; but that distinction is not now regarded, at least as a ground of decision.

(*a*) *Doyle v. Blake*, 2 Scho. & Lef. 245; a case of executors. Where a person appointed as executor merely receives a bill of exchange, and transmits it to his co-executor, and does not otherwise intermeddle, that is not such an acting as will charge him; *Balchen v. Scott*, 2 Ves. J. 678 (though the executor, in that case, had proved), *et sic de similibus*; and as to what will be an acceptance of the trust or not, see *Hovey v. Blakeman*, 4 Ves. 596; *Stacey v. Elph*, 1 My. & K. p. 195; *Lowry v. Fulton*, 9 Sim. 115, 123, *et seq.*

(*b*) Lord Hardwicke, *Charitable Corporation v. Sutton*, 2 Atk. 406. As to what is a

devastavit by an executor, *v. supra*, Vol. i. p. 192.

(*c*) 2 Fonbl. 176; Lord Hardwicke, *Ayliffe v. Murray*, 2 Atk. 60; *Fyler v. Fyler*, 3 Beav. 550; Lord Cottenham, *Home v. Pringle*, 8 Cl. & Fin. 287; *et v. infra* in this Section. Mr. Justice Story, § 1268, note, has entered into a discussion of the propriety of the rule, that the trustee shall not be remunerated for the exercise of his duties. The rule appears to have been adopted from the Roman law by every other state in Europe; and by the common law of England as regards guardians in socage; Litt. § 123.

(*d*) And see *James v. Frearson*, 1 Yo. & Coll. C. C. p. 376-7; there the co-executor had not proved till after the death of his co-executor, though he had acted.

(*e*) *Ward v. Butler*, 2 Moll. 533.

responsibility will attach, even though he may have been induced to become an executor at the instance of some of the parties interested; and had been informed that he would not thereby undertake any duty, or be responsible for anything (a).

Probate obtained by one of more executors enures for the benefit of all: on the death of the executor who proved, the survivor may renounce; but if he do any act in the character of executor, though it may have been but a slight one, he is liable to all the consequences which attach on the character of executor, and cannot renounce (b): but generally where an executor does not prove, but only acts, he is merely liable for what he himself receives, not for the defaults of a co-executor who has proved (c).

A trustee who commits a plain breach of trust is not protected from its consequences by the circumstance that he honestly took and followed the advice and opinion of his solicitor, whatever remedy he may have against his solicitor; nor can it make any difference that the solicitor was also the solicitor and adviser of the author of the trust (d). In a case where a person had been advised by counsel that the act which he had done—namely, the execution of a deed for a particular purpose and which his *cestui que trust* had required him to do—would not be an acceptance of the trust, and he had accordingly executed the deed under that impression; he was held to have accepted the trust, and an inquiry was directed, having for its object to make him liable constructively for a breach of trust by his co-trustee, in regard to a portion of the property as to which he had never in any manner interfered, or intended to interfere (e). Where a person is appointed prospectively a trustee, and is aware of that fact, if he omit to make inquiry, and having the trust fund in his possession pays it away, or applies it in violation of the trust, particularly if he has derived an advantage from such application, he is answerable for it (f).

(a) *Mucklow v. Fuller*, Jac. R. pp. 198, 201; *Booth v. Booth*, 1 Beav. 129-30; and see *Williams v. Nixon*, 2 Beav. 475. In the case of an executor, where he is not actually aware that his co-executor is misapplying the money, he is not liable, as each executor has full power to deal with the personal estate; *ibid.*: *Oliver v. Court*, 8 Price, 127; *Williams v. Nixon* is stated *infra*, p. 928.

(b) See *Cummins v. Cummins*, 3 Jo. & Lat. 91-6.

(c) *Lowry v. Fulton*, 9 Sim. p. 123; as to liability for the acts of a co-executor, *v. infra*.

(d) *Doyle v. Blake*, 2 Scho. & Lef. 243:

Bullock v. Wheatley, 1 Coll. 135; and see *Urch v. Walker*, *infra*.

(e) *Bullock v. Wheatley*, 1 Coll. 135; *Urch v. Walker*, 3 My. & Cr. 706, 708-10; this is perhaps the severest case to be found in the books. See, on this subject, Lewin, 294; Hill, 576-585. *Urch v. Walker* is a very material case as to the distinction between what seeming repudiation will amount to an acceptance and what to a disclaimer: see pp. 708-9; and *Nicholson v. Wordsworth*, 2 Swanst. p. 365, there cited.

(f) *Cummins v. Cummins*, 3 Jo. & Lat. 86, 87.

A trustee cannot by any act of his own, without communication with his *cestui que trust*, unless expressly authorized so to do by the instrument by which he is appointed, denude himself of the character of trustee till he has performed the trust (a). If the trustee assign the trust estate to another as trustee, without the consent of the *cestuis que trust*, or of the court, it is at his peril, and he will be answerable for the breaches of trust of the assignee whom he has so entrusted (b); and he will incur the same liability if he delegate the performance of the duties of the trust to a stranger, or even to his co-trustee (c). But trustees are not chargeable as having committed a breach of trust, merely by reason of their having appointed one of their number to be factor; they are however liable for his defaults as agent equally as they would for those of any other agent: the trustee who becomes factor or agent, does not become any further liable in respect of the management of the trust property than he is as trustee (d).

No allowance is made for human sympathies. We find a married woman, said Lord Langdale, in a late case, throwing herself at the feet of the trustee, begging and entreating the trustee to advance a sum of money out of the trust fund to save her husband and her family from utter and entire ruin, and making out a most plausible case for that purpose; his compassionate feelings are worked upon; he raises and advances the money; the object for which it was given entirely fails; the husband becomes bankrupt; and in a few months afterwards the very same woman who induced the trustee to do this, files a bill in the Court of Chancery to compel him to make good that loss to the trust. These are cases, added his Lordship, which, when they happen, shock everybody's feelings at the time; but it is necessary that relief should be given in such cases; for if relief were not given, and if such rights were not strictly maintained, no such thing as a trust would ever be preserved (e). Forgetfulness,

(a) Sir Thos. Plumer, *Chalmer v. Bradley*, 1 Jac. & W. p. 68; *Hamilton v. Fry*, 2 Moll. p. 458; see Lewin, 227-8. As to how a trustee may obtain his discharge, see Lewin, 457, *et seq.* As to the office of executor I need only refer to Williams on Executors.

(b) Com. Dig. Chanc. 4 W. p. 6; and see *Salway v. Salway*, on appeal, 2 R. & M. pp. 219-20.

(c) *Lord Shipton v. Lord Hinchinbrook*, 16 Ves. 477; *Kilbee v. Snayd*, 2 Moll. 212-13; *Davis v. Spurling*, 1 R. & M. 66; and see the other cases, Lewin on Trusts, 227-9.

(d) *Home v. Pringle*, 8 Cl. & Fin. 286-9.

(e) Lord Langdale, *Fyler v. Fyler*, 3 Beav. 563. In *Nail v. Punter*, 5 Sim. 562, a husband who had received all the money under the breach of trust, sought on his wife's death as her appointee, to have a portion of it paid to him over again; it is hardly necessary to add that he failed. There is one instance, before Sir Wm. Grant, (*Mosley v. Lord Hawke*, cited 2 Yo. & J. 520, see 1 Keen, 619,) where a tenant for life *sui juris*, who was a party to the breach of trust, being a co-plaintiff, a decree was made against the defendant and the offending tenant for life who was one of the plaintiffs.

we may remember, is no excuse for a trustee not having done what it was his duty to have done (a). If an executor has paid away the residue in ignorance of the existence of any debt, he is still liable (b).

It may be observed that, generally speaking, a trustee for a Charity is no otherwise or further chargeable as regards his receipts than is another trustee (c).

It is an imperative duty of an accounting party, whether an Agent, a Trustee, a Receiver, or an Executor—for in this respect, as was remarked by the Lord Chancellor in *Lord Hardwicke v. Vernon*, they all stand in the same situation—to keep his Accounts in a regular manner, and to be always ready with his Accounts (d): neglect of this duty is a ground for charging him with interest on the balances in his hands and with costs (e). So a trustee and executor is bound to render every necessary information that is required of him; and he who, undertaking to give information, gives but half information, in the view of the Court of Chancery conceals: if he have not all the information necessary, he is bound to seek for it, and, if practicable, to obtain it (f). “The court does not visit the improper holding of money, if there is nothing more, further than by charging the executor with interest; but if his account is falsified—if anything like fraud appears, then the court gives costs against him” (g).

Where it appears that the trustee or executor has improperly or unnecessarily kept Balances, or any considerable portion of the trust moneys, in his hands, he will be charged with interest on what he has so retained, generally at four per cent., but under special circumstances, at five per cent., and although it be not prayed by the bill (h). Where, by the terms of the instrument under which the trustee is appointed, he is under an obligation to accumulate, and he has omitted to do so (i); and where he has been guilty of fraud, or has sold out stock and made use of the funds in his own trade or otherwise for his own benefit; annual, and under particular circumstances half-yearly, rests have been directed against him:

(a) *Supra*, p. 762.

(b) *Knatchbull v. Fearnhead*, 3 My. & Cr. p. 122.

(c) *Mann v. Ballet*, 1 Vern. 44.

(d) *Morony v. Vincent*, 2 Moll. p. 461; *Hardwicke v. Vernon*, 14 Ves. 510-11, and see *White v. Lincoln*, 8 Ves. 363.

(e) Sir J. Plumer, *Pearse v. Green*, 1 Jac. & W. 140, 141 (14 Ves. 510); Lord Eldon, *Freeman v. Fairlee*, 3 Meriv. 43.

(f) Lord Eldon, *Walker v. Symonds*, 3 Swanst. 73.

(g) Sir A. Hart, Lord Chancellor, *Flanagan v. Nolan*, 1 Moll. 85, where his Lordship said, that in *Raphael v. Boehm*, the court did not give costs against the executor. See the remainder of the judgment, add. note, No. 1.

(h) *Woodhead v. Marriott*, C. P. Cooper, R. p. 62; though the contrary has been held, see *Weymouth v. Boyer*, 1 Ves. J. p. 426; and *Hooper v. Goodwin*, 1 Swanst. 493.

(i) Of the duties of trustees under a trust to Accumulate, v. *supra*, pp. 190, 191; and *infra*, p. 926-7.

but a direction for charging a trustee to this extent will not be given unless a special case be made out: where trust money has been employed by a trustee for his own purposes, the court has sometimes declared him liable for interest at five per cent., or the amount of the profit made, at the option of the *cestui que trust* (a). The payment of interest on balances improperly retained by an executor or trustee will be enforced against his personal representatives and his assignees under his bankruptcy or insolvency (b). An indication of intention on the part of a trustee to satisfy a breach of trust by means of funds in his hands at his death may affect that property with a trust (c).

A trustee and an executor is not only liable for his acts, but for his Omissions, if such omissions amount to a neglect of duty, and if by reason thereof any loss shall happen to the trust estate (d); and

(a) See *Heighington v. Grant*, 5 My. & Cr. 258; *Raphael v. Boehm*, 11 Ves. 92. Lord Cottenham in the first-mentioned case, after referring to *Binnington v. Harwood*, and the other cases where annual rests have been directed, explains how it is to be worked out. As to Interest on balances see *Ex parte Hilliard*, 1 Ves. J. p. 89; *Rocke v. Hart*, 11 Ves. 61 (Hill, 371). Interest at 5 per cent. *Hall v. Hallett*, 1 Cox, 134; *Ex parte Hilliard*, *ubi supra*; *Forbes v. Ross*, 2 Bro. 431; *Mosley v. Ward*, 11 Ves. 582; *Piety v. Stace*, 4 Ves. 620; *Pearse v. Green*, 1 Jac. & W. 135; *Crackelt v. Bethune*, 1 Jac. & W. p. 589; and see *Docker v. Somes*, 2 M. & K. 315, 670: on special case being made, *Woodhead v. Marriott*, C. P. Coop. p. 63. Rests: "When the executor has unduly held the assets in his hands the court can give a direction to take the account with rests, though there be no express direction or accumulation clause in the will," Sir A. Hart, 3 Moll. p. 83, contrary to *Tebbs v. Carpenter*, 1 Mad. 290: rests were refused in *Crackelt v. Bethune*, *ubi supra*, though the executor had been guilty of great misconduct, and was charged with costs. Half-yearly rests, *Raphael v. Boehm*, 11 Ves. 92; *v. supra*, pp. 190, 191, n., 811; and see *Heighington v. Grant*, 5 My. & Cr. 258; *Stacpoole v. Stacpoole*, 4 Dow. 209, and the other cases cited Hill on Trustees, p. 371, note (p). Profits, *Brown v. Litton*, 10 Mod. 21; *Lonsdale v. Church*, 3 Bro. 41; *Massey v. Davies*, 2 Ves. J. 317, case of an agent; *Rocke v. Hart*, 11 Ves. 60; *Docker v. Somes*, 2 My. & K. 655; *Palmer v. Mitchell*, cited *ibid.* p. 672; and see *Wedderburn v. Wedderburn*, 2 Keen, p. 722; 4 My. & Cr. p. 41; and *Willett v. Blanford*, 1 Hare, p. 253, as to the analogous doctrine as between partners. Four per cent. is the usual rate charged on a breach of trust arising from mere negligence or mistake, *v. inter alia*, *Underwood v. Stevens*, 1 Meriv.

717; *Rocke v. Hart*, 11 Ves. 61; and in some cases interest at that rate only has been given where there has been misconduct, *Perkins v. Bayntun*, 1 Bro. 375; *Browne v. Southouse*, 3 Bro. 107, cited 11 Ves. 60. The other cases on these several points are collected by Mr. Hill, p. 540, 541; and Mr. Lewin, 287-293: the cases are discussed by Mr. Lewin, Append. ix. 733; and see C. P. Coop. R. pp. 63, 64, n.; and add. note, No. 1.

(b) Seton on Decrees, p. 248.

(c) *Robertson v. Morrice*, ix. Jur. p. 122, Rolls.

(d) *Maitland v. Bateman*, viii. Jurist, 926. Admiral Maitland on his marriage with Mrs. Simpson, by marriage settlement, dated Jan. 1820, covenanted with the trustees, Patrick Maitland and C. Bateman, that he would on Martinmas-day, 1824, pay 1000*l.*, the trusts of which were to be for the husband for life, with remainder to the wife for life, with remainder to the children of the marriage, and in default of children, for the persons therein mentioned; the trustees executed the settlement. In 1821 Patrick Maitland died; C. Bateman, the co-trustee, never took any steps to enforce the covenant. The Admiral died in 1836, without having performed the covenant; there was no issue of the marriage. After his death a suit was instituted by the widow against the trustee to make him personally liable for the non-performance of the covenant. On the hearing before Lord Cottenham, Nov. 1840, a reference was made to the Master to inquire whether the Admiral was of ability after 1824 to pay 10,000*l.* or any part of it. It appeared by the Master's report that the Admiral had for seven years after 1824, an income of 1800*l.* a-year, but that he had no other property than his income, and that he had always lived up to or exceeded his income. The Master found that the Admiral was of ability during these seven years to have

although the omission be only that he, without any corrupt motive, passively looked on while his co-trustee diverted the property from its proper channel (a). If the loss is incurred by reason of a neglect of duty, whether the duty is expressly imposed, or the instrument is silent on the subject and the duty arises from the general obligation imposed by the law, the effect will be the same (b), excepting that the court may look to the circumstances as regards the costs.

As a general rule, trustees and executors are bound to press on all the remedies for the recovery of debts due to the trust estate; and if any securities shall seem proper to be continued, it seems the only safe course for trustees or executors to adopt is to submit the point to the judgment of the court, not to decide upon it themselves, unless a discretionary power to that extent be expressly, or by clear implication, given to them; else they will be answerable for any loss that may ensue in consequence of their misplaced confidence, however good may have been their intention (c). Where a chose in action forms part of a testator's estate, it is not such a description of property as that it should be competent to the executor to allow it to remain outstanding. In the exercise of a fair discretion he is not to commence proceedings unnecessarily, but he must exert himself to get in the debts, and if necessary must commence proceedings at law or in equity, as the case may require, to recover them; if he fails to do so, he becomes personally answerable if the debt be lost (d): a trustee to whom the personal estate of a testator may be bequeathed, in the absence of any special directions, will incur the same liability if he do not see that the whole, including the choses in action of which it may be in part composed, is realized.

It was laid down by Lord Keeper North, that the court will never

paid 4200*l.* in part performance of the covenant: no exceptions were taken to the report. The Vice-Chancellor Knight Bruce on further directions held that the trustee was liable to pay 4200*l.*, and that had the report been excepted to, it would have been confirmed, *Maitland v. Bateman*, xiii. Law J., N. S. 275; viii. Jur. 926; and see *Fenwick v. Greenwell*, Rolls, xi. Jurist, 622; in this case the trustees had merely executed the deed and thought no more of the matter, in the mean time the wife, one of the *cestuis que trust*, in whose name the fund, about 5000*l.* was originally standing, with her husband, sold it out and disposed of it to their own use.

(a) *Mucklow v. Fuller*, Jac. 198; *Booth v. Booth*, 1 Beav. 129; *Winch v. Walker*, *infra*.

(b) See *Tebbs v. Carpenter*, 1 Mad. 307, and the cases in the preceding note. As to the

liability of a trustee on a Trust to Renew, v. *sup.* p. 544, *et seq.*; and Lewin, p. 300.

(c) Lord Eldon, *Gaskell v. Harman*, 11 Ves. 498; *Lowson v. Copeland*, 2 Bro. 157. There it did not appear whether or not the debt omitted to be got in was or not recoverable, the inquiry had not extended to that fact; and so far the decree was open to Lord Camden's objections, see *Orr v. Newton*, 2 Cox, 274; and see *Powell v. Evans*, 5 Ves. 839; *Tebbs v. Carpenter*, 1 Mad. 298.

(d) *Caney v. Bond*, 6 Beav. 487. Trustees are not justified in giving any great indulgence where the debt is payable by instalments; *Caffrey v. Darby*, 6 Ves. p. 495. As to the discretion to be exercised by executors in selling Mexican bonds and the like, see *Buxton v. Buxton*, 1 My. & Cr. pp. 94-96; and *Prendergast v. Lushington*, 5 Hare, p. 176.

charge a trustee with imaginary values, but he shall be charged as a bailiff only; and although very supine negligence might indeed charge a trustee with more than he had received, yet the proof must then be very strong (*a*); or, as Lord Thurlow states the rule, you cannot affect trustees who are in the nature of mere stakeholders with more than they have actually received or might have received without wilful default (*b*): what is wilful default cannot be precisely defined: however, some general rules have been established by decision, which will be adverted to in the following pages, but the circumstances of each case must have a material influence. In order to charge trustees with wilful default, a special case must be made by the bill, and supported by admission or evidence (*c*).

A trustee, who originally let a farm at a proper rent, will not be held liable for the difference between that rent and the rent which, at a subsequent period of the tenancy, might have been obtained, merely because he neglected to give notice to quit a few months after there appeared to be a probability that the price of agricultural produce would enable him with propriety, as between landlord and tenant, to obtain a higher rent; and the fact of the tenant being a near relation of the trustee will not, in the absence of any circumstance to show personal favour on the part of the trustee, be sufficient to alter the decision to be made in such a case (*d*).

It has been held by Lord Langdale, following, it would seem, *Hockley v. Bantock*, before Lord Gifford (*e*), that where trustees are directed to invest trust money in government or real securities, and they do neither, they are answerable, at the option of the *cestuis que trust*, either for the money and interest at four per cent., or the stock which might have been purchased therewith, and the dividends (*f*). In the case referred to, the husband and wife had power to sell real estates, with the consent of the trustees; the moneys were, with all convenient speed, to be laid out in the purchase of other lands; and, until a convenient purchase could be effected, it was made lawful for the trustees, with the assent of the husband and wife, to invest the

(*a*) Treat. of Eq. ii. 178; *Palmer v. Jones*, 1 Vern. 144; *Harnawi v. Webster*.

(*b*) *Pybus v. Smith*, 1 Ves. J. 193; Sel. Ca. in Ch. 53. Connected with this subject is the common-law liability of a bailee, to which Mr. Fonblanque, ii. p. 180, and Mr. Justice Story, § 1268, have referred, citing the authorities from the Roman law.

(*c*) See additional note No. 3.

(*d*) *Ferraby v. Hobson*, 2 Phill. 255.

(*e*) 1 Russ. 141, but *Marsh v. Hunter*, 6 Mad. 295, where Sir J. Leach held that the omitting to do either was a breach of trust simply, was not cited in that case: see *Shepherd v. Moulds*, 4 Hare, 505.

(*f*) *Watts v. Girdlestone*, 6 Beav. 190; it is to be observed that the estate had been sold without necessity; *ibid.* 191.

money on government or real securities. A sale took place in 1811, and in 1816 the produce was lent by the trustees on personal security. It was held that the trustees were liable for so much stock as the money would have produced in 1816: Lord Langdale was of opinion that the trustees ought not to have consented to a sale without first providing the means of investing the purchase-money (a). But in a late case (*Shepherd v. Moulds*, 1845) Sir J. Wigram followed Sir J. Leach's decision in *Marsh v. Hunter*, and charged the trustees with the principal money and interest only; thinking that where, by the terms of the trust, the trustees have a discretion to invest the trust money in various ways, and instead of doing so they retain it in their hands, the trustees cannot properly be charged with the specific loss resulting from an act not having been done, which particular act the trustees were not, in the execution of their trust, imperatively bound to do (b). However, it is now the settled course at the Rolls, to act upon *Watts v. Girdlestone*, and, as I understand, not only in cases where the fund was originally invested, but also where it is a money fund, and the question arises on a simple omission to invest (c).

Where trustees are authorized to invest on mortgage of real estate, they ought to take security on land of the value of one-third more than the money advanced, such being the usual practice: if the security consist of houses, the value being fluctuating, they should see that they can, under no circumstances, be reduced below the value of the money advanced; and if the value depend upon fortuitous circumstances—for instance, if the property consist of a mill or factory, or houses situate in a watering-place or the like—the trustees run the risk of having the mortgage thrown upon themselves, and of being made answerable for the money advanced, in the event of the estate being administered in the Court of Chancery: and, if they should have sold out trust stock to raise the money advanced on such insufficient security, they will be in hazard of having to replace the stock as from the time of the sale (d). If an executor, without an express autho-

(a) 6 Beav. 191; see also *Robinson v. Robinson*, *supra*.

(b) 4 Hare, 504; the subject is discussed in a treatise in the Jurist, No. 443, vol. xi.

(c) See *Ouseley v. Anstruther*, 1 De G. & Sm.; 10 Beav. 459; and *Robinson v. Robinson*, xii. Jur. 972; *supra*, 581, add. note. In *Rees v. Williams*, 1 De G. & Sm. 314, where a real estate was sold under a power to sell and invest the proceeds on real or personal security, the Vice-Chancellor Knight Bruce decided in conformity with *Shepherd v. Moulds*,

as he had in a former case. Of the general duties of Trustees as to Investment, see Lewin, p. 275, *et seq.*; Hill, 367, *et seq.*

(d) *Stickney v. Sewell*, 1 My. & Cr. 8; *Phillipson v. Gatty*, xiii. Jur. 318; and see *Heywood v. Grazebrook*, Vice-Chancellor Knight Bruce, 1 May, 1849; *Fowler v. Reynell*, *ibid.* 7 May, 1849 (not yet reported); but where there is a power to purchase leaseholds, their being in a town is no objection; *Beauchlerc v. Ashburnham*, ix Jur. 146.

riety to invest on real security, invests any part of the testator's estate on a mortgage instead of the funds, he is in danger of being made answerable if the mortgage turns out to be insufficient, however eligible it may have appeared to be at the time (a).

Trustees and executors are not justified in lending any part of the trust funds on personal security unless expressly authorized so to do (b). An authority to lend on such personal security as they shall think sufficient will not justify the trustees in lending it to the husband who is in trade, or indeed to a trading concern (c). Sir William Grant made the trustees liable in a case of this description where the money was lost; saying, it was evident the trustees had, on the marriage, been induced to accommodate the husband with the money, which they had no power to do (d). Nor are trustees or executors justified, unless under a clear authority for that purpose, in leaving the trust fund out on personal security: it must be a very special authority that will justify them in so leaving the trust fund, if the security has become diminished by the death of one of the parties liable, or there be good reason to believe that the fund is in jeopardy (e). Executors have been held personally liable in respect of the loss to the testator's estate of a sum outstanding on personal security, although the security was that of a bond from the testator's solicitor, and the money had been invested on that security by the testator himself some years before, and been suffered to remain on that security down to the time of his death (f). But it is not to be understood that trustees and executors are bound immediately to call in money which they find placed out on good security, in order to invest it in government funds (g): indeed, the Court of Chancery will not permit a real security, in which persons not *sui juris* are interested, to be called in without an inquiry whether it would be for the benefit of the parties interested (h).

If a trustee, being directed to invest the residue in Consols and to accumulate the dividends, shall invest the residue on real security,

(a) See the cases, *Lewin*, p. 279.

(b) See the cases, *ibid.* 277-9.

(c) *Cock v. Goodfellow*, 10 Mod. 489.

(d) *Langston v. Olivant*, G. Coop. 33.

(e) See *Cummins v. Cummins*, 3 Jo. & Lat. 84, where trustees are "required" to lend the fund to the husband on the requisition of the wife; if the husband has become insolvent that will justify a refusal, *Boss v. God-sall*, 1 Y. & Col. C. C. 617.

(f) *Bullock v. Wheatley*, 1 Coll. 130; the testator had directed that the trustees should get in his outstanding personal estate as soon

as conveniently might be after his death; and see *Stiles v. Guy*, 4 Yo. & Coll. Append. p. 571, 575, Lord Lyndhurst, Lord C. B.; and see *Powell v. Evans*, 5 Ves. p. 844; *Attorney-General v. Higham*, 2 Yo. & Col. C. C. 634. Lord Nothington's doctrine in *Harden v. Parsons*, 1 Eden, p. 148, has been exploded; see *Walker v. Symonds*, 3 Swanst. p. 62; and the cases cited, *Lewin on Trusts*, 276, n. (c).

(g) *Orr v. Newton*, 2 Cox, 277; *Sadler v. Turner*, 8 Ves. 621; *Angerstein v. Martin*, Turn. & R. 232.

(h) *Howe v. Lord Dartmouth*, 7 Ves. 150.

thus acting in defiance of the express directions given to him, he will be bound to make good as much stock as the residue would have purchased, together with the amount of the accumulation which would have arisen from a proper investment of the dividends from time to time (a): where there is no direction for accumulation, simple interest only will be charged, and only at four per cent. (b)

If a trustee be authorized to sell or convert the stock, with the consent of some or one of the *cestuis que trust*, the terms under which the consent is to be given, and the mode in which it is to be given must be strictly pursued, or the trustees will be liable as for a misapplication (c); and a stranger in whose hands the trust fund may be, if he part with the fund even to the person having the legal right to receive it, having had notice of the trust, may be equally liable. Certain moneys in the hands of B., to which S. was entitled, were, on the marriage of S., assigned to trustees in trust when requested by S., by writing under her hand, to call in and invest the same in the public funds, in trust to pay the income to S. for life for her separate use, without power of anticipation, remainder to the husband, remainder to the children of the marriage, with a power to advance 200*l.* to the husband on his bond: B., who had notice of the settlement, with the concurrence of the trustees paid the money to the husband; it was held that he, as well as the trustees, was liable to make good the whole of the trust fund; the life interest of the husband, after the death of the wife, being declared to be liable to make compensation *pro tanto* to the parties so held to be liable (d).

It was established at a very early period, that, as a general rule, trustees are liable only for their own acts and receipts, and not for the acts, defaults, or receipts of their co-trustees, unless they can be mixed up as parties to, or as having given sanction or countenance to the act of their co-trustee (e). Co-executors also, like co-trustees, are generally answerable each for their own acts only, and not for the acts of any co-executor (f); particularly where the executor was not

(a) *Pride v. Fooks*, 2 Beav. 430; and see *Browne v. Sansome*, 1 M'Clel. & Y. 427, and the other cases, Hill on Trustees, p. 371, note (p).

(b) *Rocke v. Hart*, 11 Ves. p. 60; and see Lewin, 292.

(c) *Cocker v. Quayle*, 1 Russ. & M. 538; *Hopkins v. Myall*, 2 Russ. & M. 87. Subsequent affirmance is not sufficient, *Bateman v. Davis*, 3 Mad. 98.

(d) *Andrews v. Boufield*, 9 Law T. 353, Chan.

(e) *Townley v. Sherborne*, before Lord K. Coventry and four Judges, Bridgeman's R. 35, fully stated, Lewin on Trusts, 241-3.

(f) *Hawkins v. Day*, Amb. 162; *Hargthorpe v. Milforth*, 1 Cro. Eliz. 318; *Littlehales v. Gascoyne*, 3 Bro. p. 73; see *Riky v. Kemmis*, 1 Lloyd & G. temp. Sugd. 122, and the cases collected in the note.

aware either of the receipt of the money or of its application by his co-executor.

As regards executors: it has been taken into consideration, that in cases of this kind the testator himself, having invested certain persons with the character of executors, has trusted them to the extent to which the law allows them to act as executors; and in that character each has a separate right of receiving and of giving discharges for the property of the testator (*a*). In one case (*b*), the testator, having money in the funds, and other property to a considerable amount, directed certain annuities to be paid, and bequeathed his residuary estate, to be accumulated for the benefit of his son and his children, making two persons executors. Both executors proved the will; one of them received the property—namely, the dividends upon the stocks and funds, and the other personal estate—and misapplied the money; the other (Mr. Nixon) did not actually receive anything. “If,” said Lord Langdale, “Mr. Nixon knew that his co-executor was misapplying the moneys, and acquiesced in it, he became himself liable, because he was a witness or acquiescing party to the misapplication or breach of trust; but if he was not aware of the misapplication, I know of no case,” said his Lordship, “in which the court has gone the length of saying that an executor shall be held personally answerable for standing by and permitting his co-executor to do that which, for anything he knows to the contrary, was a performance of the trusts of the will.” “In this case,” continued his Lordship, “it was clear Mr. Nixon must have known there was stock in the funds. He might have known that the dividends arising from that stock were, from time to time, received by his co-executor, Mr. Mills: knowing that, he might nevertheless have full reason to believe that they were duly applied, according to the trusts and directions of the will, in satisfaction of the annuities or of the rent of the leasehold estate possessed by the testator at his death, and which was payable out of the whole estate. It was urged that the court ought to impute to Mr. Nixon a knowledge of all that he *might* have known; that as he proved the will, he must therefore be taken to have known its contents, and what was to be done in pursuance of the trusts. This is a presumption,” said his Lordship, “which I think the law itself will draw, and he must therefore be taken to have known the contents of the will. Then it is argued, that on proving the will he was bound to make a statement upon oath respecting the value of the property, and therefore must

(*a*) *Supra*, Vol. I. p. 585.

(*b*) *Williams v. Nixon*, 2 Beav. 475.

have become acquainted with the particulars. He might have had some knowledge of it," said his Lordship, "to the limited extent which can be known on such occasions; but I cannot impute to him a knowledge of the exact state or amount of the property, or of the claims upon it, or the clear amount of the balance in the hands of his co-executor. I certainly do not recollect any case in which the principle has been carried to the extent to which it has been here pressed; and if in this case I were to charge Mr. Nixon generally with all the assets received by his co-executor, I must in every other case say, that an executor who does not personally act, and who, having no reason to suspect any misapplication by his co-executor, permits him to act alone, is liable for every misapplication committed by his co-executor. I do not think I can lay down any such rule" (a).

As regards trustees; though money may have come into the hands of a trustee, so that his co-trustee is not liable for the receipt, he may become liable for its misapplication: no one executor can be supposed to know all the calls that may be made upon the assets in the hands of his co-executors; but a trustee knows all the purposes for which the trust fund is to be applied: a trustee therefore must not permit the money to remain in the hands of his co-trustee for a longer period than the circumstances of the case may reasonably require that it should be retained (b). If a trustee leave the trust fund in the hands of his co-trustee to do what he pleases with it, he must then stand or fall by the purpose to which it may be applied (c). *A fortiori* if an executor or a trustee be privy to the embezzlement or misapplication of the trust fund by his companion, he shall be charged with the amount (d). As a general rule, if a trustee join in a sale of stock, he must account for its application (e).

At law, where trustees join in a receipt, all are considered as having received the money, and are estopped from averring the contrary (f); but the Court of Chancery, said Lord Northington, rejects estoppels and pursues truth, and will decree according to the justice and verity of the fact (g): as it is necessary that all should join in the receipt,

(a) *Ibid.* p. 475-6.

(b) *Brice v. Stokes*, 11 Ves. 327, (there also the acquiescing co-trustee knew that the fund had been misapplied,) *Lord Shipbrook v. Lord Hinchinbrook*, 16 Ves. 480.

(c) *Chambers v. Minchin*, 7 Ves. 199, the previous authorities are cited in the cases referred to in this and the preceding note; and see *Urch v. Walker*, *ubi supra*.

(d) *Boardman v. Mosman*, 1 Bro. 68; *Bate*

v. Scales, 12 Ves. 403; *Williams v. Nixon*, 2 Beav. 475.

(e) *Williams v. Nixon*, 2 Beav. 477.

(f) Lord Northington, *Harden v. Parsons*, 1 Eden, 147, *v. supra*.

(g) Lord Northington, *Harden v. Parsons*, 1 Eden, 147, referring to *Churchill v. Hobson*, 1 P. Wms. pp. 241, 243. That was a stronger instance, for it was a case of an executor, *v. infra*, p. 930.

the signature of each does not necessarily imply that the money was paid to all (*a*); the court will therefore inquire into the fact. The onus, however, is upon the trustee who has signed: to remove the *prima facie* presumption against him; it is necessary for him to show that the money acknowledged to be received by all, was, in fact, received by one, and that he only joined for conformity (*b*): and if the receipts by each cannot be distinguished, each is answerable for the whole (*c*).

As regards executors, the case is different: executors have each an absolute power over the whole: there is no necessity for an executor to join; the fact of his joining in the receipt has therefore been considered as assuming a power over the fund, and making him consequently answerable for the application as far as it is connected with the particular transaction in which he joins. Formerly executors joining in a receipt were as rigidly held to be jointly responsible in equity as were trustees at law (*d*); but the rule was relaxed, or pared down, first by Lord Harcourt, then by Lord Northington: and now, according to Lord Redesdale (*e*), the true question is whether, looking to the circumstances, the money was under the control of both executors (*f*). According to the modern doctrine, the difference seems to be this: if the trustee prove the single fact that it was his co-trustee who received the money, he discharges himself from all liability in respect of the mere receipt; if he is to be made liable in respect of any misapplication, it must be on the ground of fraud, negligence, or misconduct (*g*): where an executor has joined in a receipt, the single proof of the fact of the co-executor having received the money of itself amounts to nothing; it is of no avail if the executor prove simply that he joined for conformity only; in such case the old rule will prevail (*h*): in order to discharge himself—and whether this will

(*a*) Lord Hardwicke, *Leigh v. Barry*, 3 Atk. 584.

(*b*) *Brice v. Stokes*, 11 Ves. p. 324-5, Lord Eldon. The report of this case, corrected from the Registrar's books, was produced in *Terrell v. Matthews*, (*v. infra*.) before Lord Cottenham, 13th Dec. 1840; *Gregory v. Gregory*, 2 Yo. & Coll. 316; Lewin, p. 250, n. (*a*). Assignees are trustees within the rule; see the cases in Mr. Blunt's note, Ambl. 219.

(*c*) Lord C. Somers, *Fellows v. Mitchell*, 1 P. W. 83; and see the other cases cited, 2 Fonbl. 183, note (*i*).

(*d*) See *Chambers v. Minchin*, 7 Ves. 199, Lord Eldon; *Belchier v. Parsons*, Ambl. 219.

(*e*) Lord Redesdale in *Joy v. Campbell*, 1 Scho. & Lef. 341; *Doyle v. Blake*, 2 Scho. &

Lef. 242; referring to *Sadler v. Hobbs*, 2 Bro. 114; and *Scurfield v. Howes*, 3 Bro. 91, see pp. 94-5.

(*f*) Lord Eldon, in *Chambers v. Minchin*, 7 Ves. 198, and *Brice v. Stokes*, 11 Ves. 325, notices the old rule and its relaxation, which he disapproved on solid grounds; "a plain general rule which once laid down is easily understood and may be generally known, is much more inviting to executors than a rule referring everything to particular circumstances." "The old rule is much more in favour of executors, enabling them to refuse to act because it is unnecessary," 7 Ves. 199.

(*g*) As to which *v. infra*.

(*h*) See the cases cited in Lord Henley's note, 1 Eden, 360-1.

be sufficient is not certain—he must prove to the satisfaction of the judge, in each particular case, that the circumstances under which he signed could neither have influenced the debtor or other person in paying, nor have given to the co-executor any sanction for his receiving the money: it may certainly be stated that without this proof he will be accountable for the whole, and if it shall have been misapplied, he will be bound to make it good, just as if he himself had been guilty of the misapplication (a). The simple fact of an executor being present when money is paid, and which is taken by his co-executor, is not sufficient to charge him (b).

The rule in all these cases appears to be, that if an executor does any act, by which money gets into the possession of another executor, the former is equally answerable with the other: not, however, where an executor is merely passive by not obstructing the other in receiving it (c).

If an executor permits his co-executor to obtain possession of money which he had at any time in his own possession, and afterwards the co-executor misapplies the money, both executors are personally responsible (d); and all who join in a sale are answerable, though one only receives the money (e). If the executor has been instrumental in any way whatever in money being placed in the hands of his co-executor, as joining in selling out stock or joining in a receipt

(a) Mr. Baron Alderson, after a review of the authorities in *Gregory v. Gregory*, 2 Yo. & Coll. 315 (1836), said the better opinion was that joining in the receipt (as a general proposition) makes the executor liable. Lord Alvanley stated that before the case of *Westley v. Clarke*, 1 Eden, p. 357, there was not one where an executor joining in a receipt was not held liable (but see *Churchill v. Hobson*, 1 P. W. 241). Lord Thurlow, in *Sadler v. Hobbs*, 2 Bro. 117, disapproved of *Westley v. Clarke*; Lord Alvanley approved it in *Hovey v. Blake-man*, 4 Ves. 608, again in *Scurfield v. Howes*, 3 Bro. 94. In *Westley v. Clarke*, one of the executors having received the money due on a mortgage, sent round the assignment to his co-executors to execute; they did so, and were held not to be liable (see 1 Eden, 360); the joining there could not amount to a *direction to pay*, or a *sanction to receive*: it is to be observed, however, that there was an express proviso in the will declaring that the one should not be answerable for the receipts of the other; on which Lord Northington, adopting Lord Hardwicke's distinction, laid some stress, p. 360. Lord Northington, in this case, *Westley v. Clarke*, said, "Though former authorities may and ought to bind the determina-

tion of subsequent cases, with respect to rights, as in the right of curtesy or dower, yet this can be no rule for the future determinations of this court concerning the *acts of men*;" but as to this, see 2 Fonbl. p. 183. In *Stiles v. Guy*, 4 Y. & Coll. p. 577, Lord Lyndhurst held that an executor, who was also a co-trustee, who had joined in an assignment of a mortgage, was not liable. Lord Eldon, though, as above stated, he was of opinion with Lord Thurlow, that the old rule, that where executors join in the receipt each should under all circumstances be charged, ought to have been retained, seems to have admitted in *Walker v. Symonds*, 3 Swanst. 64, that the rule had been altered, and that by the modern course of the court the circumstances may be taken into consideration to some extent in each particular case.

(b) *Langford v. Gascoyne*, 11 Ves. 334.

(c) Sir Wm. Grant, *Langford v. Gascoyne*, *ubi sup.*

(d) *Lord Shipbrook v. Lord Hinchinbrook*, 11 Ves. p. 252; *Underwood v. Stevens*, 1 Mer. p. 712; *Langford v. Gascoyne*, 11 Ves. p. 333; *Moses v. Leri*, 3 Yo. & Coll. 367.

(e) *Aplyn v. Brewer*, Prec. Ch. 173.

for money (*a*), it is for him to discharge himself from the liability which such an act *primâ facie* imposes (*b*); and this he may do by showing a justifiable purpose or object (*c*), or that the money was applied in payment of debts owing from the testator's estate, or otherwise in the due administration of the estate (*d*), or in such other ways as will be presently mentioned. But this exemption from liability only applies where the executor places the money in the hands of his co-executor for the purpose of paying debts and specific legacies (*e*): it does not apply to the case of a residue distributable amongst several; each of the executors is bound to see that the residue is actually paid to the persons entitled (*f*).

If trustees or executors agree that each shall have the management of a particular part of the estate, each will be liable for the whole (*g*). An executor in a gross case will be charged with five per cent. interest on all sums which he has allowed his co-executor to receive, and which have been misapplied (*h*).

Inquiries, with a view to charge executors or trustees with interest, are usually granted on further directions only; but they may be obtained on a special case at the original hearing (*i*).

However, notwithstanding the stringency of the doctrines of the Court of Chancery in cases of actual breaches of trust, the rule of law, as administered in the court, is stated to be, that where trustees *bonâ*

(*a*) See 1 Sch. & Lef. p. 341: generally the trustee is bound to replace stock improperly sold out, or to account for the proceeds of the sale, with interest at five per cent.; *Raphael v. Boehm*, 11 Ves. p. 108; but where there is no corrupt motive, though he will be bound to replace the stock, the *cestuis que trust* will not have an option; *O'Brien v. O'Brien*, 1 Moll. p. 533.

(*b*) *Murrell v. Cox*, 2 Vern. 570; *Chambers v. Minchin*, 7 Ves. 186; *Langford v. Gascoyne*, 11 Ves. 333, 335; *Joy v. Campbell*, 1 Sch. & Lef. 341; *Clough v. Bond*, 3 My. & Cr. 497; and see the cases, 2 Fonbl. 182.

(*c*) See *Bacon v. Bacon*, 5 Ves. 334-5; 7 Ves. 192; 11 Ves. 335; 16 Ves. 481; *Joy v. Campbell*, 2 Sch. & Lef. p. 341-2; *Davis v. Spurling*, 1 Russ. & M. 66; *Balchen v. Scott*, 2 Ves. J. 678; 7 Ves. 193; *Terrell v. Matthews*, xi. Law J. Chan. p. 34, Lord Ch.

(*d*) *Lord Shipbrook v. Lord Hinchinbrook*, 11 Ves. 252; *Underwood v. Stevens*, 1 Mer. 712; *Williams v. Nixon*, *ubi sup.*, and see *Hovey v. Blakeman*, 4 Ves. 596; *Westley v. Clarke* 1 Eden, 357, as to joining in receipts *v. sup.* 929. In the following cases the executors and trustees have been ordered to replace stock sold

out by them: *Forrest v. Elwes*, 4 Ves. 497; *Long v. Stewart*, 5 Ves. 800, note; *Harrison v. Harrison*, 2 Atk. 121; *Boslock v. Blakeney*, 2 Bro. 655, with costs; *Waite v. Whorwood*, 2 Atk. 159; *Powlet v. Herbert*, 1 Ves. J. 297; in this case the trustee had purchased land with the trust fund, under an idea that he was authorized to do so, he was ordered to replace the stock sold out with costs. In *Warner v. Torkington*, MS. 1835, Sir C. Pepys, Master of the Rolls, held that a trustee can only be liable to account for stock where the trust is imperative to lay out the trust fund in stock.

(*e*) As in *Bacon v. Bacon*, 5 Ves. 331.

(*f*) Baron Alderson, *Moses v. Levi*, 3 Yo. & Coll. 368.

(*g*) *Gill v. Attorney-Gen.*, Hard. 314.

(*h*) *Bick v. Motley*, 2 My. & K. 315, both executors were largely indebted to the estate, when they signed the cheques. So 5 per cent. is given when a transaction savouring of fraud is set aside on grounds of public policy, *Gillett v. Peppercorne*, 3 Beav. 84; though 4 per cent. is the rate in ordinary cases of breach of trust, *Underwood v. Stevens*, 1 Mer. 713.

(*i*) Seton on Decrees, *Law v. Hunter*, 1 Russ. 105; *Hockley v. Bantock*, 1 Russ. 142.

fide exert themselves to discharge their duty, and without exceeding the line of their duty, merely commit an error in judgment, unless there is a plain violation of trust, they shall not be visited severely; the fair exercise of their judgment is a protection to them, although the consequences may be attended with loss (a): and that where a trustee acts from moral necessity, and according to the usage of mankind, if he acts as prudently for the trust as for himself, and according to the usage of business, he will not be liable for any loss that may occur. Thus, if a trustee appoints rents to be paid to a banker at that time in credit, and leaves the money with them as he would his own only till wanted, and the banker fails before it is drawn out, the trustee is not liable: the same rule prevails in the employment of stewards and agents (b). If an executor possessing assets hands them over for the express purpose of a special administration by the co-executor, as for the payment of a particular debt, he will not in general be answerable in the event of the money being misapplied (c).

Where a trustee joins in signing a cheque, or does any other act to place money in the hands of his co-trustee, or a person employed by the trustees in a due course of business for the purpose of being applied in a due execution of the trust, such act being required for the purposes of convenience, and the money be lost; if no case of negligence in not making inquiry as to the proposed application of the money or looking after the application of the money, be made against the trustee (d), he will not be liable (e).

The result of all the best authorities upon the subject is, said Lord Cottenham in a late case, that although a personal representative, acting strictly within the line of his duty and exercising reasonable care and diligence, will not be answerable for the failure or depreciation of the fund in which any part of the estate may be involved, or for the insolvency or misconduct of any person who may have possessed it; yet if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon

(a) *Garrett v. Noble*, 6 Sim. 516, the executors had carried on the testator's trade to a loss; and see *Buxton v. Buxton*, 1 My. & Cr. 80, where Mexican bonds were left unsold; *Ashburnham v. Thompson*, 13 Ves. 402; *Munch v. Cockerell*, Lord Cottenham, 5 My. & Cr. 214.

(b) Lord Hardwicke, *Ex parte Belcher*, *Ex parte Parsons*, Ambl. 219; see also the cases in Mr. Blunt's note: but the immunity applies only to the trustee himself, and does not extend to a deposit made by a person employed by the

trustee; *Re Earl of Lichfield*, 1 Atk. 87.

(c) See *Davis v. Spurling*, 1 Russ. & M. p. 66.

(d) See *Underwood v. Stevens*, 1 Mer. 713; *Hanbury v. Kirkland*, 3 Sim. 265, 271; *Brice v. Stokes*, 11 Ves. p. 319; *Hewett v. Foster*, 6 Beav. 261.

(e) *Ex parte Griffin*, 2 Gl. & J. p. 114; *Bacon v. Bacon*, 5 Ves. 331 (see 3 Sim. 272); *Terrell v. Matthews*, 11 Law J., N. S., Chan. 31; *Broadhurst v. Balguy*, 1 Yo. & Coll. C. C. 28.

securities not authorized, or be put within the control of persons who ought not to be entrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive (*a*). Thus, if he omit to sell property when it ought to be sold, and it be afterwards lost, without any fault of his, he is liable (*b*); or if he leave money due upon personal security, which, though he found it there, and it was good at the time, afterwards fails (*c*), and the case is stronger if he be himself the author of the improper investment: he is not liable, upon a proper investment in £3 per Cents., for a loss occasioned by a fluctuation of that fund (*d*); but he is for the fluctuations of any unauthorized fund (*e*); and though liable for the loss, he is accountable for the profits, if any should be made (*f*). So, where the loss arises from the dishonesty or failure of any one to whom the possession of part of the property has been intrusted, necessity, which includes the regular course of business in administering the property, will in equity exonerate the personal representative: but if, without such necessity, he be instrumental in giving to the person failing possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator (*g*).

But in the case of money paid to a Banker, care must be taken that it be placed to the account of the trustee, so that it would not pass to the assignees of the trustee in the event of his bankruptcy; if not, he will be answerable for the amount in the event of the failure of the bankers (*h*): and if it has been mixed with his own money, so that it may be supposed that he derived, or might have derived, a benefit from his increased balance, he will be charged with interest at four per cent. or five per cent., according to circumstances (*i*): and though it

(*a*) Lord Cottenham, *Clough v. Bond*, 3 My. & Cr. 496.

(*b*) See *Phillips v. Phillips*, 2 Freem. 11.

(*c*) See *Powell v. Evans*, 5 Ves. 839; *Tebbs v. Carpenter*, 1 Mad. 290; *Lowson v. Copeland*, 2 Bro. 156, and *Belt's* note.

(*d*) *Peat v. Crane*, 2 Dick. 499, note.

(*e*) *Hancom v. Allen*, 2 Dick. 498; *Howe v. Lord Dartmouth*, 7 Ves. 150; Lord Cottenham, *Clough v. Bond*, 3 My. & Cr.; and see *Hancom v. Allen*, 2 Dick. 498; *Trafford v. Boehm*, 3 Atk. 444; *Adye v. Feuilletau*, 2 Dick. 499, note; *S. C.* 1 Cox, 24; *Peat v. Crane*, 2 Dick. 449, note; *Holland v. Hughes*, 16 Ves. 114; *Fyler v. Fyler*, 3 Beav. 550.

(*f*) *Jackson v. Jackson*, 1 Atk. 513; *Adye*

v. Feuilletau, 3 Swanst. 84, note; *S. C.* 1 Cox, 24; *Holmes v. Dring*, 2 Cox, 1.

(*g*) *Clough v. Bond* (*supra*), p. 497; *Langford v. Gascoyne*, 11 Ves. 333; *Lord Shipbrook v. Lord Hinchinbrook*, 11 Ves. 252; 16 Ves. 477; *Underwood v. Stevens*, 1 Meriv. 712; and see *Hanbury v. Kirkland*, 3 Sim. 265, and *Broadhurst v. Balguy*, 1 Yo. & Coll. C. C. 16, 28.

(*h*) *Wren v. Kirton*, 11 Ves. 377; *Massey v. Banner*, 4 Mad. 419; 1 Jac. & W. 249; *Medland v. Gray*, *ubi inf.*

(*i*) *Medland v. Gray*, 2 Coll. 300-1, 5 per cent.; *Sutton v. Sharpe*, 1 Russ. 146, the executor there was a trader.

may be necessary to employ an attorney for the getting in of money, as it is not necessary that the money should be allowed to remain in his hands, if it should be lost by being so left longer than is necessary, the trustee will be answerable for it (a).

In estimating what may be culpable negligence in a trustee residing here, and who may therefore have been compelled to leave the fund under the control of agents abroad, in not taking steps to secure a trust fund in the hands of the agents from misappropriation, the trustee having intimation that such agents were under embarrassment, it will be a material circumstance if the conduct of such trustee in his private transactions with such agents evinces a confidence that those embarrassments were only temporary (b). If the securities on which trust funds abroad have been invested in pursuance of a trust, are left or even placed under the control of agents, and it is necessary from the circumstances, or from the absence of the trustees in England, that they should have such control, the trustees will not be held liable for the acts of such agents in misapplying the funds, though by extraordinary precautions the trustee might have provided for their security; for in charging trustees with loss from the misconduct of agents, it is not sufficient to prove that it might have been prevented by extraordinary care and caution (c). But where the money is, with their knowledge, left not in a state of investment as required by the trust, but as a cash balance, there the trustees will be liable if they omit to call for an investment (d).

Where in an Indian settlement, the settlor living in Bengal, the deed directs the trustees to lay out the funds in some good and sufficient public or private security, at the best and highest interest that can be had or obtained for the same, and provides for the appointment of new trustees in the place of trustees departing from India, an investment in the government paper of the East India Company is a good investment (e).

If executors or trustees, acting by a mistake, cut timber under what by legal construction is declared to be a void trust, if there has been no profit either sought or acquired by the executors or trustees, and no fraud imputable to them, the court will not, on the ground of estoppel (that is, that the trustees are precluded from saying that they

(a) See *Townsend, Ex parte*, 1 Molloy, 140.

13-14.

(b) Lord Cottenham, *Munch v. Cockerell*, on appeal, 5 My. & Cr. 216.

(d) *Ibid.* 216-7.

(c) *Munch v. Cockerell*, 5 My. & Cr. 212.

(e) *Munch v. Cockerell*, 5 My. & Cr. 211.

did not do the act as trustees), charge them as trustees; for as the trust is void, upon what trust are they to be charged? And the consequence of charging them as trustees by estoppel only, would be that the court must charge them with all the timber cut, without the power of allowing them one farthing of discharge, and precluding them from any legal defence they might have from length of time. The court will therefore regard the trustees or executors so acting as strangers, and leave the complaining party to his remedy at law, subject to all the defences the trustee may be able to make at law; and the fact that the legal remedy may be rendered difficult, or even may have been lost by lapse of time, is not a ground for the interference of the Court of Chancery in such a case (a).

Where a person deliberately accepted a benefit under his mother's will, by which he was prohibited from setting up any claim on account of any error, irregularity, or impropriety in the execution of her father's will, it was held that he could not maintain a suit against the executor of the father's will, to make him accountable for having employed part of the father's estate in his business (b).

A breach of trust may be a specialty debt, but if not such as to be binding on the heirs, it will not have priority over simple-contract debts under the stat. 3 & 4 Will. IV. c. 104 (c).

The court will endeavour to deliver a trustee from any loss or injury that may arise from a misapplication of trust money, where it is done with the sanction of any one of the *cestuis que trust* who is *sui juris*. The rule of the court in all such cases is, that if a trustee errs in the management of a trust, and is guilty of a breach, yet if he goes out of the trust with the approbation of the *cestui que trust*, it must be made good *first* out of the estate of the person who consented to it, if that can be laid hold of (d): and no man having a right to require the performance of a duty, who becomes a party to the delay in the performance of it, can complain of any consequences which may arise from such delay (e).

(a) Vice-Chancellor Wigram, *Ferrand v. Wilson*, 4 Hare, 383-5.

(b) *Egg v. Devey*, 10 Beav. 444; xi. Jur. 1023; in *Tattersall v. Howell*, 2 Meriv. 26, cited by Lord Langdale, the condition imposed was that the legatee would give up his irregular course of life. In *Egg v. Devey*, the testatrix does not appear to have had any interest in preventing the transaction being inquired into.

(c) *Cummins v. Cummins*, 3 Jo. & Lat. 90: the proviso in the statute 3 & 4 Will. IV.

c. 104, only preserves the priority of specialty debts where the heirs are bound; and see Hill, p. 536.

(d) Lord Hardwicke, *Trafford v. Boehm*, 3 Atk. 444; *Lord Montford v. Lord Cadogan*, 17 Ves. 485; 19 Ves. 635; 2 Meriv. 3; *Booth v. Booth*, 1 Beav. 130. But see *Ling v. Colman*, 10 Beav. 370, 375, as to the course which may have to be pursued.

(e) Lord Cottenham, *Munch v. Cockerell*, 5 My. & Cr. 207, and see 209-10.

There is a marked distinction between the degree of knowledge and sanction necessary for the purpose of exonerating trustees, on the ground of Acquiescence, from that which is clearly a breach of trust; and that which is necessary to preclude the *cestui que trust* from complaining of that not being done, the omission to do which with the concurrence of the *cestui que trust*, did not constitute a breach of trust (a). In the first case it is used to *release* a right, and discharge an obligation already perfected by the breach of trust; in the latter, only to prevent a right from arising from the non-performance of a duty which it was competent for the *cestui que trust* to dispense with (b): concurrence on the part of the *cestuis que trust*, or acquiescence on their part knowing the circumstances without original concurrence, will, in the latter case, exonerate the trustees; though, in the former case, as a positive obligation has been incurred on the part of the trustee towards the *cestui que trust*, the acquiescence must be such as will amount to an actual release, and such that it would amount to something like a fraud to endeavour then to insist on the liability of the trustee (c).

If a trustee is robbed of the money he received, he shall be allowed it in account, the robbery being proved, though the sum is only proved by his own oath, for he was to keep it but as his own (d).

Every executor is a trustee in some sense (e); but there is a material distinction between the character of executor and that of trustee as regards the application of the Statute of Limitations (f). A legacy cannot be claimed if twenty years have been suffered to elapse; but when the testator has bequeathed a legacy to the executor, upon certain trusts, and the executor assents to that legacy and sets it apart, he then becomes a trustee for the *cestui que trust* upon an express trust, and any misapplication of it is a breach of trust, so that time does not run against the *cestui que trust*, nor does the statute apply (g).

(a) By the decree in the suit a moiety of the trust fund had been ordered to be transferred to the trustees of the settlement executed on the marriage of one of the parties interested, the Vice Chancellor of England had held (9 Simons, 343-4) that the original trustees were liable for not having so invested it; the Lord Chancellor held that if any such duty was imposed, the conduct of the parties interested had relieved the trustees from their liability; 5 My. & Cr. 210.

(b) Lord C., *Munch v. Cockerell*, 5 My. & C. 218; and see *Broadhurst v. Balguy*, 1 Y.

& C. C. C. p. 31.

(c) Lord Eldon, *Walker v. Symonds*, 3 Swanst. 64; *Brice v. Stokes*, 11 Ves. 326.

(d) *Morley v. Morley*, 2 Ch. Ca. 2; *Knight v. Lord Plymouth*, 3 Atk. 480; 1 Dick, 127; *Jones v. Lewes*, 2 Ves. 240, and see *Rowth v. Howell*, 3 Ves. 565. So in the case of a factor, for he cannot have other proof, Co. Litt. 89 a, *Southcote's case*, 4 Co. 84 a; 2 Fonbl. 179.

(e) *V. supra*, Vol. i. p. 578, *et seq.*

(f) 3 & 4 Will. IV. c. 27; see sect. 40.

(g) *Philippo v. Munnings*, *sup.* 48; and see *Ravenscroft v. Frisby*, 1 Coll. 21, and p. 22-3,

According to the rule which applies to all cases of trust, if Expenses have been legitimately and properly incurred in the execution of the trust, or in the performance of the duties thrown on any parties and arising out of the situation in which they are placed, such parties are entitled, without any express provision for that purpose, to make payments required to meet those expenses out of the funds in their hands belonging to the trust: such is the rule of this court, and such also is the rule at common law (a).

Trustees empowered under an act of Parliament to apply the funds under their control (in this case raised by rate), in *doing* and *constructing* and *executing* such works, acts, matters, and things as they should from time to time deem necessary, proper, and expedient for putting the banks of a river (of which they were the conservators) into and maintaining the same in a permanent state of stability, were held to be justified in applying part of the funds in watching and, if necessary, opposing, a bill in Parliament for a project which was likely to be injurious to the banks of the river (b).

It is not an improper application of the funds by trustees to employ them in defending proceedings against individual members of the corporation, which, if successful, might have the effect of destroying the corporation, and thus affecting even the existence of the corporation, an event in which every inhabitant must have an interest where the surplus funds in the hands of the corporation are to be applied for the benefit of the inhabitants (c).

A trustee will be allowed for sums properly expended in the maintenance of his *cestui que trust* (d). It was said by Lord Cowper that if a trustee lends money to his *cestui que trust*, he shall hold the trust estate as a security, because it must be presumed he lent the money upon the credit of the estate (e).

In suits between the trustees and *cestuis que trust*, the trustee is *primâ facie* entitled to have his costs as between solicitor and client,

which present an important view of the construction of the words "a present right to receive," in the 40th section; and see *Faulkner v. Daniel*, 3 Hare, p. 212. Before the statute time might lead to a presumption of payment, and the like presumption might arise in the case of specialty debts, but it was liable to be rebutted by circumstances.

(a) *Lord Cottenham, Att.-Gen. v. Mayor of Norwich*, 2 My. & Cr. 424-5; *The King v. The Inhabitants of Essex*, 4 T. R. 591; *The King v. The Commissioners of Sewers*, 1 B. & Ad. 232; 2 Fonbl. 177. But in this respect assignees in

bankruptcy do not stand exactly in the same situation as trustees, *Ex parte Elsee*, 1 Mont. p. 3. On this subject, see Lewin, 445, 446.

(b) *Bright v. North*, 2 Phill. 216; 16 Law J. 255, Ch.

(c) *Attorney-General v. Mayor of Norwich*, on Appeal, 2 My. & Cr. p. 428, and see *Att.-Gen. v. Pearson*, 2 Coll. 581.

(d) *Nelson v. Duncombe*, 9 Beav. 211.

(e) *Draper v. Burlace*, 30 Apr. 1808; Melmoth, MS. p. 64, amongst the Hargrave MSS. No. 72, Mad. Pr. and P. ii. 160.

more especially where such costs are or may be directed to be paid out of any fund under the control of the court (a); and although an executor in the result is made answerable for a loss incurred by his neglect, or is charged with interest for retaining money in his hands, still, if he has only been guilty of negligence, or undue retention of money, he is entitled to the benefit of the rule, and will have his general costs, provided he duly account (b). A trustee, it is said, will be allowed his costs, charges, and expences, without any express direction, under the head of just allowances (c); but it is now the usual practice to make a distinct reference as to charges and expences properly incurred beyond the costs of the suit; and in one branch of the court at least (the Rolls), as I understand the practice there, only when the fact appears on the bill or the answer, or on a petition presented for that purpose, or by the consent of the parties, they being competent to consent. An executor is entitled to the immediate payment of his costs, though he may be indebted to the estate upon a security payable at a future day (d).

A trustee seeking the indemnity and directions of the court, as to the execution of the trust, is always allowed his costs as between solicitor and client, unless the act which has been required to be done by him would lead to no responsibility, and the motives of the trustee

(a) *Pride v. Fooks*, 2 Beav. 437; the costs there would be paid out of the fund coming from the trustee on the result of the account: *Whitmarsh v. Robertson*, 1 Yo. & Coll. C. C. p. 717, out of a fund; *Gough v. Andrews*, viii. Jur. 305, 1 Coll. 71, costs given out of a term; and see *York v. Brown*, 1 Coll. 260. In *Mohun v. Mohun*, 1 Swanst. 203, the Master of the Rolls, in answer to a claim for costs, as between solicitor and client, said, "When the court finds a will and a fund, it avails itself of the fund to relieve the difficulties created by the will; but here is no will, nothing that can affect the real estate: were there a fund in the hands of the trustees, they would be entitled to the costs as proposed, but they are trustees of a nullity:" they had their costs as between party and party. But in *Poole v. Pass*, 1 Beav. 600, there was no fund to be administered in the suit, nor could be; yet Lord Langdale gave the trustee, a defendant, the costs as between solicitor and client, saying, "I think no trustee would be safe unless such costs were allowed;" and such costs were ordered to be paid by the plaintiff; *ibid.* p. 605: so in *Holford v. Phipps*, 4 Beav. 475; and see *Edenborough v. Archbishop of Canterbury*, 2 Russ. 112; *Perrot v. Treby*, Prec. Ch. 254; *Fearn v. Young*, 10 Ves. p. 184; *Terrell v. Matthews*,

xi. Law J., N. S., Chan. p. 36; *Woodhead v. Marriott*, C. P. Coop. 72; and *Heighington v. Grant*, 1 Phill. 604. The executor, as he volunteers to prove the will, must be content to take his costs out of the personal estate only, *Nash v. Dillon*, 1 Moll. p. 237; the case of an heir is different, for the estate is thrown upon him, *Humphrey v. Morse*, 2 Atk. 408; and see *Uvedale v. Uvedale*, 3 Atk. p. 119.

(b) *Newton v. Bennet*, 1 Bro. 362; *Hall v. Hallet*, 1 Cox, p. 141; *Raphael v. Boehm*, 13 Ves. 590; *Tebbs v. Carpenter*, 1 Mad. 308; there a suit was necessary to determine the rights of the parties. *Freeman v. Fairlee*, 3 Meriv. p. 43; *Piety v. Stace*, 4 Ves. p. 620; *Travers v. Townsend*, 1 Molloy, 499; *Taylor v. Tabrum*, 6 Sim. 282; *Fozier v. Andrews*, 2 Jones & L. 199; and see Hill on Trustees, p. 572, *et seq.* Where a principle of taxation is once adopted, unless in a particular instance by consent, it will in general be continued throughout the proceedings; see Hill on Trustees, p. 590, and the references, note (x).

(c) *Fearn v. Young*, 10 Ves. p. 184. As to charges and expenses, see Lewin, p. 448.

(d) *Stevens v. Pillen*, xii. Jur. 282, Vice-Chancellor Wigram. Of the Lien of the trustee on the trust fund for his expences, *v. sup.* pp. 803-4.

are obviously vexatious (a). But an executor or trustee may, in respect of his misconduct in the execution of his trust, be deprived of his costs, or even made to pay the costs (b): a distinction has been taken in this respect, as in every moral point of view there ought to have been, between negligence and corruption (c). If the refusal of the trustee to make good the loss occasioned by his improper acts has alone occasioned the suit, he will be ordered to pay the whole of the costs (d). It is not of course that the personal representative of a defaulting person who is dead, without leaving assets, should, without default on his part, be liable to costs, as there might be many reasons why there must be a personal representative to the defaulter, and, being so, he is a necessary party to the bill (e). Where trustees

(a) *Curteis v. Candler*, 6 Mad. 123, a trustee must be satisfied with reasonable evidence, *Lyse v. Kingdon*, 1 Coll. 188-9.

(b) See the cases where costs have been refused, Daniel's Pr. by Headlam, p. 1288; where the trustee or executor has been ordered to pay costs; *ibid.* 1291; Hill, p. 578, *et seq.*; and see the next note.

(c) Sir Thos. Plamer, *Tebbs v. Carpenter*, 1 Mad. 306; and see *Sammes v. Rickman*, 2 Ves. Jun. 38.

The following are instances of executors and trustees being ordered to pay costs of the suit, or so much as was occasioned by their misconduct; *Hall v. Hallet*, 1 Cox, p. 141, there the executors had (*int. al.*) purchased debts due to the estate for their own benefit; *Newton v. Bennet*, 1 Bro. p. 362; *Powlet v. Herbert*, 1 Ves. J. 297; *Seers v. Hind*, 1 Ves. J. 294, there Lord Thurlow laid it down that where the executor is charged with interest costs will follow (but this rule has not been adhered to, see *Ashburnham v. Thompson*, 13 Ves. 404; *Tebbs v. Carpenter*, 1 Mad. 308); *Rocke v. Hart*, 11 Ves. 62 (2 My. & K. 670), Sir Wm. Grant; there the executor had withheld the money and gone to the East Indies, but *quære*, whether it was intended to charge him with the whole costs of the suit; *Mosley v. Ward*, 11 Ves. p. 583, Lord Eldon, case of infants' funds out on good securities unnecessarily called in and not reinvested (but *quære* here also whether more was meant than the costs occasioned by the improper conduct); *Caffrey v. Darby*, 6 Ves. p. 488, negligence; *Pearse v. Green*, 1 Jac. & W. 135, agents of privateer, money retained for twelve years, previous refusal to account; *Crackell v. Bethune*, 1 Jac. & W. 589, false statement in answer, funds sold out without necessity, Statute of Limitations set up; *Piety v. Stace*, 4 Ves. 620, (2 My. & K. 670), Lord Alvanley, funds sold out unne-

cessarily, the suit entirely occasioned by misconduct of executor; *Ashburnham v. Thompson*, 13 Ves. p. 404, Sir Wm. Grant, balance kept in hand for twenty years; *Anon.* 4 Mad. 273, costs up to decree, the suit having been occasioned by refusal to account; *Mucklow v. Fuller*, Jac. 202, negligence, in not getting in a debt due from co-executor; *Watts v. Turner*, 1 Russ. & M. 634, trustee after having approved a deed for conveying the legal estate, refusing capriciously to execute it; *Wheeler v. Little*, Rolls, July 4th, 1834, defendant ordered to replace fund he had permitted his co-trustee to receive with costs.

The following are instances where costs have been refused to executors and trustees: *Knight v. Martin*, 1 Russ. & M. 70, on refusal to pay a legacy in a case clear of doubt; *Davies v. Austen*, 1 Ves. J. 249; *Newton v. Bennet*, 1 Bro. 362.

Of so much of the suit as related to inquiries arising from breach of trust, *Raphael v. Boehm*, 13 Ves. 590; *Tebbs v. Carpenter*, 1 Mad. p. 308; *Pocock v. Reddington*, 5 Ves. 599; *Turquand v. Knight*, 14 Sim. 643, on account of false recital in a deed. Of suit generally, *O'Callaghan v. Cooper*, 5 Ves. 117, for neglect. A trustee, having claimed a balance in his favour, and the Master having found a smaller sum to be due to him, he was ordered on further directions, to pay the costs up to the hearing, but no costs on either side were given after the hearing. *Attorney-General v. Gibbs*, xi. Jur. p. 745. And on the subject of costs, *v. supra*, p. 47, where, at note (h), substitute *Curteis v. Candler*, 6 Mad. p. 123, for *Goodson v. Ellison*. A trustee must be satisfied with reasonable evidence; *Lyse v. Kingdon*, 1 Coll. 188-9.

(d) *V. int. al. Hall v. Franck*, xiii. Jur. 222.

(e) *Lord Manners, Morony v. Vincent*, 2 Moll. 461.

appear separately they will, unless under very special circumstances, only be allowed one set of costs (a).

The trustee is the most proper party to file the bill where there is any question to be disposed of, as the court can hardly dismiss the bill, and therefore all the costs may be ordered to be paid; but where the question is one of nicety, costs may be given out of the fund, if in court, though the bill be dismissed by reason of the court having to decide against the claim of the plaintiff (b).

In cases of breaches of trust, where the liability arises from the wrongful act of the parties, each is liable for all the consequences, and there is no contribution between them, and each case is distinct, depending upon the evidence against each party. It is therefore not necessary to make all the trustees who may more or less have joined in the act complained of parties to the suit; nor would any one of them derive any advantage from their being all made defendants, because, as the decree would be general against all found to be guilty of the charge, it might be executed against any of them (c). If a case of wilful default is made against an executor or trustee by the bill, and no case is admitted or proved to justify such a decree, according to the present practice, at least according to my experience, the defendant ought to apply to have the bill dismissed so far as relates to wilful default, else, if on taking the accounts a case of wilful default should appear, the defendant will be liable to be charged with wilful default on further directions (d).

Where several defendants are involved in a breach of trust, and a decree is made against all in respect of it, the court decrees the costs of the suit against them all, on the principle of giving to the plaintiff the greater security for the payment, and without regard to the relative degrees of culpability in the defendants (e): one trustee or the

(a) *Wiles v. Cooper*, 9 Beav. 298; and the cases in the reporter's note, *ib.* p. 299; *Webb v. Webb*, 10 Law T., Ch. 154.

(b) *Windham v. Graham*, 1 Russ. p. 347. The same thing was done in *Green v. Jackson*, *ex relatione* the late Master Duckworth.

(c) Lord Cottenham, *Attorney-General v. Wilson*, 1 Cr. & P. 28; *Charitable Corporation v. Sutton*, 2 Atk. 406; and *Attorney-General v. Brown*, 1 Swanst. 265, there cited: see the General Order, No. 38, Aug., 1841. However, there is this advantage in all the trustees being parties, that no one of them can afterwards dispute that there has been a breach of trust; and if nothing can be recovered from

the one the other is there to answer.

(d) In *Garland v. Littlewood*, 1 Beav. 527, Lord Langdale held that where the bill makes a case for wilful default, and the common accounts only are directed, it is not competent to the plaintiff to charge the defendant with wilful default at a subsequent stage of the cause. Lord Cottenham in *Terrell v. Matthews*, xi. Law J., N. S. 35, *supra*, expressed his disapproval of that doctrine, and stated that he had acted under a contrary impression, and the practice has since been, as I believe, according to what is stated in the text. And see the additional note, No. 3.

(e) See *Lawrence v. Bowle*, 2 Phill. 140.

representatives of a trustee may it seems file a bill against a co-trustee, to make him contribute his share towards making good a joint breach of trust without making the *cestuis que trust* parties (a).

Generally where an Account has been Settled, the rule is only to give liberty to surcharge and falsify the account, when errors of fact or of law are shown in the account; but where an account has been settled between a trustee and his *cestui que trust*, under circumstances of fraud or misrepresentation or undue influence used on the part of the trustee, there is scarcely any length of time that will prevent the court from opening the account altogether (b): but directions will be given that the Master be at liberty to state special circumstances as to any difficulty that may arise from lapse of time and the consequent loss of evidence and documents (c). An error discovered and corrected before suit is not a ground for a bill to surcharge and falsify (d). Where accounts are said to be falsified, it means that they contain charges in the nature of fraud (e).

A release to one trustee, in respect of a breach of trust, will be a release to both, independently of technical grounds, where the effect of the release is an adoption of the act and an acceptance of the securities on which the trust fund had been invested (f). Where a release is given under the superintendence of a solicitor of the *cestui que trust*, it will be binding, though the trustee may have charged in his accounts for professional services, which, as will be presently mentioned, he is not permitted to do (g).

The plaintiff having read from the answer of the defendant a statement of the trusts on which, as she alleged, a trust fund had been transferred to her (according to which the residue after certain payments was to belong to herself), was not permitted to withdraw that part of the answer which had been read; but an issue was directed,

(a) *Robinson v. Evans*, vii. Jur. p. 738, Vice-Chancellor Wigram; no objection was taken in this case, or in *May v. Selby*, 1 Yo. & Coll. C. C. 235, to the bill, except for want of parties; but see *Attorney-General v. Wilson*, 1 Cr. & Phill. p. 28, and *supra*, Vol. i. p. 664. Does that dictum mean only that there can be no contribution in the suit of the *cestui que trust*?

(b) *Alfrey v. Alfrey*, 10 Beav. 353; *et v. Hardwicke v. Vernon*, 14 Ves. 504, 510, 511: see, on this subject, *Portlock v. Gardner*, 1 Hare, p. 594; *Carmichael v. Carmichael*, 2 Phil. 101; additional note, No. 3; and Vol. iii. title "Account."

(c) *Alfrey v. Alfrey*, *supra*; and see *Morgan v. Lewes*, 4 Dow. 48; *Turner v. Corney*, 5 Beav. 515; *Miller v. Craig*, 6 Beav. 444; *Rowley v. Adams*, 7 Beav. 415; *In re Watts*, 7 Beav. 491 (Reporter's note); and see *Hickson v. Aylward*, 3 Moll. 1.

(d) *Davis v. Spurling*, 1 R. & M. 67.

(e) *Heighington v. Grant*, 1 Phill. pp. 601, 603: the merely surcharging does not deprive the trustee of his costs; *ibid.* 604.

(f) *Blackwood v. Borrowes*, 2 Conn. & L. p. 478.

(g) *Stanes v. Parker*, 9 Beav. p. 385; and see *Todd v. Wilson*, *ibid.* 486.

the plaintiff to have liberty to examine the defendant as to the directions given to her in regard to the trust fund (*a*).

Where it is essential for the due execution of the trust, the court will remove trustees, and appoint others in their place; and the court will remove one of the trustees, even though he may not have been guilty of any act of misconduct and may be desirous of remaining, if it be inexpedient that he should continue to be a trustee (*b*).

The court may appoint new trustees on petition under 1 Will. IV. c. 60, § 22, although the instrument creating the trust contains a power to appoint new trustees (*c*). Tenant for life of estates decreed to be sold for payment of debts in a creditor's suit, is a trustee for the purchaser within the meaning of 1 Will. IV. c. 60, § 18 (*d*).

The general rule is, that trustees, (unless they are nominally such, as trustees to preserve contingent remainders,) agents, commissioners of bankrupts, assignees of bankrupts, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, counsel, or any persons who by having been employed or concerned in the affairs of another may have acquired a knowledge of his property, are incapable of Purchasing such property except under certain regulations; for if persons having a confidential character were permitted to purchase they might avail themselves of knowledge acquired in that capacity, and might be induced to conceal their information, and not to make use of it for the benefit of the parties relying on their integrity: the two characters of trustee and purchaser are inconsistent (*e*).

It is not necessary, in order to set aside a sale to a trustee, to prove that he has made any advantage in the article of the purchase (*f*); the principle is, that as the trustee is bound by his duty

(*a*) *Freeman v. Tatham*, 5 Hare, 329; and see the additional note.

(*b*) See the cases collected, Hill on Trustees, chap. ii. p. 166; in that chapter the rules of the court in regard to the appointment of new trustees is fully entered into: and see a Treatise in the Jurist, (No. 616, p. 449,) on the subject of where the court will insert a power for appointing new trustees. It is to be observed that a reference to a Master to approve of new trustees in the place of deceased or retiring trustees, in the absence of any special direction in the decree, will supersede any right of nomination given to the continuing trustee; *Middleton v. Reay*, xiii. Jur. p. 116, Vice-Chancellor Wigram. As to the passing

of the trust estate by the will of a trustee, v. *supra*, p. 364; and see add. note, No. 3.

(*c*) *Re Foxhall*, 2 Phill. 281; on this subject see Hill on Trustees, *ubi sup*.

(*d*) *Re Milfield*, 2 Phill. 254.

(*e*) *Richardson v. Chapman*, 7 Bro. P. C. 324; *Forbes v. Ross*, 2 Cox, 116; *Randall v. Errington*, 10 Ves. 428; Sugd. V. and P. chap. xix. sect. ii. p. 887, *et seq.*, where all the authorities on the subject, and the several qualifications of the rule may be found. See also chap. xv. sect. xi. of Mr. Lewin's work on Trusts, p. 361; *et v. supra*, p. 208, 299.

(*f*) 10 Ves. p. 393. As to the Terms on which the sale will be set aside, see Lewin, p. 366.

to acquire all the knowledge possible to enable him to sell to the utmost advantage for the *cestui que trust*, the question what knowledge he has obtained, and whether he has fairly given the benefit of that knowledge to the *cestui que trust* which he always acquires at the expense of the *cestui que trust*, no court can discuss with competent sufficiency or safety to the parties (*a*): it makes no difference that the sale was by auction (*b*). The principal has a right to have such a transaction set aside, and to be placed in the same situation as if the transaction had not taken place, after the fact of the agent having been the purchaser comes to his knowledge, provided he act with sufficient promptitude after he so becomes acquainted with the fact. However, it is not sufficient to say that the probabilities (however strong) are that the facts were known to the principal, that there were books open to his own inspection, in which the facts appeared, or that some person intimately connected with him (his son, for instance) was in such a position as to make it highly probable that he had seen entries in the books which would have apprized him of the facts; the knowledge ought to be brought home to the principal before lapse of time or acquiescence can be relied upon by the agents (*c*). This subject belongs to one class of Equitable Rights.

A trustee may buy from the *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a zealous and scrupulous examination of all the circumstances, proving that the *cestui que trust* intended the trustee should buy, and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee,—the parties being at arms' length, as it has been called (*d*): it is obvious that it must be a difficult task to establish the exception; and the rule precludes the possibility of a trustee ever purchasing the property of an infant (*e*).

It has been decided that if a man chooses to give a benefit to his trustee, agent, or receiver, he may do so (*f*); but it is for the party dealing with his principal or *cestui que trust*, to show, and he is bound to show, that he dealt for value or that the employer made him a present; but in either case, it must be made clear, that the principal had all the knowledge that he had, and that it was a fair dealing between them (*g*).

(*a*) *Ex parte James*, 8 Ves. 337; *Ex parte Bennett*, 10 Ves. p. 394-5; *Gillett v. Pepper-corne*, 3 Beav. 84.

(*b*) *Ibid.*; *Sanderson v. Walker*, 13 Ves. 602; the trustee pays the costs of setting aside the sale, though if the suit embraces the administration of the trust he will have his costs of the remainder of the suit.

(*c*) *Gillett v. Pepper-corne*, 3 Beav. 85.

(*d*) Lord Eldon, *Coles v. Trecothick*, 9 Ves. 247; *Sanderson v. Walker*, 13 Ves. 601.

(*e*) 13 Ves. 602.

(*f*) *Selsey v. Rhoades*, 1 Bligh, N. S. p. 1.

(*g*) See the dict. of Sir E. Sugden, Chancellor, *Kerr v. Lord Dungannon*, 1 Conn. & L. 360; and 1 Dru. & W. 542, S. C.

It is owing to the jealousy which the court entertains of executors or trustees, that if they compound debts, and buy them in for less than is due upon them, they shall not take the benefit of it themselves, but the other creditors and legatees shall have the advantage of it, and for want of them the benefit shall go to those who are entitled to the surplus; whereas if one who acts for himself, and does not stand in a fiduciary character, buys in a mortgage for less than is due, or for less than it is worth, he shall be allowed all that is due thereon (a).

Where a trustee or other person standing in a fiduciary character, makes a profit by means of any transaction within the scope of his agency or authority, that profit belongs to the *cestui que trust* (b), and he is precluded from making any profit which could only redound to his own benefit. This latter doctrine often comes into operation as regards Solicitors who are appointed trustees. Where the business of a trusteeship is conducted by two solicitors in partnership, one of whom is a trustee, they can only charge the costs out of pocket (c). A trustee or executor may indeed take all the benefit, by way of remuneration, which the will or other instrument by which he is appointed may provide for him (d); and it is now held that a trustee may stipulate beforehand (e), and make it part of the contract under which he accepts the trust that he shall have a remuneration for his trouble, or that he shall be allowed his professional charges as solicitor, auctioneer, or otherwise (f): but all such agreements between the trustee and *cestui que trust* are looked upon with great jealousy and are construed strictly (g). Where a suit has been instituted and a trustee declines further to act, by reason that due attention to the affairs of the trust will occupy too much of his time, it is competent to the court in

(a) 3 P. Wms. p. 251, the Reporter's note; Salk. p. 155; and the principle extends to a mortgagee, *Baldwin v. Banister*, there cited, *et v. supra*.

(b) *Fawcett v. Whitehouse*, 1 Russ. & M. 132, 149, q. v.; Com. Dig. Chancery, 4 W. 30; and see *Bulkley v. Wilford*, 2 Cl. & Finell. 177, the case of an attorney who advised his client to levy a fine by reason of which, though it was not proved that the attorney knew that such would be the consequence, his client's will was revoked, and the estate descended to him; he was declared to be trustee for the devisee: see Sir E. Sugden's remarks on the principle of this case, Law of Prop. p. 194.

(c) *Collins v. Carey*, 2 Beav. 128.

(d) *Robinson v. Pett*, 3 P. Wms. 250-1;

Ellison v. Airey, 1 Ves. 115; *Willes v. Kibble*, 1 Beav. 560.

(e) See *Brocksopp v. Barnes*, 5 Mad. p. 91; *Ayliffe v. Murray*, 2 Atk. 59, 60.

(f) *Moore v. Froud*, 3 My. & Cra. 48; *Re Sherwood*, 3 Beav. 338.

(g) See *Gould v. Fleetwood*, stated in note, 3 P. Wms. p. 250; 2 Fonb. p. 176; *Ayliffe v. Murray*, 2 Atk. 60, was a case of undue influence. A mortgagee, as we may remember, cannot by contract with the mortgagor obtain any allowance for his trouble, *French v. Baron*, 2 Atk. 120, *supra*, p. 657: see, on this subject, Hill on Trustees, p. 600, 601, where also the subject of contracts between *cestui que trust* and trustee as to the allowance of professional charges is discussed.

such case to award to him a compensation, on its being ascertained that the continuance of his personal exertions is essential for the benefit of the estate, and that although he may have had a legacy given to him by the testator for his care and trouble; but such legacy must be taken into account (a). A trustee acting as solicitor will be allowed the costs he actually pays to the town agent whom he may employ (b).

The reason of the rule that a trustee, executor, or administrator, shall have no allowance for his care and trouble is, that on these pretences, if allowed, the trust estate might be loaded and rendered of little value; besides which there might be great difficulty in settling and adjusting the quantum of such allowance, especially as one man's time may be more valuable than another's; and it has been said, there is no hardship in the rule, for every one is at liberty to reject the office, even though he may have promised to accept it (c). In a late case in Ireland, securities containing charges for costs by a solicitor being a trustee, were set aside as against a purchaser with notice, the trust deed not having authorized them, notwithstanding that letters had been written by the *cestui que trust*, clearly recognizing the right to charge such costs, but which appeared to have been written under the influence of the trustee (d).

In order to entitle an executor or trustee to a legacy given to him as such executor or trustee, he must act in the performance of the duties of the office (e); but a legacy may be so given to the person who is appointed trustee or executor, and not annexed to his office, that he may renounce and still receive the legacy (f).

The powers and duties of trustees for sale have already been noticed (g). But it may be useful here to introduce a late case, decided

(a) *Marshall v. Holloway*, 2 Swanst. 453; *Freeman v. Fairlie*, *infra*, is not inconsistent or conflicting—here the trustee makes a bargain, and gives a valuable consideration.

(b) *Burge v. Brutton*, 2 Hare, 378, though, as the Vice-Chancellor Wigram observed, the general rule of policy, if fully carried out, might exclude even those costs. Where the court decrees that the costs of a defendant trustee, who is a solicitor, shall be taxed, the order will be drawn up in the usual form, that is, giving him his costs as between solicitor and client, and it seems it is for the taxing officer to determine how the language is to be construed in reference to any business he may

have transacted as solicitor; *York v. Brown*, 1 Coll. 260.

(c) *Robinson v. Pett*, 3 P. Wms. p. 251; *Doyle v. Blake*, 2 Sch. & Lef. 239.

(d) *Gomley v. Wood*, 9 Ir. Eq. Rep. 418.

(e) See the authorities cited in *Compton v. Bloxam*, 2 Coll. 202, *infra*, next note.

(f) *Compton v. Bloxam*, 2 Coll. 201, is an instance. In this case the Vice-Chancellor Knight Bruce sent for the original will, which only related to personality, and the construction which his Honour put upon the will was influenced by such inspection.

(g) *V. supra*, pp. 366, 369, 370, additional note; and see *Lewin*, p. 330.

by Sir J. Wigram, on the subject of powers conferred upon trustees. Where a power is annexed to the office of trustee, the disclaimer of one will vest the office of trustee in the remaining two (a). A testator gave to three persons by name his real and personal estate upon trust to sell and invest the proceeds upon certain trusts therein mentioned, the effect of which was that the amount, after payment of certain legacies, was to be paid in sixths, as therein mentioned; and if the trustees named, or any succeeding trustee to be named, should happen to die, or refuse, or neglect, or become incapable to act in the execution of the trusts or powers, then the testator empowered the survivor of them his trustees named, and such new trustee or trustees to be nominated in their or either of their place or stead, as thereafter mentioned, to appoint a new trustee or trustees for the purposes aforesaid; and thereupon the trust property should be transferred and assigned upon the same trusts to such new trustee, and such new trustees should have the same powers as if he or they had been named in the said will (b). One of the trustees renounced and disclaimed by deed; the two other trustees sold the estates devised for sale; afterwards, one of the two continuing trustees died, and the survivor of the two, the disclaiming trustees being then living, appointed two new trustees in the stead of the one who had disclaimed and the one who had died: a question was raised whether this was a good appointment, and the Vice-Chancellor held that it was. If the three trustees had not been mentioned by name in the introductory part of the will, it would have been clear that the power was annexed to the office of trustee, in which case the disclaimer would have vested the office in the remaining two, and the power would, in fact, have been exercised by the surviving trustee; and the Vice-Chancellor was of opinion, on the cases cited (c), that the trustees were so named in the introductory part of the clause, not for the purpose of founding a distinction between them and future trustees, but only because they happened, in fact, to be the trustees for the time being (d).

Where one trustee only has been appointed in a case where, according to the exigencies of the trust, there ought to have been two, payment by the outgoing trustee to the one is not a good payment (e).

(a) *Cafe v. Bent*, 5 Hare, 37; v. *supra*, 366.

(b) See *S. C.* 3 Hare, 245.

(c) *Int. alia*, *Townsend v. Wilson*, 1 Barn. & Ald. 608; *Morris v. Preston*, 7 Ves. 547; *Hall v. Dewes*, Jac. 189; *In re Roche*, 2 Dru.

& W. 287.

(d) *Cafe v. Bent*, 5 Hare, 37; as to this exercise of a discretion to be exercised by a trustee, v. *supra*, p. 87, 88.

(e) *Hulme v. Hulme*, 2 My. & K. 682.

I propose to conclude by taking a cursory view of the doctrines as to Trustees to support Contingent Remainders.

It has been noticed in the preceding volume that the law in regard to the destruction of contingent remainders has been altered by a late statute (*a*), so that it is no longer necessary to limit an estate to trustees in trust to support contingent remainders: contingent remainders must still be created according to the forms of law; when legally created, they become, by reason of their indestructibility, similar in their nature to executory devises. It may be well to give the leading doctrines as to this description of trust, which was once universally introduced into settlements where the legal estate was settled in strict settlement. The text and the notes are chiefly taken from the late Mr. Maddock's valuable work (*b*).

These trusts arose out of the doctrine in *Chudleigh's* case (*c*), and in *Archer's* case (*d*), but they were not put in practice till the time of the Usurpation (*e*), when Sir Francis More first made use of them. *Duncomb* and *Duncomb* (*f*) appears to have been the first case in which such a limitation of trustees came in question (*g*).

Where an estate (*h*) was limited to A. for life, remainder to his first, &c., sons in tail, though it were a plain wrong and tort in him to do any act which would destroy those contingent remainders ("a most barbarous thing," Lord Talbot calls it) (*i*), before the birth of a son, notwithstanding his legal power of doing so, yet, as in such case there was no trustee, there could be no trust, nor consequently any breach of trust, and therefore a court of equity had no cognizance of such a case, the matter being left purely to the common law.

The appointment of trustees was invented on purpose to disable the tenant for life from destroying contingent remainders; for if before the birth of a son, a mere trustee to preserve contingent remainders (it was different if he were tenant for life, as well as trustee (*h*)), whether appointed under a settlement voluntary or for a valuable

(*a*) 8 & 9 Vict. c. 106, § 4; *supra*, Vol. i. p. 156, 291, 500, note (*d*).

(*b*) Mr. Hill, on Trustees, pp. 309 to 316, has collected all the authorities on this subject, but the act he refers to, 7 & 8 Vict. 76, was repealed by the act of the 8 & 9 Vict., above cited. The Fines and Recoveries Act, 3 & 4 Will. IV. c. 74, *supra*, Vol. i. p. 166, creating a protector of the settlement, had also a material influence upon the powers of trustees of this description, see Hill, 315.

(*c*) 1 Co. 120.

(*d*) *Ibid.* 66.

(*e*) *Garth v. Cotton*, 1 Ves. 555; 1 Dick. 191, where the whole doctrine is to be found.

(*f*) 3 Lev. 437.

(*g*) *Garth v. Cotton*, 1 Ves. 555.

(*h*) *Mansell v. Mansell*, 2 P. Wms. 681; *Pye v. George*, Salk. 680; *Garth v. Cotton*, 3 Atk. 754; cases overruling what is said in *Duke of Norfolk's* case, Pollexf. 250; 1 Dick. 199; *Hopkins v. Hopkins*, 1 Atk. 589.

(*i*) For. 239.

(*k*) *Osbrey v. Bury*, 1 Ball & Beatty, 58.

consideration or by will (*a*), joined in barring such remainders, it was a breach of trust, and he was answerable to a son afterwards coming into existence; and so was a purchaser with notice (*b*), or a person taking by voluntary conveyance (*c*): but it seems that only the first son, and not second and other sons, had this shield thrown over their interest (*d*), though a difference was made where the limitation was by settlement, and where by will, as in the latter case all persons are volunteers (*e*): and though Lord Harcourt, in the case of a settlement, thought that the second and other sons of the marriage were entitled to relief as parties to the consideration, yet he held that the remainders after to the heirs of the body of the husband, remainder to his right heirs, were merely voluntary, and not to be aided by the court (*f*).

Where trustees to preserve contingent remainders were called upon to join for the purpose of a new settlement, upon the marriage of the eldest son, making the tenant in tail tenant for life, and continuing instead of destroying the object of the settlement, in such cases it has been said the court would compel them to join (*g*); and also in some cases, though not for that purpose, but under some particular distress, or other special circumstances (*h*); but, generally, in all other cases, and where instead of the ordinary limitation to a tenant for life, it was to the husband for a term of years, if he should so long live, with remainder to trustees during his life, to preserve contingent remainders, the court would leave it to the discretion of the trustees (*i*). If the trustees improperly used their discretion, or refused to exercise it upon a proper occasion, the court, it was said, would interfere (*k*).

And where the court at the instance of an eldest son, ordered trustees to join in the destruction of contingent remainders, it sometimes imposed conditions upon the son, as that he should make a provision for a sister (*l*).

Trustees in a voluntary settlement have, upon the bill of creditors,

(*a*) *Mansell v. Mansell*, 2 P. Wms. 678; *Symance v. Tattam*, 1 Atk. 614.

(*b*) *Mansell v. Mansell*, For. 253; S. C. MS.; *Moody v. Walters*, 16 Ves. 303, 307; *Pye v. George*, 1 P. Wms. 128; S. C. 2 Salk. 680; and in Eq. Ab. 384; *Biscoe v. Perkins*, 1 V. & B. 491.

(*c*) 1 P. Wms. 129; *Mansell v. Mansell*, 2 P. Wms. 680.

(*d*) *Moody v. Walters*, 16 Ves. 304; but see *Ib.* 305; *Tipping v. Piggot*, 1 Eq. Ab. 385.

(*e*) See *Barnard v. Large*, 1 Bro. C. C. 535.

(*f*) *Tipping v. Piggot*, 1 Eq. Abr. 385, § 2;

16 Ves. 304; though *Jenkins v. Keymes*, 1 Lev. 237, seems to the contrary.

(*g*) As in *Winnington v. Foley*, 1 P. Wms. 536; and see *Symance v. Tattam*, 1 Atk. 613; but see *Biscoe v. Perkins*, 1 V. & B. 492.

(*h*) See *Barnard v. Large*, Ambl. 774.

(*i*) See *Woodhouse v. Hoskins*, 3 Atk. 24; and *arguendo* *Moody v. Walters*, 16 Ves. 291; *Fearne*, Cont. Rem. p. 331, 5th ed. and cases there cited.

(*k*) *Barnard v. Large*, 1 Bro. C. C. 535; *Moody v. Walters*, 16 Ves. 307.

(*l*) *Frewin v. Charleton*, 1 Eq. Ab. p. 386, quoted 16 Ves. 304.

claiming under a subsequent conveyance in trust for payment of debts, been decreed to join in destroying the contingent remainders (*a*). And such trustees (there being no issue) have been decreed to join in a sale where the settlement was only of an equity of redemption, and the wife consented to the sale (*b*).

It was said, that trustees ought never to join in the destruction of contingent remainders without the direction of the court (*c*); but it seems, that as the court only decrees the trustees to do what they ought to do, it was not necessary for trustees, in clear cases, to apply to the court; and that the absence of that sanction would not render the act a breach of trust (*d*). The doctrine on this subject was, however, involved in difficulties; so much so, that Lord Eldon declared upon a review of the cases as to the duties and liabilities of trustees, "The task of deducing from them what is the true principle, is greater than I have abilities well to execute. The cases," said his Lordship, "are uniform to this extent, that if trustees, before the first tenant in tail is of age, join in destroying the remainders, they are liable for a breach of trust; and so is every purchaser under them with notice; but when we come to the situation of trustees to preserve remainders, who have joined in a recovery after the first tenant in tail is of age, it is difficult to say more than that no judge in equity has gone the length of holding that he would punish them as for a breach of trust, even in a case where they would not have been directed to join. The result is, that they seem to have laid down, as the safest rule for trustees, but certainly most inconvenient for the general interests of mankind, that it is better for trustees never to destroy the remainders, even if tenant in tail of age concurs, without the direction of the court" (*e*).

Trustees created by express limitation, for the purpose of preserving contingent estates, are guilty of a neglect of their duty and answerable accordingly, if they permit the tenant for life liable to impeachment for waste, or a tenant *pur autre vie* who by the nature of his estate is liable for waste, to cut down or destroy timber (*f*); their duty is to preserve the inheritance as entire as possible to go according to the succession established by the donor: I hold it, said Lord Hardwicke, agreeable to natural justice and in support of right to construe their

(*a*) *Basset v. Clapham*, 1 P. Wms. p. 358, quoted 16 Ves. 305.

(*b*) *Platt v. Sprigg*, 2 Vern. 303.

(*c*) See Fearne, Cont. Rem. pp. 335-6, and Cox's note to *Basset v. Clapham*, 1 P. Wms. p. 358.

(*d*) See *Moody v. Walters*, 16 Ves. 310;

Woodhouse v. Hoskins, 3 Atk. 24.

(*e*) *Per* Lord Eldon, in *Biscoe v. Perkins*, 1 V. & B. 491; and see *Moody v. Walters*, 16 Ves. 301 to 314, where Lord Eldon examines all the cases.

(*f*) *Stansfield v. Habbergham*, 10 Ves. 283; *Garth v. Cotton*, 1 Dick. 200-1.

trust in the most liberal manner ; the inheritance consists of the land, timber, and mines, and cannot be preserved entire without preserving all three : in many estates the timber is the most valuable part ; in more the mines ; and the destruction of the one, or the exhausting of the other, might take away or be an alienation of the best part of the inheritance (a) : and it has been held that such trustees ought not to permit the tenant for life or years, by the destruction of his estate, to bring forward a remainder to himself or another for the purpose of cutting timber (b). In the case of copyholds the lord's estate would preserve contingent remainders, without any express nomination of trustees for that purpose ; but Lord Eldon seems to have doubted whether it was his duty to interpose actively to prevent waste (c).

Here I conclude the subject of Equitable Estates and Interests. I have already noticed the reason that has induced me not to include the general subject of Legacies (d) : nor does this volume embrace the general subject of Charities (e). Some of the doctrines in regard to the Equitable Interests of the vendor and purchaser under a contract for sale, have also been omitted as more properly belonging to the title of specific performance, which is one of the subjects embraced in the second principal head or division of the jurisdiction of the court. With these exceptions, I hope that the present volume will be found to contain a general view of the jurisdiction of the Court of Chancery, in regard to every description of Equitable Estate or interest which may come before the Court of Chancery for adjudication.

(a) *Garth v. Cotton*, 1 Dick. p. 196, from Lord Hardwicke's written judgment.

(d) *Supra*, p. 580.

(b) *Ibid.* 3 Atk. 751 ; 1 Ves. 524, 546 ; *Stansfield v. Habergham*, 10 Ves. 279.

(e) The general nature of the jurisdiction in respect of charities is described, Vol. i. pp. 587-593.

(c) 10 Ves. 282.

ADDITIONAL NOTE.—No. I.

Sir A. Hart's Exposition of the Rule as to Interest on Balances.—*Supra*, p. 921.

“ We are not to look so closely into the dates of a running account to calculate interest upon it, as to deter respectable men from undertaking the office of executor, and on the other hand we are not loosely to permit any man, however respectable, to retain the money of others in his hands without making it productive. An executor's duty in this respect is to deal with the trust estate as a provident man would deal with his own ; and every provident man makes interest of his money when he has got together a sum which he thinks to be worth while to lay out at interest.” “ But a court of equity takes upon itself to distinguish : if there has been an actual use of the money by the executor, then the court imposes the highest rate of interest ; but if no benefit has been sought by the executor from using the money, then that is a case for

a reduced rate of interest. In looking accurately into the cases a difference will be found where an executor retaining a balance, was at the same time liable to outstanding demands, which, though not called for, it was uncertain when they might be made; the balance in such a case may be called only an ostensible balance. Again, in taking the account to ascertain balances in the executor's hands for the purpose of charging him with interest; if he made any payments by anticipation to legatees, regard is to be had to that fact:" *Flanagan v. Nolan*, 1 Molloy, 84, 85, 86: the remainder of the judgment is also material. In *Heighington v. Grant*, 1 Phillips, 604, the Lord Chancellor confirmed the general doctrine laid down by Sir A. Hart.

ADDITIONAL NOTE.—No. II.

Executors and Trustees joining in Receipts.—*Supra*, p. 929.

Mr. Justice Story has collected from the judgments of Chancellor Kent in *Monell v. Monell*, 5 Johns, Ch. R., U. S. 926; and *Clark v. Clark*, 8 Paige, R. 152, the following as the result of the authorities. "It is, that, if two executors, guardians, or trustees, join in a receipt for trust-money, it is *primâ facie* although not absolutely conclusive evidence, that the money came to the hands of both. But either of them may show by satisfactory proof, that his joining in the receipt was necessary, or merely formal and that the money was, in fact, all received by his companion. And, without such satisfactory proof, he ought to be held jointly liable to account to the *cestui que trust* for the money, upon the fair implication resulting from his acts, that he did not intend to exclude a joint responsibility. But, wherever either a trustee or an executor, by his own negligence or laches, suffers his co-trustee or co-executor to receive and waste the trust fund or assets of the testator, when he has the means of preventing such receipt and waste by the exercise of reasonable care and diligence; then, and in such a case, such trustee or executor will be held personally responsible for the loss occasioned by such receipt and waste of his co-trustee or co-executor."

ADDITIONAL NOTE.—No. III.

Wilful Default, Supplemental Bill to charge Trustee or Executor with—Settled Account, Executor de son Tort—Admission of Assets—Charge and Discharge—Parties—Orders for carrying out the Stat. 10 & 11 Vict. c. 96 (supra, p. 49); Costs under that Act.

Some recent decisions on the following points, which may frequently arise in suits to which trustees or executors are parties, may perhaps be usefully referred to.

As to Wilful Default, Supplemental Bill to Charge, supra, p. 941.—A plaintiff, who has taken a common decree against a trustee or executor, cannot, unless under special circumstances, and on leave obtained, file a new bill to charge the trustee or executor with wilful default; *Hodson v. Ball*, 1 Phil. 177 (but note, *Bainbrigge v. Baddeley*, 9 Beav. 538, referred to, *int. al.*, 10 Beav. 440, has been reversed by Lord Cottenham). But if a case for it has been made by the plaintiff, and he has notwithstanding abandoned it though admitted in the answer, a co-defendant may file a supplemental bill

to charge the defendant the trustee with wilful default, but the decree will be confined to the specific instances alleged and proved; *Berrow v. Morris*, 10 Beav. 441, *et seq.*; *Shepherd v. Towgood*, Turn. & R. 379.

Settled Accounts—Executor de son Tort, *supra*, p. 942.—A direction to the Master to take the account against the defendants, not disturbing any settled account, cannot be directed on an allegation that one of the defendants has settled the account of his receipts and payments with the other—for instance, the defendant executor *de son tort* with the rightful executor: nor can an executor *de son tort* in any case discharge himself from his liability to the persons beneficially interested by settling his account with the rightful executor; *Carmichael v. Carmichael*, 2 Phill. 105. An executor *de son tort* has all the liabilities, but none of the privileges, that belong to that character; *ibid.* 103.

As to the course to be pursued in *Administering the estate of an executor*, where he has bequeathed part of the testator's assets *in specie* as his own (*supra*, p. 943), see *Ibbetson v. Ibbetson*, 13 Sim. 544.

As to what amounts to an Admission of Assets.—As a general rule, the assent by an executor to a legacy is an admission of assets for its payment; see *Attorney-General v. Higham*, 2 Yo. & Coll. C. C. 645; and see *Attorney-General v. Chapman*, 3 Beav. 256. However, payment of one legacy will not of itself bind the executor, as an admission of assets, to pay all the legacies. "Suppose a case," said the Vice-Chancellor Sir J. Wigram on a late occasion, *Postlethwaite v. Mounsey*, 6 Hare, 33, n. (1842), "in which small legacies were given to servants, and the executor chose, on his own responsibility, to pay these legacies at once, without reference to the state of the assets, it would be hard to say that he had thereby bound himself to pay all the legacies given by the will:" and the Vice-Chancellor in that case, where the defendant had paid one legacy and the interest on the others, as he alleged, under mistake and also in ignorance of the true construction of the will, declined to hold the defendant to be absolutely bound personally to pay the legacies. In that case (6 Hare, pp. 34, 35) most of the material cases on the subject of the admission of assets may be found: and see *Purcell v. Blennerhassett*, 3 Jo. & Lat. 42, and *Clark v. Butes*, xii. Jur. p. 597, before the Vice-Chancellor K. Bruce, where the circumstances were held not to amount to an admission of assets. An admission of assets to pay testamentary expences and legacies is an admission which embraces the costs, *Roch v. Callen*, 6 Hare, 531. If the bill prays for an account, and nothing more, the payment of legacies cannot be insisted upon by a creditor at the hearing, as making the executor personally liable for the payment of his debt, *Savage v. Lane*, 4 Hare, 33; and where the case is properly made against the executor, the circumstances under which the payment of the legacies was made may be examined into; *ibid.* 35. An actual admission of assets cannot, generally speaking, be got rid of; nor does it follow that accounts are to be taken in those cases where, with the denial of assets, the answer discloses circumstances which show a personal liability for what is asked; *Rogers v. Soutten*, 2 Keen, 600; *Savage v. Lane*, 6 Hare, 36. And see on the subject of the admission of assets, *Davys v. Pritchard*, before the Vice-Chancellor K. Bruce, 6 June, 1848, not yet reported, and *Pritchard v. Murray*, xii. Jur. 616.

Charge and Discharge.—As to the effect of reading admissions to charge an execu-

tor or trustee, which are coupled with what may amount to a discharge in the whole or in part, see *Inge v. Kenny*, 4 Hare, 452; and *Freeman v. Tatham*, 5 Hare, 329.

As to Parties.—On a question as to the liability of trustees to replace a trust fund belonging to classes, or a class, of persons—as children, or grandchildren, or the like—as a general rule, all the persons constituting the class must be parties, and there must be evidence of that fact at the hearing; for if the Court, at the instance of some, should decide against the claim, the trustees would be liable to another suit, but the trustees are entitled to have the question decided once for all, *Philipson v. Gatty*, 6 Hare, 28.

A series of Orders (see 2 Phillips, Append. p. xiii.) have been issued by Lord Cottenham for carrying out the provisions of the act 10 & 11 Vict. c. 96, for the “better securing of trust funds, and for the relief of trustees” (v. *sup.* p. 49); and that act has come into full operation. In a late case (*Re Bartholomew’s will*, xiii. Jur. 380) a petition was presented by the representatives of an infant for payment out of court to them of the amount of a legacy paid in by the trustees of the will under that act: the residuary legatees, having made an adverse claim, were served: the question was, how their costs were to be paid, the amount of the particular legacy only having been paid into court. The Vice-Chancellor of England, unwillingly, ordered the costs to be paid out of the fund in court; observing, that the act operated an injustice in treating the fund paid into court in the same manner as if it had been carried over from the testator’s general estate to a particular account in a cause, and in allowing an executor, by paying the money into court, to put the parties in a worse situation than they would have been if a bill had been filed, in which latter case they would get their costs out of the general estate; (see *Elborne v. Goode*, 14 Sim. 178, as to the general rule;) and see *Re Sharpe*, 15 Sim. 471, and *Re Staples*, xiii. Jur. 273.

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